

# **DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939**

**Subject Matter :** Effect of conversion to other faith

**Relevant Section :** Section 4: The renunciation of Islam by married Muslim woman of her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage; Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in Section 2; Provided further that provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

**Key Issue :** Whether apostate husband can be prosecuted under Section 494 for committing bigamy?

**Citation Details :** Sarla Mudgal and Ors. vs. Union of India (UOI) and Ors. (10.05.1995 - SC): [MANU/SC/0290/1995](#)

**Summary Judgment :**

**Facts:** Husband converted to another religion and married to another woman without having first marriage dissolved.

**Held:** Conversion does not ipso facto dissolve first marriage. Second marriage during subsistence of first marriage is void even if solemnised after conversion. Apostate husband guilty of bigamy.

# **MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937**

**Subject Matter :** Triple Talaq

Maintenance for Muslim Divorced Women

**Relevant Section :** Section 2: Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding interstate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

**Key Issue :** Whether triple talaq, could be interfered with on judicial side by present Court? Whether Section 125 applicable to Muslim women? Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife ?

**Citation Details :** Shayara Bano and Ors. vs. Union of India (UOI) and Ors. (22.08.2017 - SC): [MANU/SC/1031/2017](#)

Mohd. Ahmed Khan vs. Shah Bano Begum and Ors. (23.04.1985 - SC):

[MANU/SC/0194/1985](#)

**Summary Judgment :**

**Facts:** Petitioner/Wife had approached present Court, for assailing divorce pronounced by her Husband in presence of witnesses saying that I gave 'talak, talak, talak'. Petitioner had

sought declaration, that talaq-e-biddat pronounced by her husband be declared as void ab initio.

**Held:** Given the fact that Triple Talaq is instant and irrevocable, it was obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which was essential to save the marital tie, could not ever take place. Also, as understood by the Privy Council in Rashid Ahmad, such Triple Talaq was valid even if it was not for any reasonable cause, which view of the law no longer holds good after Shamim Ara. This being the case, it was clear that this form of Talaq was manifestly arbitrary in the sense that the marital tie could be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained Under Article 14 of the Constitution. The 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, was within the meaning of the expression laws in force in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. The practice of talaq-e-biddat-triple talaq was set aside.

**Facts:** The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage. In 1975 the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under Section 125 of the Code in the court of the learned Judicial Magistrate (First Class), Indore asking for maintenance at the rate of Rs. 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable talaq. His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of the divorce granted by him, to provide that he was therefore under no obligation maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years and that, he had deposited a sum of Rs. 3000 in the court by way of dower during the period the of iddat. In August, 1979 the learned Magistrate directed appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. It may be mentioned that the respondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. In July, 1980 in a revisional application filed by the respondent, the High court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. The husband is before us by special leave.

**Held:** Language of statute provides for no escape from conclusion that divorced Muslim wife entitled to apply for maintenance under Section 125 and 'Mahr' not a sum which under Muslim Personal Law is payable on divorce. we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal to respondent 1, which we quantify at rupees ten thousand.

## JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000

**Subject Matter :** Adoption rights for Muslims

**Relevant Section :** Section 41: Adoption of children by persons irrespective of religion, caste, creed etc. Muslim personal law does not recognize adoption though it does not prohibit

childless couple from taking care and protecting child with material and emotional support. Section 41 as amended in 2006 contemplates adoption, enabling any person, irrespective of religion he professes to take child in adoption. Prospective parents, irrespective of their religious background, are free to access provision of 2000 Act for adoption of children after following procedure prescribed.

**Key Issue :** Whether right to adopt shall be a fundamental right under Article 21 of the Constitution of India?

**Citation Details :** Shabnam Hashmi vs. Union of India (UOI) and Ors. (19.02.2014 - SC):

[MANU/SC/0119/2014](#)

**Summary Judgment :**

**Facts:** The writ Petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitution. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognize adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

**Held:** While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution.

## CODE OF CRIMINAL PROCEDURE, 1973

**Subject Matter :** Pre - Arrest Bail in Sexual Harassment cases.

**Relevant Section : Section 438:** Direction for grant of bail to person apprehending arrest - Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail

**Key Issue :** Whether bail conditions imposed by High Court liable to set aside?

**Citation Details :** Aparna Bhat and Ors. vs. State of Madhya Pradesh and Ors. (18.03.2021 - SC) : [MANU/SC/0193/2021](#)

**Summary Judgment :**

**Facts:** The Accused-applicant, neighbour of the complainant, entered her house and caught hold of the complainant's hand, and allegedly attempted to harass her sexually. Accordingly, Crime was registered, investigated and a charge sheet was filed. The Accused filed an application under Section 438 of Code of Criminal Procedure, 1973 seeking pre-arrest bail. The High Court, by the impugned order, even while granting bail to the applicant imposed

the condition that the applicant along with his wife shall visit the house of the complainant with Rakhi thread/band with a box of sweets and request the complainant to tie the Rakhi band to him with the promise to protect her to the best of his ability.

**Held:** The use of reasoning/language which diminishes the offence and tends to trivialize the survivor, was especially to be avoided under all circumstances. Thus, the following conduct, actions or situations were hereby deemed irrelevant, e.g. to say that the survivor had in the past consented to such or similar acts, etc. The law did not permit or countenance such conduct, where the survivor could potentially be traumatized many times over or be led into some kind of non-voluntary acceptance, or be compelled by the circumstances to accept and condone behavior what was a serious offence. Therefore, the bail conditions in the impugned judgment, were set aside, and expunged from the record.

**Subject Matter :** Default Bail

**Relevant Section : Section 167(2)** - The Magistrate to whom an accused person is forwarded may, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole, irrespective of his jurisdictional authority; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction.

**Key Issue :** Whether the Appellant due to non-submission of charge sheet within the prescribed period by the prosecution was entitled for grant of bail as per Section 167(2) of the Code of Criminal Procedure?

**Citation Details :** S. Kasi vs. State (19.06.2020 - SC) : [MANU/SC/0491/2020](#)

**Summary Judgment :**

**Facts:** The bail application of Appellant-Accused was rejected by the trial court. After being in judicial custody for more than 73 days, the Appellant filed an application for grant of bail on account of passage of such 73 days and non-filing of charge sheet. One of the contentions of the Appellant before the High Court was that charge sheet having not been filed, the Appellant had become entitled for bail by default as contemplated u/s. 167(2) of the CrPC. High Court denied the relief that period of submission of charge sheet stood extended by concerned order dated 23.03.2020 as passed by the Apex Court. Hence, the present appeal.

**Held:** The order of this Court dated 23.03.2020 never meant to curtail any provision of Code of Criminal Procedure or any other statute which was enacted to protect the Personal Liberty of a person. The right of prosecution to file a charge sheet even after a period of 60 days/90 days is not barred. Monday, April 17, 2023

**Subject Matter :** Default Bail

**Relevant Section : Section 167:** Procedure when investigation cannot be completed in twenty-four hours - Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours and there are grounds for believing that the accusation is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall produce the accused along with the entries of the Case Diary to the nearest Judicial Magistrate.

**Key Issue :** Whether the period of 34 days spent in house arrest to be counted towards the period of 90 days and thereby making Appellant entitled to default bail?

**Citation Details :** Gautam Navlakha vs. National Investigation Agency (12.05.2021 - SC) :

[MANU/SC/0350/2021](#)

**Summary Judgment :**

**Facts:** Appellant in the instant matter sought default bail after being kept in house arrest for 34 days. No charge sheet was filed in stipulated 90 days and it was sought that period of 34 days of house arrest to be included in 90 days. The question that arose for consideration was to determine whether order passed by High Court would include an order under Section 167 of the Code of Criminal Procedure.

**Held:** Act of Court should not negatively impact the investigating agency. The maxim "Actus curiae neminemgravabit" would apply in the present case. House arrest, in turn, involved, deprivation of liberty and will fall within the embrace of custody under Section 167 of the Code of Criminal Procedure, was not apparently in the minds of both this Court and the High Court of Delhi. On the other hand, Article 21 of the Constitution of India, provides that no person shall be deprived of his life or personal liberty except in accordance with the procedure prescribed by law. In view of the fact that the house arrest of the Appellant was not purported to be under Section 167 and cannot be treated as passed thereunder, appeal dismissed.

**Subject Matter :** Taking cognizance of an offence.

**Relevant Section : Section 2(c):** "**Cognizable offence**" means an offence for which a police officer may arrest without warrant.

**Section 2(d):** "**Complaint**" means any **allegation made orally or in writing to a Magistrate** that some person, known or unknown, has committed an offence, but **does not include a police report**.

**Section 2(r):** "**Police report**" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173.

**Section 190(1):** Any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf, may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon Magistrate's own information or information received from non police person.

**Key Issue :** Whether the cognizance will be with reference to the offender or the offence?

**Citation Details :** Prasad Shrikant Purohit vs. State of Maharashtra and Ors. (15.04.2015 - SC): [MANU/SC/0449/2015](#)

**Summary Judgment :**

**Facts:** There was a bomb blast at the place called Malegaon in Mumbai on 29.9.2008. With reference to it, FIR was registered on 30.9.2008. On 26.10.2008, the said FIR was transferred and the investigation was taken over by ATS. Thereafter the Appellant, namely, one Rakesh Dattaray Dhawade was arrested by ATS on 02.11.2008. earlier on 21.11.2003, there was a bomb explosion at Mohammedia Masjid, Nanal Peth, Parbhani. There was another bomb explosion at Kaderia Masjid, Jalna during Friday Namaz. All of these incidents were registered as separate cases. In the case pertaining to Parbhani, the charge-sheet was filed on 07.09.2006 against A1-Sanjay Choudhary. A supplementary chargesheet-I was filed in Parbhani case against four accused. In Jalna case, charge-sheet was filed against A-1 on 30.9.2006. In Jalna case, two supplementary charge-sheets were filed on 7.1.2008 against four additional accused and against five accused on 14.1.2008. It was contended that the cognizance should be with reference to the offender and not the offence which has to be mandatorily satisfied.

**Held:** When we apply the requirement as stipulated under the provisions, it can be safely held that the **requirement of filing of the charge-sheet in two earlier cases before the**

**competent court can be held to be satisfied once cognizance is taken by a Judicial Magistrate of first class or for that matter an empowered second class Magistrate, in the event of filing of a police report** as prescribed Under Section 173(2)(i) by virtue of the power vested **Under Section 190(1)(b)** of CrPC. If the ingredients of the above requirements are fulfilled it will have to be held, that part of the requirement, namely, the competent court taking cognizance of the offence in respect of two earlier cases will get fulfilled. The said statement of law reinforces the legal position that **cognizance is always of the offence and not the offender and once the Magistrate applies his judicial mind with reference to the commission of an offence the cognizance is taken at that very moment.**

**Subject Matter :** Cognizance of offences by Magistrates. **Note:** "May" is to be understood as "Shall".

**Relevant Section : Section 2(c):** "Cognizable offence" means an offence for which a police officer may arrest without warrant.

**Section 2(d):** "Complaint" means any **allegation made orally or in writing to a Magistrate** that some person, known or unknown, has committed an offence, but **does not include a police report.**

**Section 2(r):** "Police report" means **a report forwarded by a police officer to a Magistrate** under sub-section (2) of section 173.

**Section 190(1):** Any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf, may take cognizance of any offence-

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a police report of such facts;
- (c) upon Magistrate's own information or information received from non police person.

**Key Issue :** a. Whether the cognizance was taken by the Magistrate?

b. Whether the High court erroneously quashed the proceedings?

**Citation Details :** State of Karnataka and Ors. vs. Pastor P. Raju (04.08.2006 - SC):

[MANU/SC/3533/2006](#)

**Summary Judgment :**

**Facts:** One R.N. Lokesh, lodged an FIR alleging that on 14.1.2005, he along with some other persons was celebrating Sankranthi festival when the respondent Pastor P. Raju, who is a member of Christian community, came there and made an appeal to them to get converted to Christian religion where they would get many benefits and facilities which were not available to them in Hindu religion to which they belong. On the basis of the FIR, a case was registered at the concerned police station. The respondent was arrested on 15.1.2005 and was produced before a Magistrate on the same day who remanded him to judicial custody as no application for bail had been filed. Subsequently, a bail application was moved which was rejected on the ground that the offence was a non- bailable offence. The respondent filed a petition for quashing of the proceedings initiated against him under.

**Held:** a. In the present case **neither any complaint had been filed nor any police report had been submitted nor any information had been given by any person other than the police officer before the Magistrate competent to take cognizance of the offence.** After the FIR had been lodged and a case had been registered under Section 153B IPC, the respondent was arrested by the police and thereafter he had been produced before the Magistrate. The Magistrate had merely passed an order remanding him to judicial custody.

**Section 190 Cr.P.C.** confers power upon a Magistrate to take cognizance of an offence. Therefore, **an order remanding an accused to judicial custody does not amount to taking cognizance of an offence.**

b. The High Court clearly erred in quashing the proceedings on the ground that previous

sanction of the Central Government or of the State Government or of the District Magistrate had not been obtained. It is important to note that on the view taken by the High Court, no person accused of an offence, which is of the nature which requires previous sanction of a specified authority before taking of cognizance by the Court, can ever be arrested nor such an offence can be investigated by the police.

**Subject Matter :** Cognizance of offences by Magistrates. **Note:** "May" is to be understood as "Shall".

**Relevant Section : Section 2(c):** "Cognizable offence" means an offence for which a police officer may arrest without warrant.

**Section 2(d):** "Complaint" means any allegation made orally or in writing to a Magistrate that some person, known or unknown, has committed an offence, but does not include a police report.

**Section 2(r):** "Police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173.

**Section 190(1):** Any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf, may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon Magistrate's own information or information received from non police person.

**Key Issue :** a. Whether issuance of warrant of arrest amounts to taking cognizance of offence under Section 190?

b. Whether there was any sanction granted by the Government before the Magistrate took cognizance of the offence and issued the notice under section 190 on 25th March, 1949?

**Citation Details :** R.R. Chari vs. The State of Uttar Pradesh (19.03.1951 - SC):

[MANU/SC/0025/1951](#)

**Summary Judgment :**

**Facts:** In 1947 the appellant held the office of Regional Deputy Iron and Steel Controller, Kanpur Circle, U.P. The police suspected the appellant to be guilty of the offences u/s.161 & 165 IPC, applied to the Deputy Magistrate, for a warrant of his arrest on the 22nd of October, 1947, and the warrant was issued on the next day. The appellant was arrested on the 27th of October, 1947, but was granted bail. On the 26th of November, 1947, the District Magistrate cancelled his bail as the Magistrate considered that the sureties were not proper. On the 1st of December, 1947, the Government appointed a Special Magistrate to try offences under the Act and on the 1st December, 1947, the appellant was produced before the Special Magistrate and was granted bail. The police continued their investigation. On the 6th of December, 1948, sanction was granted by the Provincial Government to prosecute the appellant inter alia under sections 161 and 165 of the Indian Penal Code. On the 31st January, 1949, sanction in the same terms was granted by the Central Government. In the meantime as a result of an appeal made by the appellant to the High Court of Allahabad the amount of his bail was reduced and on the 25th of March, 1949, the appellant was ordered to be put up before the Magistrate to answer the charge-sheet submitted by the prosecution.

**Held:** a. In the present case on the 25th March, 1949, the Magistrate issued a notice under section 190 of the Code against the appellant and made it returnable on the 2nd of May, 1949. That clearly shows that the Magistrate took cognizance of the offence only on that day and acted under section 190.

b. To answer that, the Government had given its sanction for the prosecution of the appellant before that date. It seems to us therefore that the appellant's contention that the Magistrate

had to take cognizance of the offences without the previous sanction of the Government is untenable and the appeal fails.

**Subject Matter :** Cognizance of offences by Magistrates. **Note:** "May" is to be understood as "Shall".

**Relevant Section : Section 2(c):** "Cognizable offence" means an offence for which a police officer may arrest without warrant.

**Section 2(d):** "Complaint" means any **allegation made orally or in writing to a Magistrate** that some person, known or unknown, has committed an offence, but **does not include a police report.**

**Section 2(r):** "Police report" means **a report forwarded by a police officer to a Magistrate** under sub-section (2) of section 173.

**Section 190(1):** Any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf, may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon Magistrate's own information or information received from non police person.

**Key Issue :** Whether the Judicial Magistrate of First Class, Gandhidham had any jurisdiction to entertain the complaint?

**Citation Details :** Trisuns Chemical Industry vs. Rajesh Agarwal and Ors. (17.09.1999 - SC): [MANU/SC/0581/1999](#)

**Summary Judgment :**

**Facts:** In 1996 the accused Directors approached him and offered to supply 5450 metric tones of "Toasted Soyabean Extractions" for a price of nearly four and a half crores of rupees. The rate quoted by the accused was higher than the market price. Appellant had to pay the price in advance as demanded by the accused. But the accused sent the commodity which was of the most inferior and sub-standard quality. The testing laboratory has remarked that the commodity was of "the most inferior and sub-standard quality." The complainant suffered a loss of 17 lakhs of rupees by the aforesaid consignment alone. By supplying the most inferior quality the accused deceived the complainant and thereby the offence was committed.

Chairman of the appellant company filed a complaint before the Judicial Magistrate of First Class, Gandhidham (Gujarat) alleging certain offences including the offence of cheating against another company located at Indore (Madhya pradesh) and its Directors. The Magistrate forwarded the complaint to the appellant for investigation. The accused Directors thereupon moved the High Court of Gujarat under Section 482 of the Code for quashing the complaint. A single Judge of the High Court quashed the complaint as also the order passed by the Magistrate thereon. Complainant has, therefore, filed this appeal.

**Held:** It is an erroneous view that the Magistrate taking cognizance of an offence must necessarily have territorial jurisdiction to try the case as well. Section 193 imposes a restriction on the court of Sessions to take cognizance of any offence as a court of original jurisdiction. But 'any' Magistrate of the First Class has the power to take cognizance of any offence, no matter that the offence was committed within his jurisdiction or not. **The only restriction contained in Section 190** is that the power to take cognizance is "**subject to the provisions of this Chapter.**" There are 9 Sections in Chapter XIV most of which contain one or other restriction imposed on the power of a First Class Magistrate in taking cognizance of an offence. But **none of them incorporates any curtailment on such powers in relation to territorial barrier.** Appeal Dismissed.

**Subject Matter :** Inquiry: Postponement of issue of process.

**Relevant Section : Section 202 :** Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance may, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. And he **shall**, in a case where the accused is residing at a place beyond the area of his jurisdiction, follow the same;

**Exception:**

- (a) if the offence complained of is triable exclusively by the Court of Sessions; or
- (b) if the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath. If an investigation is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

**Section 203:** If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry u/s. 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, briefly recording his reasons for doing so.

**Exceptions:**

**Section 193:** No Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

**Key Issue :** Whether it was obligatory on the part of learned ACMM to conduct an enquiry envisaged under Section 202 Cr.P.C?

**Citation Details :** Madhvi Singh vs. G.K. Hada and Ors. (25.06.2020 - DELHC):

[MANU/DE/1304/2020](#)

**Summary Judgment :**

**Facts:** The husband of the petitioner along with his brother were the owners of the property in Maharani Bagh, New Delhi. In January, 1981, the entire ground floor along with two servant quarters at the first floor was let out to M/s. Century Tubes Ltd. (CTL) for residence of its Managing Director Sh. Gautam Hada i.e. respondent no. 1 herein, initially at a monthly rent of Rs. 4,000/- . From time to time, fresh agreements were executed with CTL. It has been pleaded that initially the cheques towards the rent were drawn by CTL but later the cheques were issued by M/s. Pavik Lifestyle Ltd. A suit was filed for recovery of possession, rent and mesne profit. The petitioner, a lady aged about 78 years who is presently residing in Varanasi, has been shown as a resident of Kolkata besides mentioning the Delhi address and the summoning order has been passed without conducting the mandatory enquiry under Section 202 Cr.P.C.

**Held:** The complainant, is occupying as a tenant the entire ground floor of the very premises, which are mentioned as the Delhi address of the petitioner in the memo of the complaint, the other being an address in Kolkatta. In spite of that, there is not even a whisper let alone an averment to the effect that the petitioner has been residing at the given address in Delhi. In these circumstances, in absence of any averment in the complaint or the material on record to the aforesaid effect coupled with the fact that an alternate address of the petitioner is given which is outside the jurisdiction of the court, then an enquiry ought to have been conducted. When the law casts a duty on the court to conduct an enquiry once an accused is stated to be a resident of a place which is outside the territorial jurisdiction of the court, in the opinion of this Court, **in the facts and circumstances of this case, it was obligatory on the part of learned ACMM to conduct an enquiry envisaged under Section 202 Cr.P.C.**

Accordingly, the impugned order dated 01.10.2016 is set aside and the matter is remanded

back to the concerned court for fresh consideration in accordance with law. The matter shall be initially listed before the concerned court on 01.07.2020 for directions.

**Subject Matter :** Power of the Magistrate to dismiss the complaint at the threshold.

**Relevant Section : Section 202 :** Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance may, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. And he **shall**, in a case where the accused is residing at a place beyond the area of his jurisdiction, follow the same;

**Exception:**

- (a) if the offence complained of is triable exclusively by the Court of Sessions; or
- (b) if the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath. If an investigation is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

**Section 203:** If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry u/s. 202, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, briefly recording his reasons for doing so.

**Exceptions:**

**Section 193:** No Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

**Key Issue :** Whether the high court was justified in holding the second complaint to be maintainable?

**Citation Details :** Samta Naidu and Ors. vs. State of Madhya Pradesh and Ors. (02.03.2020 - SC): [MANU/SC/0243/2020](#)

**Summary Judgment :**

**Facts:** The vehicle had been sold by the Respondent by putting forged signatures of the complainant's father. The Respondents filed complaint against Appellants. The Judicial Magistrate First Class dismissed complaint by holding that no prima facie case was made out against Accused persons. The complainant being aggrieved, filed Revision before the Additional Sessions Judge. The Complainant submitted that he wished to withdraw the Revision with liberty to file a fresh complaint on the basis of certain new facts, which request was opposed. After perusing the record and considering the submissions, the Revisional Court observed that if there were new facts, complainant, in law would be entitled to present new complaint and there was no need of any permission from Court and thereby dismissed complaint. Thereafter, Complaint Case was preferred by the Complainant on same allegations but relying on additional material.

**Held:** The first complaint contained the basic allegations that the vehicle belonging to the father was sold after the death of the father, that signatures of the father were forged, that signatures on the affidavit were also forged and that on the basis of such forged documents the benefit of sale consideration of the vehicle was derived by the Accused. The order passed by the Judicial Magistrate First Class, shows that after considering the evidence and documents produced on behalf of the complainant, no prima facie case was found and the complaint was rejected under Section 203. There was no legal infirmity in the first complaint filed in the present matter. The complaint was filed more than a year after the sale of the vehicle which meant the complainant had reasonable time at his disposal. The earlier complaint was dismissed after the Judicial Magistrate found that no prima facie case was

made out, the earlier complaint was not disposed of on any technical ground, the material adverted to in the second complaint was only in the nature of supporting material and the material relied upon in the second complaint was not such which could not have been procured earlier. Pertinently, the core allegations in both the complaints were identical. The High Court was thus not justified in holding the second complaint to be maintainable.

**Subject Matter :** Discharge.

**Relevant Section : Section 227 :** The Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing. **Section 239:** The same power as mentioned above is given to the Magistrate under this section.

**Key Issue :** Whether High Court erred in setting aside order of discharge?

**Citation Details :** M.E. Shivalingamurthy vs. Central Bureau of Investigation, Bengaluru (07.01.2020 - SC): [MANU/SC/0012/2020](#)

**Summary Judgment :**

**Facts:** It was alleged in the charge-sheet that the acts of the Accused, seven in number, including the third Accused (Appellant), constitutes criminal offences punishable by the Indian Penal Code, 1860 and the Prevention of Corruption Act, 1988. The allegations include the allegation that the Accused conspired to commit theft of Government property, i.e., mineral ore. They allegedly trespassed into the forest area and other areas of Bellary District, carried out illegal mining and transported it. Though, second Accused (A2) to seventh Accused (A7) filed applications under Section 227 of the Code of Criminal Procedure, 1973 seeking discharge. The Trial Court discharged the second Accused and the Appellant. It was this order which had been set aside by the High Court by the impugned Order. Hence, the present appeal.

**Held:** It is, no doubt, true that there may not be any other material to link the Appellant with various other acts and omissions which have been alleged against the first Accused in particular along with the fifth Accused and other Accused. However, the fact remains, if the defence of the Appellant is not to be looked into, which included the practice obtaining in the past whenever the firm was reconstituted, and also the version of the Appellant that he did in fact speak with the Deputy Director (Legal) and acted on his advice and further that this fact would be established if the Deputy Director (Legal) was questioned in his presence, they would appear to be **matter which may not be available to the Appellant to press before the court considering the application Under Section 227 of the Code of Criminal Procedure.**

This being the outcome of our discussion, the inevitable consequence is that we are not persuaded to hold that the High Court was in error in the view it has taken.

Consequently, the **appeal fails.**

**Subject Matter :** Framing of Charge.

**Relevant Section : Section 228:** (1) If, after consideration and hearing as u/s.227, the **Judge** is of opinion that there is ground for presuming that the accused has committed an offence which-

(a) is not exclusively triable by the **Court** of Session, he may, frame a charge against the accused and, transfer the case for trial to the Chief Judicial Magistrate or the Judicial Magistrate of the first class;

(b) is exclusively triable by the **Court**, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge, **the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty** of the offence charged or claims to be tried.

**Key Issue :** Whether High Court erred in quashing charges framed against Respondent Nos. 1 and 2?

**Citation Details :** Bhawna Bai vs. Ghanshyam and Ors. (03.12.2019 - SC):

[MANU/SC/1660/2019](#)

**Summary Judgment :**

**Facts:** The FIR had been registered against Accused-Respondents under Section 302 of IPC pursuant to direction of the Additional Chief Judicial Magistrate. The charge sheet had been filed against the Accused-Respondent Nos. 1 and 2 under Section 302 of IPC read with Section 34. Upon hearing the prosecution and also the Respondents-Accused, the **Second Additional Sessions Judge had found that there are sufficient grounds for proceeding against the Accused and framed the charges against the Accused-Respondent Nos. 1 and 2** under Section 302 read with Section 34 of Code.

**Held:** In the present case, upon hearing the parties and considering the allegations in the charge sheet, the Second Additional Sessions Judge was of the opinion that there were sufficient grounds for presuming that the Accused had committed the offence punishable under Section 302 read with Section 34 of IPC. The order framing the charges was not a detailed order. **For framing the charges under Section 228 CrPC, the judge is not required to record detailed reasons.** As pointed out earlier, **at the stage of framing the charge, the Court was not required to hold an elaborate enquiry, only prima facie case was to be seen.** Upon hearing the parties and based upon the allegations and taking note of the allegations in the charge sheet, the Second Additional Sessions Judge was satisfied that there was sufficient ground for proceeding against the Accused and framed the charges against the Accused-Respondent Nos. 1 and 2. While so, the High Court was not right in interfering with the order of the trial court framing the charges against the Accused-Respondent Nos. 1 and 2 under Section 302 of Code read with Section 34 of IPC and the **High Court, erred in quashing the charges framed against the Accused.**

**Subject Matter :** May presume,  
Shall presume, Conclusive proof

**Relevant Section : Section 4:** In regards to a **fact**, the court

**May Presume-either** regard the fact as proved unless disproved, **or** call for proof of it.

**Shall Presume** - it **shall** regard such fact as proved, unless and until it is disproved.

**Conclusive Proof** - when one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

**Key Issue :** What can be the stage at which presumption can be raised under Section 90 r/w Section 4 of the Indian Evidence Act, 1872?

**Citation Details :** Hazarilal and Ors. vs. Shyamlal and Ors. (14.11.2006 - RAJHC):

[MANU/RH/0507/2006](#)

**Summary Judgment :**

**Facts:** This appeal by the plaintiff arises from a suit for declaration of title and permanent injunction. The appellants claim title by adverse possession. The cause of action for filing the suit was a decree of eviction obtained by Shyamlal(R1) against Chhogalal(R2) and Chothmal(R3). According to R1 he is owner of the premises. He had let out the same on rent to R2 on 29.5.1956. R(2) inducted R(3) as sub-tenant. Shyamlal filed a suit and obtained

decree for eviction against them. According to Shyamlal, the appellant had been set up by Chothmal to pre-empt the eviction decree. While dismissing the appellant's suit and deciding issue as to whether R(1) was in possession of the land on the basis of the document executed in favour of his father by Lalu Chamar of Bhilwaraon, the trial Court held, **placing reliance on the document**, the R(1) had proved the fact that the land was mortgaged by Lalu Chamar in favour of his father Kanakmal, and since then it was in his possession. In recording the said finding, **the trial Court inter alia drew presumption under Section 90 of the Indian Evidence Act, 1872**. At the time of hearing of this appeal, submission was made on behalf of the appellant that the presumption had been drawn without giving opportunity to the appellants to lead rebuttal evidence.

**Held:** Before answering the question we may refer to the meaning of the expressions "may presume", "shall presume" and "conclusive proof" in **Section 4 of the Evidence Act**. It would appear these expressions "may presume" or "shall presume" lay down the rules of proof and **by legal fiction mandate the Court to treat a fact as proved unless and until it is disproved**. In the result, the reference is answered in the negative and it is held that **presumption under Section 90 of the Evidence Act can be claimed and drawn at any stage including the appellate stage; belated claim of presumption will not by itself confer any right on the other party to claim opportunity to lead evidence in rebuttal**. Such opportunity shall ordinarily be refused at the stage of final arguments save in exceptional cases for cogent and sufficient reasons recorded in writing.

**Subject Matter :** May presume,  
Shall presume, Conclusive proof

**Relevant Section : Section 90:** Where any document, purporting or proved to be thirty years old, is produced from any custody, such documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or the circumstances of the particular case are such as to render such an origin probable.

**Key Issue :** What can be the stage at which presumption can be raised under Section 90 r/w Section 4 of the Indian Evidence Act, 1872?

**Citation Details :** Hazarilal and Ors. vs. Shyamlal and Ors. (14.11.2006 - RAJHC):

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**Summary Judgment :**

**Facts:** This appeal by the plaintiff arises from a suit for declaration of title and permanent injunction. The appellants claim title by adverse possession. The cause of action for filing the suit was a decree of eviction obtained by Shyamlal(R1) against Chhogalal(R2) and Chothmal(R3). According to R1 he is owner of the premises. He had let out the same on rent to R2 on 29.5.1956. R(2) inducted R(3) as sub-tenant. Shyamlal filed a suit and obtained decree for eviction against them. According to Shyamlal, the appellant had been set up by Chothmal to pre-empt the eviction decree. While dismissing the appellant's suit and deciding issue as to whether R(1) was in possession of the land on the basis of the document executed in favour of his father by Lalu Chamar of Bhilwaraon, the trial Court held, **placing reliance on the document**, the R(1) had proved the fact that the land was mortgaged by Lalu Chamar in favour of his father Kanakmal, and since then it was in his possession. In recording the said finding, **the trial Court inter alia drew presumption under Section 90 of the Indian Evidence Act, 1872**. At the time of hearing of this appeal, submission was made on behalf of the appellant that the presumption had been drawn without giving opportunity to the appellants to lead rebuttal evidence.

**Held:** Before answering the question we may refer to the meaning of the expressions "may presume", "shall presume" and "conclusive proof" in **Section 4 of the Evidence Act**. It would appear these expressions "may presume" or "shall presume" lay down the rules of proof and **by legal fiction mandate the Court to treat a fact as proved unless and until it is disproved**. In the result, the reference is answered in the negative and it is held that **presumption under Section 90 of the Evidence Act can be claimed and drawn at any stage including the appellate stage; belated claim of presumption will not by itself confer any right on the other party to claim opportunity to lead evidence in rebuttal**. Such opportunity shall ordinarily be refused at the stage of final arguments save in exceptional cases for cogent and sufficient reasons recorded in writing.

**Subject Matter :** Relevancy of facts forming part of same transaction

**Relevant Section : Section 6:** Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. Also called as, **Doctrine of Res Gestae:** Facts which may be proved, as part of res gestae, must be facts other than those in issue but must be connected with it.

**Note:** A **transaction**, as the term used in this sec. is defined by a single name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue.

**Key Issue :** Whether the deposition of the accused father can be admitted under S. 6 as a hearsay exception being part of Res Gestae?

**Citation Details :** Vasa Chandrasekhar Rao vs. Ponna Satyanarayana and Ors. (05.05.2000 - SC): MANU/SC/0394/2000

**Summary Judgment :**

**Facts:** The prosecution case in nutshell is that the accused had married the deceased Padmavati in June, 1985 and out of the wedlock, a daughter deceased Suneetha was born. The accused earned his livelihood by doing tailoring work. On account of financial stringency faced by the accused, often he harassed the deceased Padmavati and forced her to get money from her parents. It was informed to the parents of the deceased by a phone call by the parents of the accused that the accused had killed the two deceased. Learning about the death of their daughter and granddaughter, the parents of the deceased rushed to the place of occurrence. The accused himself made a confession that he murdered the two deceased persons. On the basis of the First Information Report, the police registered a case and took up investigation. The learned Sessions Judge, relying upon the circumstantial evidence, convicted the accused of the charge under Section 302 IPC. The High Court however, came to the conclusion, that the conviction of the charge under Section 302 cannot be, sustained and accordingly set aside the same and acquitted the accused of the said charge.

**Held:** In absence of a finding as to whether the information by accused's parents to deceased's parents that accused has killed the deceased was either **at the time of commission of the crime or immediately thereafter, so as to form the same transaction**, such utterances **cannot be considered as relevant under Section 6 of the Evidence Act**. In this state of affairs, it may not be proper to accept that part of the statement of deceased's parents and the said circumstances cannot be held to have been established. But even excluding such circumstances, if all other circumstances enumerated above are taken into consideration, which must be held to have been proved beyond reasonable doubt, **the conclusion is irresistible that all these circumstances point towards the guilt of the accused and inconsistent with his innocence**. We, therefore, unhesitatingly, come to the conclusion that the **High Court committed serious error in acquitting the accused** respondent of the charge under Section 302 IPC.

**Subject Matter :** Relevancy of facts forming part of same transaction

**Relevant Section : Section 6:** Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. Also called as, **Doctrine of Res Gestae:** Facts which may be proved, as part of res gestae, must be facts other than those in issue but must be connected with it.

**Note:** A transaction, as the term used in this sec. is defined by a single name, as a crime, a contract, a wrong or any other subject of enquiry which may be in issue.

**Key Issue :** Whether the testimonies of the witnesses are reliable for the accused to be convicted?

**Citation Details :** Bishna and Ors. vs. State of West Bengal (28.10.2005 - SC):

[MANU/SC/1913/2005](#)

**Summary Judgment :**

**Facts:** The accused persons were illegally harvesting paddy from the field of the deceased. They were variously armed. On being asked to not do such illegal act, they threatened the deceased. The argument got heated up and eventually led to the death of Prankrishna and severe injuries to Nepal. **The two witnesses reached the place of occurrence immediately after the incident had taken place** and found the dead body of Prankrishna and injured Nepal in an unconscious state. One of them found the mother of Prankrishna and Nepal weeping and **heard about the entire incident from an eye-witness and the role played by each of the appellants.**

**Held:** A right of private defence cannot be claimed when the accused are aggressors, when they go to complainant's house well prepared for a fight and provoke the complainant party resulting in quarrel and taking undue advantage that the deceased was unarmed causes his death. It cannot be inferred that there was any sudden quarrel or fight, although there might be mutual fight with weapons after the deceased was attacked. In such a situation, a plea of private defence would not be available. The **depositions of the witnesses clearly establish** that the accused persons armed with deadly weapons went to the plot of complainant party with a common object to harvest the paddy and when asked not to do so, they were attacked and when they retreated to some extent, they chased and caused injuries to the deceased and other witnesses. This clearly establishes that the said act was in furtherance of a common intention. The fact that evidence of other independent witnesses also points out the overt acts played by each one of the accused is also not in dispute. **Nothing has been brought to our notice to show that the presence of the eye- witnesses who were independent witnesses are wholly unreliable.** Therefore, accepting the testimonies of the witnesses u/s. 6 of Evidence Act, the accused are liable to be convicted for the charge of murder and grievous hurt.

**Subject Matter :** Motive, preparation and previous or subsequent conduct

**Relevant Section : Section 8:** The conduct of any party or their agent, to any suit or proceeding, in reference to a fact which is either relevant or the issue of the proceeding; **and** any person who has been charged with an offence and that offence is the subject of any proceeding, his/her conduct is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact; **and**

whether such conduct was previous or subsequent is also relevant.

**Key Issue :** Whether the proof of motive affects the proof of guilt of the accused?

**Citation Details :** Asar Mohammad and Ors. vs. The State of U.P. (24.10.2018 - SC):

[MANU/SC/1209/2018](#)

**Summary Judgment :**

**Facts:** In the present matter, conviction recorded against Appellants for an offence punishable under Section 302, 201 of IPC. Prosecution examined 10 witnesses. Defence of Accused was of total denial. They did not produce any evidence. Sessions Court found that even though it was a case of circumstantial evidence, prosecution had succeeded in establishing guilt of Accused beyond all reasonable doubt and found them guilty of offences under Sections 302 and 201 of IPC. Sessions Court vide judgment awarded death sentence. All three Appellants carried matter in appeal before High Court. High Court noted that, facts and circumstances of present case would not come within purview of a rarest of rare case, for which reason it did not confirm sentence of death awarded to Appellants. High Court, instead, commuted sentence to life imprisonment for offence under Section 302 of IPC. Hence, the present appeal.

**Held:** Fact that the three witnesses became hostile and prosecution could not establish **factum of motive** could not be basis to doubt correctness of finding of guilt recorded by two Courts against Accused on basis of **other proved circumstances including confession of Accused about murder** and more importantly, **having dumped dead bodies in septic tank in backyard of their house** and to have led police to that place from where two dead bodies, whose identity also had not been disputed, came to be recovered, **coupled with medical evidence that, cause of death of the two dead persons was due to ante-mortem injury caused on neck resulting in their death due to asphyxia** and was a homicidal death, as per the language of **section 8 of the Evidence Act**.

## CULPABLE HOMICIDE AND MURDER

**Subject Matter :** Culpable homicide

**Relevant Section : Section 299:** Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death commits the offence of culpable homicide.

**Key Issue :** Whether the act committed by the accused is punishable for culpable homicide amounting to murder?

**Citation Details :** Arvind Singh vs. The State of Maharashtra (24.04.2020 - SC):

[MANU/SC/0398/2020](#)

**Summary Judgment :**

**Facts:** Dr. Mukesh Ramanlal Chandak (PW-1), in an oral statement to the Police Sub-Inspector on 1st September, 2014 about his son Yug, aged 8 years being missing. Dr. Chandak stated that, on 1st September, 2014, when he was present with his wife at the hospital, she told him that their driver Raju Tote had informed her on the phone that their son went along with somebody. Dr. Chandak (PW-1) came home and inquired from Arun Parmanand Meshram (PW-31), the watchman of their housing society, "Guru Vandana Apartment 4", who informed him that at about 3:45 pm, when he was sitting near the gate of the Apartment, an unknown, fair complexioned boy, aged about 20-25 years, wearing a red half sleeves T-shirt, full white pants with a white handkerchief wrapped around his face, came to him, riding a black scooty. This boy parked his vehicle near the footpath in front of the gate and asked Arun Parmanand Meshram (PW-31) whether Yug has come home. Arun

Parmanand Meshram (PW-31) replied in the negative and asked him to go inside and find out for himself but the boy remained at the gate itself. He had worn the clothes (uniform) like that of the clothes of the employees of Dr. Chandak's clinic. After about 15 minutes, Yug, came in his school dress. He kept his school bag on chair meant for him and told Arun Parmanand Meshram (PW-31) to leave the school bag at his Apartment, who told him that he will require half an hour to do the same. Thereafter, he saw Yug going towards Chhapru Nagar Chowk along with the boy on his scooter. Arun Parmanand Meshram (PW-31) was under the impression that the said boy might be an employee of Dr. Chandak's clinic because his clothes were like the uniform that his employees wear. There is overwhelming evidence of A-1 having motive to cause damage to Dr. Chandak on account of payment of less salary, more work and scolding on account of over-charging customers. Such motive gets further strengthened by the desire in A-1 to get rich even by robbing employer of Sandeep Katre (PW-8), when he planned looting of cash. Such evidence is corroborated by Sonam Meshram (PW-19), the friend of A-1. The desire to get rich by whatever means was a driving force with A-1 to kidnap a young child of 8 years, who was a school going innocent child, who happened to be a son of well-to-do dentist couple.

**Held:** The motive of the Accused to take life was to become rich by not doing hard work but by demanding ransom after kidnapping a young, innocent boy of 8 years. Thus, having considered all the circumstances and facts on record, we are of the considered view that the present case falls short of the "rarest of rare" cases where a death sentence alone deserves to be awarded to the Appellants. It appears to us in light of all cumulative circumstances that the cause of justice will be effectively served by invoking the concept of special sentencing as evolved by this Court in the cases of Swamy Shraddananda and Sriharan. Thus, the present appeals succeed in part. The Judgment and Order passed by the learned Trial Court and confirmed by the High Court convicting the Accused for the offences punishable Under Sections 302 and 364A read with Section 34 Indian Penal Code is hereby confirmed.

However, the death sentence imposed by the learned Trial Court, confirmed by the High Court, is converted into the life imprisonment. It is further observed and directed that the life means till the end of the life with the further observation and direction that there shall not be any remission till the Accused completes 25 years of imprisonment. The Prosecution is required to bring home the guilt beyond reasonable doubt. The appeals are allowed in part.

**Subject Matter :** Culpable homicide amounting to Murder

**Relevant Section : Section 300 r/w Section 302:**

**Section 300-** Culpable homicide is murder, **firstly-** if the act by which the death is caused is done with the intention of causing death, **or secondly-** done with the intention of causing such bodily injury likely to cause the death knowingly, **thirdly-** done with the intention of causing bodily injury to any person inflicted as such is sufficient in the ordinary course of nature to cause death, **fourthly-** If the person committing the act knows the imminent danger of causing death or such bodily injury as is likely to cause death commits the above act of murder.

**Key Issue :** Whether the death of the deceased was homicidal as per s.300 of the IPC, 1860?

**Citation Details :** Feroj Mohammad Shaikh vs. The State of Maharashtra (13.12.2019 - BOMHC): [MANU/MH/3718/2019](#)

**Summary Judgment :**

**Facts:** Shahanaj, the deceased, married the appellant Feroj Mohammad Shaikh about seven years before the incident in question. They have a son and a daughter out of the wed-lock. The said Shahanaj was treated well till the birth of the daughter. After one year of the birth of daughter, accused no. 2 who is the mother in law of the deceased-Shahanaj, started causing

mental ill-treatment to the deceased. She used to pass sarcastic remarks at her. The appellant Feroj developed an addiction to alcohol. He would demand money from Shahanaj for consumption of liquor. He would abuse and beat Shahanaj if she refused to oblige him. The appellant sent the deceased-Shahanaj to her maternal place when the daughter of Shahanaj who was one year old and she was asked to bring Rs. 10,000/- from her father. Since the financial condition of the father of the deceased-Shahanaj was precarious she could not fulfill the said demand, as a result of which she had to stay with her father for one year. The father of the deceased-Shahanaj raised the said amount of Rs. 10,000/- by taking hand loan and doing labour work and paid the said amount to accused no. 2-Bilkis. Thereafter the deceased-Shahanaj started co-habiting with the appellant. After two three months again the appellant Feroj started demanding Rs. 10,000/- from the deceased-Shahanaj to be brought from her father for re-payment of personal loan obtained from a finance company. The father of the deceased-Shahanaj fulfilled the said demand also. Despite that the appellant-Feroj once again started demanding Rs. 10,000/- from Shahanaj to be brought from her father. Further on 16.02.2013 at about 10.00 pm he got a call from his niece Shabana from Government Hospital, Osmanabad informing that Shahanaj had sustained burn injuries. The father of the deceased-Shahanaj along with Ex-Sarpanch of the village Umakant Kadam reached Civil Hospital, Osmanabad at 2.00 am and noticed that Shahanaj was fully burnt. He asked Shahanaj as to how the incident took place. Shahanaj told him that at about 9.00 pm in the night of Saturday accused Feroj demanded money from her for drinking liquor. She refused to give money and further stated that she would not give money to him in future also, owing to which a quarrel ensued between her and appellant-Feroj and accused no. 2-Bilkis. Thereafter, appellant-Feroj abused her, poured kerosene on her person. At that time accused-Bilkis was instigating the appellant to kill the deceased. The appellant-Feroj set her on fire by lighting the match stick. Both the accused went out and came back after five minutes. On hearing her screams wife of landlord and Shabana came there and tried to extinguish the fire. She was taken to a hospital by rickshaw. On 17.02.2013 at about 11.00 am Shahanaj breathed her last. The deceased-Shahanaj gave dying declaration to police head constable-Hanmant Kolangade (PW-3) B. No. 808 between 9.10 am and 9.35 am on 17.02.2013.

**Held:** In the case at hand, it cannot be said that there was complete absence of motive. The dying declaration states that the accused appellant as usual demanded money for drinking liquor. When she refused there ensued a quarrel as usual and thereafter the accused appellant poured kerosene oil on her and set her on fire. This shows that there was a motive to kill the deceased as she was refusing to give money for drinking liquor. The accused was addicted to drinking has been established by the prosecution beyond reasonable doubt. Satish Bande (PW-5) admittedly is the landlord of the appellant. PW-5 has stated that the appellant-Feroj habitually used to consume liquor due to which there used to be quarrel between him and the deceased. He stated about the burn injuries of the deceased and also stated that accused Feroj came out of the house and poured water on the person of Shahanaj. Thus from the evidence adduced by the prosecution the learned Additional Sessions Judge has correctly recorded conviction against the accused under Section 302 of the I.P.C. In view of this, the appeal is devoid of any substance. The prosecution has established beyond reasonable doubt that the death of the deceased was homicidal. It was caused by the appellant by setting her on fire after dousing her with kerosene. The appeal is bereft of any merit and hence the appeal is dismissed.

**Subject Matter :** Culpable homicide not amounting to Murder, Defense against murder & Punishment Of Murder

**Relevant Section : Exceptions to Section 300:** Culpable homicide is not murder,

**Exception 1-** If the offender loses self control due to sudden and grave provocation and

causes death of the person who provoked him or of any other person by mistake or accident.

**Provided that:** 1. The provocation is not voluntarily provoked as an excuse to kill any person,

2. The provocation is not given due following of the rule of law by any person or public servant in the course of his duty,

3. The provocation is not given by anything done in the lawful exercise of the right of private defence.

**Exception 2-** If the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person attacking him without premeditation.

**Exception 3-** If a public servant due to the discharge of his duty for public justice causes the death of any person without any ill-will towards such a person.

**Exception 4-** If it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

**Exception 5-** When the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

**Section 302:** Whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to fine.

**Key Issue :** Whether the act committed by the accused amounts to murder?

**Citation Details :** Daya Ram and Ors. vs. State of Chhattisgarh (03.03.2020 - CGHC):

[MANU/CG/0232/2020](#)

**Summary Judgment :**

**Facts:** On the date of incident i.e. 08.02.2012, at about 10:00-11:00 am, when the complainant party namely Manraj, Dilraj, Marhu, Dujram and others were ploughing the field near Kedama Nala, it is alleged that the present accused/appellants and other persons reached there with Lathi-Danda and deadly weapon, in furtherance of common object started beating the complainant party abusing and threatening them to kill, as a result of which Sukul, Kartik, Marhu, Manraj and Dilraj have suffered simple injuries, Basant and Dujram suffered grievous injuries and during treatment Dujram died because of injuries on his head. On the same date i.e. 08.02.2012 at about 17:00 hours injured Sukul Majwar lodged FIR against Dayaram, Mayaram, Sukhraman Yadav, Darwa Yadav, Shrawan Yadav and others under Sections 294, 506, 323, 147 and 148 of IPC which was registered at zero number. Thereafter numbered FIR was registered on 09.02.2012 at 16:35 hours against the aforesaid accused persons. The incident was witnessed by PW-1 Basant, PW-4 Kartikram, PW-6 Sukul, PW-7 Dilraj, PW-10 Manraj, PW-11 Marhuram and P.W. 13 Panmeshwar. As per the statements of P.W. 1 Basant and P.W. 7 Dilraj, it is clear that the land in question belongs to the accused persons and they had prepared the same for cultivation. It is admitted by P.W. 1 Basant that the complainant party wanted to dispossess accused Dayaram from the land in question which was given to him by his forefathers and take possession of the same and on account of this dispute quarrel took place between both the parties.

**Held:** Considering the entire evidence of the eye-witnesses, the admitted fact that the land in question belongs to the accused party, the fact that the complainant party wanted to dispossess the accused from the disputed land on account of which quarrel took place between both the parties in which the complainant party as well as accused Dayaram suffered injuries, the fact that soon after the incident FIR Ex. D-1 was lodged by accused Dayaram against the complainant party, it appears that the accused persons assaulted the complainant party in exercise of right of their self-defence as well as property. D.W. 2 Dayaram has also

stated in his statement under Section 313 of Cr.P.C. that he assaulted the complainant party in exercise of right of self-defence. However, keeping in view the principles of law laid down in the aforesighted judgments, considering the fact that while exercising such right of self-defence and property, the deceased was assaulted on vital part i.e. head which resulted in his death, the accused party exceeded their right of private defence. Considering the facts and circumstances of the case, the manner in which the incident occurred, we are of the opinion that the case of the accused persons is covered by Exception 2 to Section 300 of IPC.

## GRIEVOUS HURT AND ASSAULT

**Subject Matter :** Kinds of hurt termed as grievious hurt

**Relevant Section : Section 320:** Only the following types of hurt are considered under grievious hurt- Emasculation; Permanent deprivation of one's eyesight; damage of either ear; damage of any member or joint; permanent disfiguration of head or face or dislocation or fracture of any bone or any threat which is endangering to life.

**Section 326:** Voluntarily causing grievious hurt by dangerous weapons or means is punished with imprisonment for life or upto ten years and fine.

**Key Issue :** Whether the injuries caused by the accused were intentional and fall under the category of grievious hurt?

**Citation Details :** Thakuwa Munda and Ors. vs. The State of Jharkhand (08.01.2020 - JHRHC): [MANU/JH/0005/2020](#)

**Summary Judgment :**

**Facts:** The informant of this case is daughter-in-law of Biglahi Devi, the deceased. On the basis of her fardbayan, which was recorded on 04.07.2006 at about 18:00 hrs. at village Sadma Kathaltoli, Ormanjhi, a case has been lodged against Thakuwa Munda, Rajesh Munda, Rajendra Munda, Sawna Munda, Aghnu Munda and Barti Devi. In her fardbayan the informant has stated that in the afternoon of 04.07.2006, at about 3:00 p.m., the accused persons forming an unlawful assembly, variously armed with iron rod, tangi, lathi and dabia, entered her house and started abusing her mother-in-law who was sitting in the courtyard. They were calling her daain and accusing her of practicing witchcraft on their son, daughter and daughter-in-law. They have assaulted her mother-in-law indiscriminately due to which she fell on the ground and died. On her raising hulla, several villagers had assembled there and the accused persons fled away. In the court, the informant has given a similar narration of the incident as has been recorded in her fardbayan. She has named all the appellants as the persons who have assaulted her mother-in-law. She has stated that at the time when her mother-in-law was assaulted by the appellants no other family member was at home; her father-in-law was ploughing a nearby field.

**Held:** We find that the prosecution has established that he has played a role in the incident. The informant has stated that he has assaulted Biglahi Devi with road and the doctor has found several injuries around her chest and thigh. There are corresponding internal injuries found by the doctor-seven ribs were found fractured-but the prosecution has failed to establish that all the injuries were caused by Sawna Munda. In the opinion of the doctor, death has been caused due to shock and haemorrhage as a result of injuries caused to Biglahi Devi and, not to forget, there is one more accused who has been found involved in the occurrence.

Section 320 of the Indian Penal Code defines grievious injury. Clause-Seventhly to section

320 provides that fracture or dislocation of a bone or tooth would amount to grievous hurt. In the light of the above evidence, it is established that he intended to cause such grievous injury which was likely to cause death. In view of the above discussions, we hold that the appellant, namely, Sawna Munda has committed the offence under section 326 of the Indian Penal Code and, accordingly, he is convicted and sentenced to RI for ten years under section 326 of the Indian Penal Code.

**Subject Matter :** Actions considered to be Assault; Exceptions to the offence of assault.

**Relevant Section : Section 351:** Whoever makes any gesture or preparation which might cause any person to apprehend such a gesture or preparation to be use of criminal force is said to have committed assault.

**Section 358:** Whoever assaults any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term extending to one month, or with fine extending to two hundred rupees, or with both.

**Key Issue :** Whether the allegations against the accused would amount to a case of assault?

**Citation Details :** Robin and Ors. vs. State of Kerala and Ors. (15.01.2020 - KERHC):

[MANU/KE/0105/2020](#)

**Summary Judgment :**

**Facts:** The Assistant Educational Officer, Cherpu is the de facto complainant in the case. The allegations against the accused in the case are that, while the de facto complainant had visited a school under her jurisdiction, having found that the Head Master of the school has not disbursed the lump sum grant payable to the students belonging to Scheduled Castes, she has issued directions to the Manager of the School to take appropriate action against the Head Master; that annoyed and infuriated by the said conduct of the de facto complainant, the accused who are the office bearers of an association of Head Masters went to the office of the de facto complainant and threatened and abused the de facto complainant, as a result of which, the accused fainted. The petitioners moved for anticipatory bail before the Sessions Court, the Sessions Court declined the relief to the petitioners. It was contended by the learned counsel that the allegations made against the accused should make out a case that the accused have either assaulted or used criminal force to the public servant in the execution of his/her duty as such public servant. It was also pointed out by the learned counsel for the petitioners that lump sum grant payable to the students belonging to Scheduled Castes is now being disbursed directly to the bank account of the eligible students; that the Head Master of the school has no role in the matter and that the accused went to the office of the de facto complainant only to explain the said fact to her.

**Held:** The fact that the de facto complainant fainted in the course of the conversation the accused had with her is not seriously disputed. A perusal of the case diary reveals that the accused have abused and threatened their superior officer, the de facto complainant at her office by shouting at her. The explanation to Section 351 IPC clarifies that mere words do not amount to an assault, but the explanation also clarifies that the words which a person use may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault. Application for anticipatory bail is dismissed.

# KIDNAPPING ABDUCTION AND EXTORTION

**Subject Matter :** Kidnapping

**Relevant Section : Section 359:** Kidnapping is of two types- Kidnapping from India and Kidnapping from lawful guardian.

**Read with**

**Section 360:** Kidnapping from India

Whoever takes any person beyond the limits of India without his/her consent or his/her legal guardian's consent is said to have kidnapped that person from India.

**And**

**Section 361:** Kidnapping from lawful guardianship

Whoever takes any boy under 16 years of age or any girl under 18 years of age, or any person of unsound mind without the consent of such guardian, is said to have kidnapped that person from a lawful guardianship.

**Key Issue :** Whether the accused are liable for the act of kidnapping?

**Citation Details :** Nisar vs. State of Kerala (04.06.2020 - KERHC): [MANU/KE/1285/2020](#)

**Summary Judgment :**

**Facts:** While PW2 was riding on his motorcycle, a Maruti Van blocked the motorcycle at Bakery Junction and six well built men who got out from the van, forced PW2 into the Maruti Van and the vehicle drove off. Of the six persons, PW2 identified the first accused Oopher Shaji, with whom he had previous acquaintance. While sitting inside the moving vehicle, the first and second accused fisted PW2 on his face asking why PW2 had not returned his mobile phone. After some time the first accused called out to someone named Sabeer to remove the number sticker fixed on the number plate. Meanwhile, the first accused forcibly removed Rs. 5,000/- from the pant pocket of PW2 and another person removed Rs. 1,000/- from his shirt pocket. The vehicle stopped at a secluded place and PW2 was forced to put his signature and thumb impression on blank and stamped papers. Utilising the opportunity of traffic congestion, PW2 jumped out of the vehicle, got into an autorickshaw and straight away went to the General Hospital. On receiving information regarding the incident, PW11 reached the Government Hospital and recorded First Information statement and thereafter registered FIR, arraying against Oopher Shaji (A1), Sameer (A2) and five other identifiable persons as accused. The first accused was arrested by and the Maruti Van, two fake number stickers, stamp pad and an amount of Rs. 2,030 was seized from his residential premises. Based on the information provided by the first accused, the Police party apprehended the second accused from his house and thereafter arrested the appellant (A3) from his wife's house. The stamp paper and blank papers with revenue stamps affixed on it and bearing the signature and thumb impression of PW2 were produced by the appellant and seized mahazar. The other accused, except accused No. 7, were also arrested on the same day.

**Held:** The form and content of the charge leaves much to be desired, about which I don't intend to belabour, since the offences are clearly stated. The first charge is of abduction, which by itself is not a punishable offence. **The offence of kidnapping or abduction with intent to secretly and wrongfully confine a person is made punishable under Section 365.** On scrutiny of the provisions relating to abduction and kidnapping, it can be seen that Section 359 segregates kidnapping into two kinds; kidnapping from India and kidnapping from lawful guardianship. Going by Section 360, **kidnapping from India would be**

**attracted only when a person is conveyed beyond the limits of India without consent and as per section 361, the offence of kidnapping from lawful guardianship is attracted only if the victim is a minor.** Abduction by itself is not made a punishable offence. **Only when the abduction is coupled with kidnapping and is made with certain intent, as stated in Sections 364 to 369, does it become a punishable offence.** The evidence of this case would show that PW2 was forced into the Maruti Van and removed from the spot against his will, thereby committing the act of abduction. But, there is nothing in the evidence of either PW2 or PW11 to indicate that such abduction was made with the intention of secretly and wrongfully confining PW2. The evidence only shows that PW2 was forced into the Maruti Van and taken in the vehicle for some distance, during the course of which PW2 was assaulted, cash removed from his possession and forced to affix signature on certain papers. A little while later, PW2 managed to jump out of the vehicle. **The two limbs of Section 365 are, (i) the victim should have been abducted or kidnapped and (ii) such abduction or kidnapping should have been with intent to secretly and wrongfully confine the victim.** **Both limbs having been used conjunctively, in order to attract the offence under Section 365,** it is necessary that the victim should have been abducted with intent to wrongfully and secretly confine him/her. The second limb of Section 365 is not stated in the charge or proved by the prosecution. Hence, conviction of the appellant under Section 365 cannot be sustained. For the reasons mentioned above, the criminal appeal is allowed and the appellant acquitted.

#### **Subject Matter : Abduction**

**Relevant Section : Section 362:** Whoever by force compels, or deceitfully, induces any person to go from any place, is said to abduct that person.

**Key Issue :** Whether the accused are liable for the act of kidnapping?

**Citation Details :** Nisar vs. State of Kerala (04.06.2020 - KERHC): [MANU/KE/1285/2020](https://www.indianlegalservices.in/case-manu/KE/1285/2020)

#### **Summary Judgment :**

**Facts:** While PW2 was riding on his motorcycle, a Maruti Van blocked the motorcycle at Bakery Junction and six well built men who got out from the van, forced PW2 into the Maruti Van and the vehicle drove off. Of the six persons, PW2 identified the first accused Oopher Shaji, with whom he had previous acquaintance. While sitting inside the moving vehicle, the first and second accused fisted PW2 on his face asking why PW2 had not returned his mobile phone. After some time the first accused called out to someone named Sabeer to remove the number sticker fixed on the number plate. Meanwhile, the first accused forcibly removed Rs. 5,000/- from the pant pocket of PW2 and another person removed Rs. 1,000/- from his shirt pocket. The vehicle stopped at a secluded place and PW2 was forced to put his signature and thumb impression on blank and stamped papers. Utilising the opportunity of traffic congestion, PW2 jumped out of the vehicle, got into an autorickshaw and straight away went to the General Hospital. On receiving information regarding the incident, PW11 reached the Government Hospital and recorded First Information statement and thereafter registered FIR, arraying against Oopher Shaji (A1), Sameer (A2) and five other identifiable persons as accused. The first accused was arrested by and the Maruti Van, two fake number stickers, stamp pad and an amount of Rs. 2,030 was seized from his residential premises. Based on the information provided by the first accused, the Police party apprehended the second accused from his house and thereafter arrested the appellant (A3) from his wife's house. The stamp paper and blank papers with revenue stamps affixed on it and bearing the signature and thumb impression of PW2 were produced by the appellant and seized mahazar. The other accused, except accused No. 7, were also arrested on the same day.

**Held:** The form and content of the charge leaves much to be desired, about which I don't intend to belabour, since the offences are clearly stated. The first charge is of abduction,

which by itself is not a punishable offence. **The offence of kidnapping or abduction with intent to secretly and wrongfully confine a person is made punishable under Section 365.** On scrutiny of the provisions relating to abduction and kidnapping, it can be seen that Section 359 segregates kidnapping into two kinds; kidnapping from India and kidnapping from lawful guardianship. Going by Section 360, **kidnapping from India would be attracted only when a person is conveyed beyond the limits of India without consent** and as per section 361, **the offence of kidnapping from lawful guardianship is attracted only if the victim is a minor.** Abduction by itself is not made a punishable offence. **Only when the abduction is coupled with kidnapping and is made with certain intent, as stated in Sections 364 to 369, does it become a punishable offence.** The evidence of this case would show that PW2 was forced into the Maruti Van and removed from the spot against his will, thereby committing the act of abduction. But, there is nothing in the evidence of either PW2 or PW11 to indicate that such abduction was made with the intention of secretly and wrongfully confining PW2. The evidence only shows that PW2 was forced into the Maruti Van and taken in the vehicle for some distance, during the course of which PW2 was assaulted, cash removed from his possession and forced to affix signature on certain papers. A little while later, PW2 managed to jump out of the vehicle. **The two limbs of Section 365 are, (i) the victim should have been abducted or kidnapped and (ii) such abduction or kidnapping should have been with intent to secretly and wrongfully confine the victim.** **Both limbs having been used conjunctively, in order to attract the offence under Section 365,** it is necessary that the victim should have been abducted with intent to wrongfully and secretly confine him/her. The second limb of Section 365 is not stated in the charge or proved by the prosecution. Hence, conviction of the appellant under Section 365 cannot be sustained. For the reasons mentioned above, the criminal appeal is allowed and the appellant acquitted.

#### **Subject Matter : Extortion**

**Relevant Section : Section 383:** Whoever intentionally puts any person in fear of any injury to that or any other, and thereby dishonestly induces the person to deliver any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion".

**Key Issue :** Whether the actions of Respondent amount to extortion?

**Citation Details :** Reliance Industries Ltd. vs. Shyam Sundar Sharma (30.07.2018 - ORIHC): [MANU/OR/0426/2018](#)

#### **Summary Judgment :**

**Facts:** The complainant was a successful businessman in lime business and in order to establish a R.I.L. petrol pump at Khuntuni, he purchased land and with the help of the representatives of the R.I.L., he obtained 'No Objection Certificate' for establishment of retail outlet at Khuntuni under the name and style 'M/s. Shyam Filling Station'. A lease deed and a dealership agreement were executed between the complainant and the R.I.L. It is the case of the complainant that he paid Rs. 3,00,000/- as signing fees and Rs. 23,50,000/- as security deposits to the company. The complainant also obtained finance from State Bank of India, Athagarh Branch to the tune of Rs. 1.19 crores for completion of construction of the filling station as per the approved layout and design of R.I.L. It is also the case of the complainant that he operated the outlet for a period of two years as per the instructions and directions of the R.I.L. issued from time to time. There is no dispute that the R.I.L. suspended the supply of petrol and diesel to the outlet of the complainant with effect from 01.05.2008. In the complaint petition, it is mentioned that the R.I.L. and its representatives dishonestly and fraudulently made, signed, sealed and executed the documents with the intention of causing the complainant to believe that such documents would be acted upon bonafide and R.I.L. shall continue to deliver, diesel and allied products to the said filling station as per terms

under the dealership agreement. The documents referred to are lease deed and dealership agreement. Both these documents were executed on 22.08.2005 in the non-judicial stamp papers. The complainant has signed the documents so also from the side of the R.I.L., the authorized signatory has signed the same. These documents have been executed in the prescribed formats of R.I.L. which are meant for the lessors/dealers. There is nothing to show that these documents are forged documents and created dishonestly or fraudulently.

**Held:** A distinction between theft and extortion is that the offence of extortion is carried out by overpowering the will of a person by putting him intentionally with fear whereas in commission of an offence of theft, the offender's intention is always to take the property without the owner's consent. In view of the discussions which have been made relating to offence under section 471 of the Indian Penal Code, since there is no material on record to show that the documents i.e. lease deed and dealership agreement are forged documents, the basic ingredients of offence under section 467 of the Indian Penal Code are altogether missing even in the allegations leveled in the complaint petition against the petitioner. Therefore, by no stretch of the imagination, the petitioner can be legally prosecuted for an offence under section 467 of the Indian Penal Code. To sum up, in the light of discussions made, it seems that the criminal prosecution instituted against the petitioner is nothing but used as an instrument of harassment and with an ulterior motive to pressurize the petitioner to compensate the loss or damage which has been caused to the complainant. For the reasons stated above, the CRLMC application is allowed.

## MISCELLANEOUS

**Subject Matter :** Quashing of proceedings under Section 420 of IPC

**Relevant Section : Section 420:** Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Key Issue :** Whether proceedings initiated against Accused under Section 420 of IPC liable to quashed under Section 482 of CrPC?

**Citation Details :** Rekha Jain vs. The State of Karnataka and Ors. (10.05.2022 - SC):

[MANU/SC/0618/2022](#)

**Summary Judgment :**

**Facts:** The original writ petitioners before the High Court have preferred the present appeal against impugned judgment and order passed by the High Court by which, the High Court has dismissed the said criminal petition and has refused to quash the FIR/criminal proceedings against petitioners.

**Held:** There is no allegation at all against accused - Rekha Jain of any inducement by her to deceive and to deliver the gold Jewellery. The allegations of dishonest inducement and cheating are against her husband - accused - Kamalesh Mulchand Jain. Therefore, considering the allegations in the FIR/complaint as they are, and in the absence of any allegation of dishonest inducement by Rekha Jain, it cannot be said that she has committed

any offence under Section 420 of IPC for which she is now charge sheeted. Therefore, the High Court has committed a grave error in not quashing the criminal proceedings against Rekha Jain for the offence under Section 420 of IPC. This is a fit case where the High Court could have exercised its powers under Section 482 of CrPC and to quash the criminal proceedings against Rekha Jain for the offence under Section 420 of IPC. The criminal proceedings against the appellant - accused - Rekha Jain for the offence under Section 420 of IPC is hereby quashed. Appeal allowed in part.

**Subject Matter :** Guidelines drafted for Dowry Death Trials.

**Relevant Section : Section 304B:** If a woman dies of unnatural causes within the seven years of her marriage and it is shown that she was subjected to harassment and cruelty for dowry, then such death shall be considered as dowry death and the husband along with his family will be held liable for her death.

**Section 306:** Abetment of suicide - If any person commits suicide, whoever abets the commission of such suicide, is liable to be punished with imprisonment and/or fine.

**Key Issue :** Whether the conviction as directed against the accused is liable to be set aside?

**Citation Details :** Satbir Singh and Ors. vs. State of Haryana (28.05.2021 - SC) :

[MANU/SC/0361/2021](#)

**Summary Judgment :**

**Facts:** Deceased, who was married to Accused-Appellant, died due to burn injuries. It was submitted by the prosecution that the deceased committed suicide by setting herself ablaze just after one year of her marriage and that soon before her death she was subjected to cruelty and harassment on account of bringing less dowry by both the Accused. Appellants were convicted for dowry death under IPC, 1860. The conviction was upheld by the High Court, hence, the present appeal by Appellants herein.

**Held:** In light of the fact that there was insufficient evidence to prove the factum of suicide beyond reasonable doubt and the essential ingredient of deceased committing suicide has not been proved by the prosecution by adducing sufficient evidence, it can be said that the prosecution failed to establish that the death occurred due to suicide. High Court and Trial Court have not committed any error in convicting the Appellants under Section 304-B, Indian Penal Code as the Appellants failed to discharge the burden under Section 113-B, Evidence Act. Appeal is allowed on account of charge under section 306.

**Subject Matter :** Murder and Conspiracy to Murder

**Relevant Section : Section 34:** Acts done by several persons in furtherance of common intention -

When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

**Section 300:** Culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death or bodily injury.

**Key Issue :** Whether the Trial Court was correct in acquitting the Appellants?

**Citation Details :** Jayamma and Ors. vs. State of Karnataka (07.05.2021 - SC) :

[MANU/SC/0347/2021](#)

**Summary Judgment :**

**Facts:** A quarrel took place between Appellant 1 and the deceased. Appellants allegedly doused the deceased in kerosene and set her on fire. Arrest was made. Appellants pleaded not guilty and claimed trial. Son of the deceased, put forward an alternative chain of events wherein he claimed that the deceased committed suicide because she couldn't bear the fact that her son was arrested and sent to jail for beating husband of the 1st Appellant. Since it

was not in dispute that deceased died due to burn injuries, the crucial question before the trial Court was whether the death was suicidal or homicidal. Considering the mitigating circumstances such as testimonies of the hostile witnesses, nature of burn injuries of the victim, and the lack of any corroborative evidence, trial Court acquitted the Appellants. High Court in appeal reversed the findings and held that the evidence consisting of dying declaration was clinching and sufficient to bring the guilt home. Hence, the present appeal.

**Held:** The decision of the Trial Court was upheld in light of the fact that the judge extensively examined the entire evidence and after reaching to the conclusion that all the witnesses of the motive or the occurrence have resiled and declared hostile, he was left with the residuary question to decide as to whether the death was suicidal or homicidal. He, thereafter, considered the dying declaration threadbare and critically analysed the statements of the police officer and the doctor. The factors like (i) interpolation in the dying declaration (ii) contradiction in the statements of witnesses regarding injuries on the palm, (iii) the victim with 80% injuries apparently not in a situation to talk or give statement, (iv) PW-2, son of the deceased himself stating that his mother committed suicide as she could not bear that her another son had been sent to jail, (v) there being no corroborative evidence to the statement and (vi) no other evidence led by the prosecution to connect the Appellants with the crime except the statement, he held it unsafe to convict the Appellants on the solitary basis of the dying declaration. Appeal Allowed.

**Subject Matter :** Acts done by several persons in furtherance of common intention resulting in criminal conspiracy.

**Relevant Section : Section 120A, Section 120B r/w Section 34:**

**Section 34-** When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

**Section 120A-** When two or more persons agree to do an illegal act, or a legal act by illegal means, such an agreement is designated a criminal conspiracy. It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

**Section 120B-** Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life] or rigorous imprisonment for a term of two years or upwards.

**Key Issue :** Whether the accused are liable for the offence u.s.120A r/w s.120B?

**Citation Details :** Bilal Hajar vs. State (10.10.2018 - SC): [MANU/SC/1149/2018](#)

**Summary Judgment :**

**Facts:** On 19th August 1991, some posters were found pasted on the walls of public streets in the city of Coimbatore. These posters contained threats that seven persons belonging to a particular community would be killed. One person, out of the seven named person, was "Siva Kumar @ Siva". Siva on coming to know of his name being published in the poster scolded in filthy language the members of a particular community in a public meeting, as according to him, the members of that community had pasted such posters wherein he and six others named therein were given threat of murder. On 01.09.1991 between 2.30 p.m. to 3.30 p.m., all the nine Accused (A-1 to A-9) assembled in the house of the Appellant (A-6) and they hatched a criminal conspiracy to murder Siva. In furtherance of the criminal conspiracy, on 05.09.1991, around 7.45 a.m. Accused (A-1 to A-5) along with one absconded Accused armed with deadly weapons assembled at Kovai Mill Road, Coimbatore and Accused (A-1 and A-3) attacked Siva with knife, who was passing through the road. Accused (A-1) also stabbed one Constable Chinnathambi (PW-1) with knife, who had come to the spot. Injured Siva was taken to the nearest hospital where he succumbed to injuries and was declared dead.

This incident led to arrests of nine accused. The accused and other persons were put to trial for commission of offences of murder and criminal conspiracy under Section 302 and 120(B)(1) of Code. The Accused Nos. 1 to 9 was convicted by Trial Court under Section 120(B)(1) of Code and Accused Nos. 1 to 4 was convicted for offence of murder under Section 302 of Code. On appeal before the High Court, the High Court dismissed appeals of accused filed against judgment of conviction.

**Held:** In order to constitute a conspiracy, meeting of mind of two or more persons to do an illegal act or an act by illegal means is a must. In other words, it is sine qua non for invoking the plea of conspiracy against the accused. However, it is not necessary that all the conspirators must know each and every detail of the conspiracy, which is being hatched and nor it is necessary to prove their active part/role in such meeting. The test laid down by this Court as to how a case under Section 120-A of Code read with Section 120-B of Code was required to be made out by the prosecution with the aid of evidence is found proved by the prosecution beyond reasonable doubt in this case. The complicity of the Appellant in conceiving a plan to kill Siva was therefore duly proved with the evidence adduced by the prosecution. Indeed, it was the Appellant who took the lead to kill deceased and with that end in view first he held a meeting in his house with all the other Accused and pursuant thereto got it accomplished through Accused (A-1 to A-5) on when Accused (A-1 & A-3) caused fatal stab injury with knife to deceased resulting in his homicidal death. Prosecution was able to prove beyond all reasonable doubt with the aid of evidence that the Appellant (A-6) was one of the active members of the criminal conspiracy along with other Accused and hatched the plan in his house in the meeting which was held to kill deceased and in furtherance thereof Accused (A-1 to A-5) successfully killed deceased by causing deceased stab injuries with the aid of knife resulting in his homicidal death. The Appellant's conviction and award of life sentence as prescribed under Section 302 read with Section 120-B, Indian Penal Code was, therefore, rightly held made out along with other Accused persons by the two courts below.

**Subject Matter :** Attempt of suicide

**Relevant Section : Section 309:** Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both

**Key Issue :** Whether the act of the petitioner be considered an offence u/s.309?

**Citation Details :** Pratibha Das vs. The State of Orissa (25.06.2019 - ORIHC):

[MANU/OR/0374/2019](#)

**Summary Judgment :**

**Facts:** The petitioner is the mother of one Abinash Das, child of 3 1/2 years old who expired during treatment in S.V.P. Post Graduate Institute of Paediatrics, Cuttack on 5.10.2002. On the allegation made by the father of the child, an enquiry was conducted regarding negligence of doctor and the enquiry report was submitted to the Director, Medical Education and Training on 18.10.2002. On 28.10.2002, the mother of the deceased sat on hunger-strike in front of the Outdoor, threatening to die, demanding appropriate action. Basing upon the F.I.R. submitted by Superintendent of SVP PG Institute of Paediatrics, after investigation, the police report was submitted and cognizance was taken.

**Held:** I am of the considered view that the mother whose child died during treatment and allegation of negligence in treatment by the doctor was entertained, for enquiry, she could be said under severe stress. Her action cannot be said mala fide. Due to strike, she could not decide the consequence of demand for action and to go for hunger-strike. For want of

criminal intent, the offence as alleged cannot be said to have been made out against the petitioner mother and continuance of the proceeding against her is an abuse of process of the court.

**Subject Matter :** Criminal breach of trust

**Relevant Section : Section 405:** Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property or wilfully suffers any other person so to do, commits "criminal breach of trust".

**Key Issue :** Whether the contents of the complaint and facts of the case amounts to a criminal offence?

**Citation Details :** Vivek vs. Vishwam Power and Buildcon Pvt. and Ors. (07.01.2020 - BOMHC): [MANU/MH/0020/2020](#)

**Summary Judgment :**

**Facts:** Contents of the complaint, verification, etc would show that complainant was harping upon the contract that had taken place between the Company and accused. The correspondence that was exchanged ought to have been considered. It has been alleged that the accused was not providing work as per the terms of contract. Some amount was paid by accused to the complainant, so also some material was also provided. If there would have been intention to cheat since inception, then these things would not have taken place. Complainant says that amount of Rs. 10,00,430/- is due and payable from accused; but accused avoided on one or the other pretext. It was submitted that the accused had no intention to make payments since beginning. On the say of accused, the complainant had shifted its material to Parali, Ambajogai and Osmanabad. On the basis of representations made by the accused, work was done and even the labours were employed. Huge amount was due and payable by the accused to the complainant. Every time when the demand of the amount was made, it was avoided by accused on one or the other pretext. This amounts to cheating and criminal breach of trust. Though there was a contract between complainant and accused, accused had no intention to act as per the same. The said action has given rise to civil as well as criminal remedy. It can be seen from the contents of complaint that the complainant intended to rely on the terms of contract entered into between it and accused.

**Held:** The contents of the complaint in this case do not show any entrustment by the complainant to the accused. It is tried to be contended that the cheque which was given by the complainant as security has not been returned by the accused. However, there is no averment in the complaint that the said cheque has been converted by accused to his use or it has been used by accused with dishonest intention or it has been disposed of in violation of any direction of law prescribing the mode in which such trust is to be discharged. Further as regards ingredients of Section 415 of Indian Penal Code as concerned it should show- "(i) Deception of any persons; ii) Fraudulently or dishonestly inducing any person to deliver any property; or (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit." Contents of the complaint, verification and documents in this case do not show what were those representations or dishonest inducement which were false or misleading. The details of the same have not been given. It appears that the alleged act was going on for months together. Then the question arises as to why complainant had not refused to do any further work. As aforesaid, even that work has been done for which there was no work order. That means in spite of knowledge the work has been done. This does not amount to fraudulent inducement.

**Subject Matter :** Cheating

**Relevant Section : Section 415:** Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".  
**Key Issue :** Whether the contents of the complaint and facts of the case amounts to a criminal offence?

**Citation Details :** Vivek vs. Vishwam Power and Buildcon Pvt. and Ors. (07.01.2020 - BOMHC): [MANU/MH/0020/2020](#)

**Summary Judgment :**

**Facts:** Contents of the complaint, verification, etc would show that complainant was harping upon the contract that had taken place between the Company and accused. The correspondence that was exchanged ought to have been considered. It has been alleged that the accused was not providing work as per the terms of contract. Some amount was paid by accused to the complainant, so also some material was also provided. If there would have been intention to cheat since inception, then these things would not have taken place. Complainant says that amount of Rs. 10,00,430/- is due and payable from accused; but accused avoided on one or the other pretext. It was submitted that the accused had no intention to make payments since beginning. On the say of accused, the complainant had shifted its material to Parali, Ambajogai and Osmanabad. On the basis of representations made by the accused, work was done and even the labours were employed. Huge amount was due and payable by the accused to the complainant. Every time when the demand of the amount was made, it was avoided by accused on one or the other pretext. This amounts to cheating and criminal breach of trust. Though there was a contract between complainant and accused, accused had no intention to act as per the same. The said action has given rise to civil as well as criminal remedy. It can be seen from the contents of complaint that the complainant intended to rely on the terms of contract entered into between it and accused.

**Held:** The contents of the complaint in this case do not show any entrustment by the complainant to the accused. It is tried to be contended that the cheque which was given by the complainant as security has not been returned by the accused. However, there is no averment in the complaint that the said cheque has been converted by accused to his use or it has been used by accused with dishonest intention or it has been disposed of in violation of any direction of law prescribing the mode in which such trust is to be discharged. Further as regards ingredients of Section 415 of Indian Penal Code as concerned it should show- "(i) Deception of any persons; ii) Fraudulently or dishonestly inducing any person to deliver any property; or (iii) To consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit." Contents of the complaint, verification and documents in this case do not show what were those representations or dishonest inducement which were false or misleading. The details of the same have not been given. It appears that the alleged act was going on for months together. Then the question arises as to why complainant had not refused to do any further work. As aforesaid, even that work has been done for which there was no work order. That means in spite of knowledge the work has been done. This does not amount to fraudulent inducement.

**Subject Matter : Cruelty**

**Relevant Section : Section 498A:** If any person being the husband or the relative of the husband of a woman, subjects such a woman to mental or physical harrassment in order to coerce her to meet any unlawful demand or any such action that drives her to commit suicide or any injury or death, is liable to imprisonment upto 3 years and/or with fine.

**Key Issue :** Whether the appellant id guilty of cruelty or murder?

**Citation Details :** Ajay vs. State of Maharashtra (27.04.2020 - BOMHC):  
[MANU/MH/0540/2020](#)

**Summary Judgment :**

**Facts:** The appellant was husband of deceased Nanda. He was cohabiting with her at his house at village Wadgaon, Amravati. During the wedlock, they had two sons and at the time of incident, sons Sojwal and Chetan were aged about 9 years and 5 years respectively. It is alleged that on 19.3.2014, deceased Nanda, appellant and their children were present in their house when the incident occurred. The incident took place at about 12.30 noon of that day. There was some quarrel between the deceased and the appellant which enraged the appellant so much so that he picked up a can containing kerosene oil, opened it, poured some of the kerosene on the person of deceased and set her ablaze by means of a lit match-stick. the appellant did not do anything to extinguish the fire of the deceased and it were the neighbours who rushed to the house of accused after they heard the shouts of the deceased seeking some help to relieve herself of the agony of the flames. The neighbours put out the fire of the deceased and rushed her to the hospital which was Rural Hospital, Dhamangaon Railway, it being a nearby hospital. The deceased had sustained extensive burns to the extent of 92% and she was required to be shifted to the Government Hospital, Yavatmal. Deceased Nanda was administered treatment for her burn injuries. On the next day, a dying declaration of the deceased was recorded by a police officer which blamed the appellant. She succumbed to her injuries on 22.3.2014. A post-mortem report was obtained. It disclosed the cause of death as septicemic shock due to burns. On merits of the case, the learned Additional Sessions Judge found the appellant as not guilty for an offence of cruelty punishable under Section 498A of the Indian Penal Code, but found him guilty for the offence of murder punishable under Section 302 of the Indian Penal Code and thus convicted him to suffer imprisonment for life and also to pay a fine of Rs. 2000/- and in default, to suffer simple imprisonment for six months, by the impugned judgment and order. Hence the present appeal.

**Held:** The aspect of nature of death of deceased Nanda is still a mystery because the appellant kept complete silence on the nature of death of his wife. To worsen the things, the neighbours who had extinguished the fire of the deceased and had taken her to the hospital, as per the original prosecution story, were not examined. We think, postmortem report is the only evidence which helps in this regard and when it is considered, along with other relevant circumstances, we should be able to unravel the mystery behind nature of death of Nanda. Of course, dying declaration is also there but, we have our own doubt about the creditworthiness of the dying declaration and, therefore, at this moment, we would keep it aside and only consider the post-mortem report and the other relevant circumstances of the case. The cause of death as disclosed in the post-mortem report is septicemic shock due to burns. Sustaining of such extensive burn injuries suggests that the cause for the same could hardly be accidental and mostly could be suicidal or be some deliberate act on the part of somebody. There is also no evidence whatsoever regarding deceased Nanda being ill-treated, tortured and harassed by the appellant. There is no evidence that deceased Nanda was suffering from any depression or any terminal disease or was going through any phase of extreme frustration. All these factors would rule out the possibility of suicidal death of Nanda. Then what remains is only the homicidal nature of death. The doctor certified the victim as fit to give a dying declaration. If we consider the evidence of PW 2 Gopika and also the dying declaration, we would find that PW 2 Gopika did not put any question to the deceased to ascertain her state of mind to make the declaration. Nowhere in her evidence has PW 2 Gopika stated that apart from the fitness certificate issued by the doctor, she herself was satisfied regarding the fit condition of the deceased to make the statement. Thus, this is a case wherein there is neither any certificate of

the doctor regarding fit state of mind of the declarant duly proved before the Court nor the satisfaction of the person who recorded the dying declaration as to the fitness of the deceased to make a declaration. Therefore, such a dying declaration cannot be relied upon and it would be risky for this Court to give any credence to such a dying declaration. The evidence in the nature of dying declaration is rejected by us. Apart from the rejected evidence of dying declaration, there is no evidence brought on record in the present case against the appellant. Hence, appeal is allowed.

**Subject Matter :** Defamation

**Relevant Section : Section 499:** Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any remarks concerning any person intending to harm, or knowing that such remarks will harm, the reputation of such person, is said to defame that person.

**Key Issue :** Whether the broadcast of the incident and the debate regarding it falls u/s.499?

**Citation Details :** Arnab Ranjan Goswami vs. Union of India (UOI) and Ors. (19.05.2020 - SC): [MANU/SC/0448/2020](#)

**Summary Judgment :**

**Facts:** On 16 April 2020, a broadcast took place on Republic TV. This was followed by a broadcast on R Bharat on 21 April 2020. These broadcasts led to the lodging of multiple First Information Reports<sup>1</sup> and criminal complaints against the Petitioner. They have been lodged in the States of Maharashtra, Chhattisgarh, Rajasthan, Madhya Pradesh, Telangana and Jharkhand as well as in the Union Territories of Jammu and Kashmir. In the State of Maharashtra, an FIR was lodged at Police Station Sadar, District Nagpur City. These places lie in the states where the state government is in allegiance with Indian National Congress. The genesis of the FIRs and complaints originates in the broadcasts on Republic TV on 16 April 2020 and R Bharat on 21 April 2020 in relation to an incident which took place in Gadchinchle village of Palghar district in Maharashtra. During the course of the incident which took place on 16 April 2020, three persons including two sadhus were brutally killed by a mob, allegedly in the presence of the police and forest guard personnel. The incident was widely reported in the print and electronic media. The petition states that a video recording of the incident is available in the public domain. In his news show titled "Poochta hai Bharat" on 21 April 2020 on R Bharat, the Petitioner claims to have raised issues in relation to the allegedly tardy investigation of the incident. A review of the above debate would show that its thrust was to question the tardy investigation, inconsistent versions of the authorities and the administration and the State Government's silence on the Palghar incident given that the unfortunate incident happened in Maharashtra which is presently Under Rule of an alliance government jointly formed by Shiv Sena, the Congress and the Nationalist Congress Party. The debate highlighted the manner in which the incident was being portrayed by the authorities, including the glaring fact that the incident occurred in the presence of numerous police officials which fact was initially suppressed. The Petitioner claims that following the broadcast, "a well-coordinated, widespread, vindictive and malicious campaign" was launched against him by the Indian National Congress<sup>2</sup> and its activist under the hashtag "**ArrestAntiIndiaArnab**". The petitioner requested to transfer he FIRs to Maharashtra.

**Held:** As we have observed earlier, the Petitioner requested for and consented to the transfer of the investigation of the FIR from the Police Station Sadar, District Nagpur City to the NM Joshi Marg Police Station in Mumbai. He did so because an earlier FIR lodged by him at that police station was under investigation. The Petitioner now seeks to preempt an investigation by the Mumbai police. The basis on which the Petitioner seeks to achieve this is untenable. An Accused person does not have a choice in regard to the mode or manner in which the

investigation should be carried out or in regard to the investigating agency. The line of interrogation either of the Petitioner or of the CFO cannot be controlled or dictated by the persons under investigation/interrogation. So long as the investigation does not violate any provision of law, the investigation agency is vested with the discretion in directing the course of investigation, which includes determining the nature of the questions and the manner of interrogation. No offence under defamation arises. Petition dismissed.

**Subject Matter :** Capital Punishment

**Relevant Section :** Note: Capital Punishment refer to death sentence and life imprisonment given in the rarest of the rare cases.

**Section 302 and Section 376** are the charging sections for the same.

**Section 302-** Punishment for murder.

**Section 376-** Punishment for rape.

**Key Issue :** Whether the crime committed calls for capital punishment?

**Citation Details :** Dhananjay Chatterjee vs. State of West Bengal (11.01.1994 - SC):

[MANU/SC/0626/1994](#)

**Summary Judgment :**

**Facts:** According to the prosecution case, the appellant Dhananjay was one of the security guards deputed to guard the building 'Anand Apartment' by M/s. Security and Investigating Bureau of which Mr. Shyam Karmakar PW 21 was the proprietor. Hetal complained to her mother Yashmoti Parekh PW 3 that the appellant had been teasing her on her way to and back from the school and had proposed to her on that day to accompany him to cinema hall to watch a movie. She had made complaints about the teasing by the appellant to her mother previously also. Yashmoti PW 3 told her husband Nagardas Parekh PW 4 about the behaviour of the appellant towards their daughter, who in turn complained to Shyam Karmakar PW 21 and requested him to replace the appellant. At the asking of Shyam Karmakar PW 21, who came to meet Nagardas PW 4 in his flat in that connection, PW 4 gave a written complaint also and the appellant was transferred and a transfer order posting the appellant at 'Paras Apartment' was issued by PW 21. Bijoy Thapa, a security guard at Paras Apartment was posted in his place, at Anand Apartment. The accused did not follow the transfer order instead performed duties at the same place the next day too. Hetal Parekh a young 18 years old school-going girl was raped and murdered on the third floor of 'Anand Apartment'. The appellant was challenged and tried for rape and murder and also for an offence under Section 380 IPC, for committing theft of a wrist watch from the said flat. The learned Additional Sessions Judge found him guilty and convicted the appellant, and sentenced him to death, life imprisonment and rigorous imprisonment for five years.

Reference for confirmation of the death sentence was accordingly made to the High Court. The appellant also preferred an appeal against his conviction and sentence in the High Court. The criminal appeal filed by the appellant was dismissed and the sentence of death was confirmed by the High Court. On special leave being granted, the appellant, Dhananjay Chatterjee @ Dhana, has filed this appeal.

**Held:** It is settled law that in a case based on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused. Those circumstances should not be capable of being explained by any other hypothesis, except the guilt of the accused and the chain of the evidence must be so complete as not to leave any reasonable ground for the belief consistent with the innocence of the accused. It needs no reminder that legally established circumstances and not merely indignation of the court can form the basis of conviction and the more serious

the crime, the greater should be the care taken to scrutinise the evidence lest suspicion takes the place of proof. Since, the instant case is based on circumstantial evidence and the sentence awarded by the trial court and confirmed by the High Court is that of death, we have no consider the circumstances carefully bearing the principles noticed above in mind. The High Court failed to notice that the vague and indefinite information given on the telephone which made the investigating agency only to rush to the scene of occurrence could not be treated as a first information report under Section 154 of the Cr.P.C. The unchallenged statement of the investigating officer that he commenced the investigation only after recording the statement of PW 3 Yashmoti unmistakably shows that it was that statement which alone could be treated as the first information report. The High Court fell in error in observing that the statement of PW 3 Yashmoti was recorded "after the investigation had already commenced". All the circumstances referred to above and relied upon by the prosecution have been conclusively established by the prosecution. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years and certainly makes **this case a 'rare of the rarest' cases which calls for no punishment other than the capital punishment and we accordingly confirm the sentence of death** imposed upon the appellant for the offence under Section 302 IPC.

## SEXUAL OFFENCES

**Subject Matter :** Criminalisation of Marital Rape

**Relevant Section :** Section 375 Exception 2 of Indian Penal Code, 1860: Exception 2 of Section 375 states that “sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”

Section 376 B of Indian Penal Code, 1860: Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Section 198B of Criminal Procedure Code, 1973 : No Court shall take cognizance of an offence punishable under section 376B of the Indian Penal Code (45 of 1860) where the persons are in a marital relationship, except upon *prima facie* satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband

Section 114A of the Indian Evidence Act, 1872

**Key Issue :** Whether Exception 2 to Section 375 of the Penal Code, insofar as it relates to girls aged 15 to 18 years, is unconstitutional and liable to be struck down?

**Citation Details :** 1. RIT Foundation v. The Union of India

2. Khusboo Saifi v. The Union of India & Anr.

3. All India Democratic Women's Association v. The Union of India

4. Farhan v. State & Anr.

(11.05.2021 – Delhi High Court): [MANU/DE/1638/2022](#)

**Summary Judgment :**

**Facts:** Four petitions have been filed in this case out of which two are purely in the nature of Public Interest Petitions while the third petition has been filed by Ms Khushboo Saifi wherein she has made assertions that she has been subjected to sexual abuse including rape by her husband. The fourth petition has also been instituted by an individual i.e., Mr Farhan.

**Held:** The Delhi high court, gave a split verdict in a case related to the criminalisation of marital rape.

The verdict was delivered by a division bench of Honorable Justices Rajiv Shakdher and C. Hari Shankar. The case will now be dealt with by the Honorable Supreme Court.

#### **JUSTICE SHAKDHER'S OBSERVATIONS:**

Justice Shakdher ruled in favour of striking down the exception – that is, Exception 2 to Section 375 of the Indian Penal Code (IPC) which says that sexual intercourse by a man with his own wife is not rape.

The major observations made by him are:

1. To understand whether a classification based on the relationship between the offender and victim is constitutionally viable, one would have to examine whether the classification has an intelligible differentia (IA) with the object which is sought to be achieved.
2. It cannot be doubted that there is a differentia between married, separated and unmarried couples. However, what needs to be established once the differentia is accepted is: whether the differentia between married and unmarried couples has a rational nexus with the object, which the main provision seeks to achieve; that is, protecting a woman from being subjected to a sexual act against her will or her consent.
3. Marital Rape Exception (MRE) does not meet the nexus test as it grants impunity to an offender based on his relationship with the victim.
4. The classification, in his opinion, is unreasonable and manifestly arbitrary as it seems to convey that forced sex outside marriage is “real rape” and that the same act within marriage is anything else but rape.
5. For a woman who is violated by her husband by being subjected to the vilest form of sexual abuse (i.e., rape), it is no answer to say that the law provides her with other remedies. When marriage is a tyranny, the state cannot have a plausible legitimate interest in saving it. “In every sense, MRE, in my view, violates the equality clause contained in Article 14 of the constitution.” Justice Shakdher said.
6. The classification between married and unmarried couples in the context of forced sex is not just unequal in its operation, but is also manifestly unjust. As such, he called marital rape exception oppressive.
7. While sex workers have been invested with the power to say ‘no’, by law, a married woman has not.
8. The immediate deleterious impact of the provisions of MRE is that while an unmarried woman who is the victim of the offence of rape stands protected and/or can take succour by taking recourse to various provisions of the IPC and the [Criminal Procedure] Code, the same regime does not kick-in if the complainant is a married woman.

#### **Article 21**

9. The offence of rape and injury caused remains the same, irrespective of who the offender is and therefore, the MRE is violative of Article 21 of the constitution.

10. Women's right to withdraw consent at any given point in time forms the core of the woman's right to life and liberty, which encompasses her right to protect her physical and mental being.

#### **Articles 15 and 19(1)(a) of the constitution**

11 Continuance of the MRE on the statute violates Articles 15 of the Constitution since it

triggers discrimination against women based on their marital status. As a result, it impairs and nullifies their sexual agency with regard to coitus and their right to procreate or abstain from procreation. More fundamentally, according to Justice Shakdher, women's power to negotiate contraception, to protect themselves against sexually transmissible disease and to seek an environment of safety, away from the clutches of her abuses, is completely eroded.

**12.** Likewise, the MRE, is also violative of Article 19(1)(a) as it violates the guarantee given by the constitution concerning freedom of expression, amongst others, to married women who are citizens of this country. The guarantee of freedom of expression includes a woman's right to assert her sexual agency and autonomy.

#### **Conjugal expectations**

**13.** With regard to conjugal expectations, he observed that these expectations, even though legitimate during the subsistence of a joyful marriage, cannot be put at par with unbridled access and/or marital privilege claimed by the husband vis-a-vis his wife, disregarding circumstances and her physical and mental condition.

#### **'Non-consensual sexual intercourse is not labelled as 'rape' to save the institution of marriage'**

**14.** The marital bond between individuals is the edifice of the familial structure. However, the edifice can remain intact only if it is rooted in mutuality, partnership, agency and the ability to respect each other's yearning for physical and mental autonomy.

Sexual assault by the husband on his wife, which falls within the fold of Section 375 of the IPC, needs to be called out as rape as that is one of the ways in which the society expresses its disapproval concerning the conduct of the offender.

### **JUSTICE SHANKAR'S OBSERVATIONS**

Justice Shankar, meanwhile, ruled against striking down the MRE.

The following were the nine observations made by him:

**1.** The impugned exception chooses to treat sex, and sexual acts, within a surviving and subsisting marriage differently from sex and sexual acts between a man and woman who are unmarried. It extends this distinction holding that, within marital sexual relations, no "rape", as statutorily envisioned by Section 375, can be said to occur.

**2.** In treating sexual acts between a husband and wife, whether consensual or non-consensual, differently from non-consensual sexual acts between a man and woman not bound to each other by marriage, the legislature cannot be said to have acted unconstitutionally.

**3.** The distinction is based on IA having a rational nexus to the object sought to be achieved by the impugned exception, which fulfils not only a legal but also a laudatory object, and does not compromise any fundamental rights guaranteed in Part III of the constitution.

**4.** It is not open to courts to examine whether the object of the legislation is sufficient to justify the differentia. A writ court, venturing into that territory, would clearly be exceeding the boundaries of its authority under Article 226.

**5.** Section nowhere disallows a wife from saying no to sexual intercourse, the language of the section plainly states that sexual acts and sexual intercourse, by a man with his wife, are not rape.

#### **Article 14**

**6.** Arbitrariness, as an abstract concept, cannot constitute the basis for striking down a legislative provision as unconstitutional, or as violative of Article 14. It has to be remembered that Article 14, after all, pertains to the fundamental right to equality.

#### **Challenge related to section 376B (which deals with sexual intercourse between husband and wife in separation)**

**7.** Sexual intercourse between a separated couple cannot be equated with sex between strangers or to a couple in marriages cohabiting together. Therefore, a middle path has been carved out by the legislature and there is no reason to interfere with this dispensation.

**Subject Matter :** Assault or criminal force to woman with intent to outrage her modesty

**Relevant Section : Section 354:** Whoever assaults or uses criminal force to any woman, intending to outrage her modesty is liable to be imprisoned for upto five years and fine.

**Key Issue :** Whether the appellant is eligible to get the benefit under the Probation of Offenders Act, 1958 ('Act 1958')?

**Citation Details :** Ajahar Ali vs. State of West Bengal (04.10.2013 - SC):

[MANU/SC/1016/2013](#)

**Summary Judgment :**

**Facts:** On 6.11.1995, Nasima Begum (PW. 1), aged about 16 years filed a complaint alleging that on that day while she was going to attend her tuition alongwith her friend Nilufa Khatun, she met the Appellant on the way who suddenly came and forcibly caught hold of her hair and planted a kiss, resultantly, she suffered a cut over her lower lip and started bleeding. Appellant was held guilty in trial for the offence punishable under Section 354 of Indian Penal Code, 1860. Appellant contended that since the incident occurred more than 18 years ago and at that time the Appellant as well as the complainant were about 16 years of age, the court should not send the Appellant to jail at such a belated stage. Considering the fact that the Appellant was juvenile in view of the provisions of Juvenile Justice Act, 2000, he ought to have been tried before the Juvenile Justice Board and not by the criminal court, as was done. Even otherwise, considering the time gap of 18 years and the fact that the Appellant as well as the complainant have settled in life and both of them are married and have children, their lives should not be disturbed. In all circumstances, the court should give the benefit to the Appellant under the provisions of Probation of Offenders Act, 1958. State of West Bengal has opposed the appeal contending that considering the nature of offence wherein the modesty of a young girl was outraged, the question of showing any leniency or granting the benefit of the Act 1958 is not warranted. Even if the case of the Appellant is considered under the JJ Act 2000, the maximum punishment that can be awarded is of 3 years, while in the instant case, the Appellant had been sentenced only for a period of six months. Therefore, it will be a futile exercise to consider the case of the Appellant on that anvil. Nasima Begum who had no enmity against the Appellant has been very consistent about the factual matrix not only in her statement under Section 161 of Code of Criminal Procedure, 1973 but also before the court and had supported the prosecution case fully. Her version was corroborated by several other witnesses and the courts below have recorded a finding that the Appellant was guilty beyond reasonable doubt.

**Held:** In the instant case, as the Appellant has committed a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded and as the **Appellant behaved like a road side Romeo, we do not think it is a fit case where the benefit of the Act 1958 should be given to the Appellant.** In view of the above, we are of considered opinion that as the Appellant had been awarded only six months imprisonment, considering the matter under the JJ Act, 2000 would not serve any purpose at such a belated stage. The High Court had been of the opinion that Appellant had been dealt with very leniently and it was a fit case where the High Court wanted to enhance the sentence but considering the fact that the incident occurred long back, the High Court refrained to do so. Thus, the appeal fails and is accordingly dismissed. The Appellant is directed to surrender within a period of four weeks to serve out the sentence.

**Subject Matter :** Actions amounting to Sexual Harrassment

**Relevant Section : A:** Physical contact and unwelcome and explicit sexual overtures; or a demand or request for sexual favours; or showing pornography against the will of a woman; or making sexually coloured remarks.

**Key Issue :** Whether the appellant is eligible to get the benefit under the Probation of Offenders Act, 1958 ('Act 1958')?

**Citation Details :** Ajahar Ali vs. State of West Bengal (04.10.2013 - SC):

[MANU/SC/1016/2013](#)

**Summary Judgment :**

**Facts:** On 6.11.1995, Nasima Begum (PW. 1), aged about 16 years filed a complaint alleging that on that day while she was going to attend her tuition alongwith her friend Nilufa Khatun, she met the Appellant on the way who suddenly came and forcibly caught hold of her hair and planted a kiss, resultantly, she suffered a cut over her lower lip and started bleeding. Appellant was held guilty in trial for the offence punishable under Section 354 of Indian Penal Code, 1860. Appellant contended that since the incident occurred more than 18 years ago and at that time the Appellant as well as the complainant were about 16 years of age, the court should not send the Appellant to jail at such a belated stage. Considering the fact that the Appellant was juvenile in view of the provisions of Juvenile Justice Act, 2000, he ought to have been tried before the Juvenile Justice Board and not by the criminal court, as was done. Even otherwise, considering the time gap of 18 years and the fact that the Appellant as well as the complainant have settled in life and both of them are married and have children, their lives should not be disturbed. In all circumstances, the court should give the benefit to the Appellant under the provisions of Probation of Offenders Act, 1958. State of West Bengal has opposed the appeal contending that considering the nature of offence wherein the modesty of a young girl was outraged, the question of showing any leniency or granting the benefit of the Act 1958 is not warranted. Even if the case of the Appellant is considered under the JJ Act 2000, the maximum punishment that can be awarded is of 3 years, while in the instant case, the Appellant had been sentenced only for a period of six months. Therefore, it will be a futile exercise to consider the case of the Appellant on that anvil. Nasima Begum who had no enmity against the Appellant has been very consistent about the factual matrix not only in her statement under Section 161 of Code of Criminal Procedure, 1973 but also before the court and had supported the prosecution case fully. Her version was corroborated by several other witnesses and the courts below have recorded a finding that the Appellant was guilty beyond reasonable doubt.

**Held:** In the instant case, as the Appellant has committed a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded and as the **Appellant behaved like a road side Romeo, we do not think it is a fit case where the benefit of the Act 1958 should be given to the Appellant.** In view of the above, we are of considered opinion that as the Appellant had been awarded only six months imprisonment, considering the matter under the JJ Act, 2000 would not serve any purpose at such a belated stage. The High Court had been of the opinion that Appellant had been dealt with very leniently and it was a fit case where the High Court wanted to enhance the sentence but considering the fact that the incident occurred long back, the High Court refrained to do so. Thus, the appeal fails and is accordingly dismissed. The Appellant is directed to surrender within a period of four weeks to serve out the sentence.

**Subject Matter :** Assault or use of criminal force to woman with intent to disrobe.

**Relevant Section : B:** Any man who assaults any woman or abets such act with the intention of disrobing or compelling her to be naked, is liable to imprisonment upto 7 years and fine.

**Key Issue :** Whether the appellant is eligible to get the benefit under the Probation of Offenders Act, 1958 ('Act 1958')?

**Citation Details :** Ajahar Ali vs. State of West Bengal (04.10.2013 - SC):

[MANU/SC/1016/2013](#)

## **Summary Judgment :**

**Facts:** On 6.11.1995, Nasima Begum (PW. 1), aged about 16 years filed a complaint alleging that on that day while she was going to attend her tuition alongwith her friend Nilufa Khatun, she met the Appellant on the way who suddenly came and forcibly caught hold of her hair and planted a kiss, resultantly, she suffered a cut over her lower lip and started bleeding. Appellant was held guilty in trial for the offence punishable under Section 354 of Indian Penal Code, 1860. Appellant contended that since the incident occurred more than 18 years ago and at that time the Appellant as well as the complainant were about 16 years of age, the court should not send the Appellant to jail at such a belated stage. Considering the fact that the Appellant was juvenile in view of the provisions of Juvenile Justice Act, 2000, he ought to have been tried before the Juvenile Justice Board and not by the criminal court, as was done. Even otherwise, considering the time gap of 18 years and the fact that the Appellant as well as the complainant have settled in life and both of them are married and have children, their lives should not be disturbed. In all circumstances, the court should give the benefit to the Appellant under the provisions of Probation of Offenders Act, 1958. State of West Bengal has opposed the appeal contending that considering the nature of offence wherein the modesty of a young girl was outraged, the question of showing any leniency or granting the benefit of the Act 1958 is not warranted. Even if the case of the Appellant is considered under the JJ Act 2000, the maximum punishment that can be awarded is of 3 years, while in the instant case, the Appellant had been sentenced only for a period of six months. Therefore, it will be a futile exercise to consider the case of the Appellant on that anvil. Nasima Begum who had no enmity against the Appellant has been very consistent about the factual matrix not only in her statement under Section 161 of Code of Criminal Procedure, 1973 but also before the court and had supported the prosecution case fully. Her version was corroborated by several other witnesses and the courts below have recorded a finding that the Appellant was guilty beyond reasonable doubt.

**Held:** In the instant case, as the Appellant has committed a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded and as the **Appellant behaved like a road side Romeo, we do not think it is a fit case where the benefit of the Act 1958 should be given to the Appellant.** In view of the above, we are of considered opinion that as the Appellant had been awarded only six months imprisonment, considering the matter under the JJ Act, 2000 would not serve any purpose at such a belated stage. The High Court had been of the opinion that Appellant had been dealt with very leniently and it was a fit case where the High Court wanted to enhance the sentence but considering the fact that the incident occurred long back, the High Court refrained to do so. Thus, the appeal fails and is accordingly dismissed. The Appellant is directed to surrender within a period of four weeks to serve out the sentence.

## **Subject Matter : Voyeurism**

**Relevant Section : C:** Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator is liable to be imprisoned for voyeurism for the term of upto 3 years and fine.

**Note:** "Private act" includes an act of watching carried out in a place which otherwise would have been a private one where the woman could be naked without being observed by any unknown person; or Where the victim consents to the capture of the images or any act but no to their display or dissemination, the act of leaking the images would become an offence.

**Key Issue :** Whether the appellant is eligible to get the benefit under the Probation of Offenders Act, 1958 ('Act 1958')?

**Citation Details :** Ajahar Ali vs. State of West Bengal (04.10.2013 - SC):

[MANU/SC/1016/2013](#)

**Summary Judgment :**

**Facts:** On 6.11.1995, Nasima Begum (PW. 1), aged about 16 years filed a complaint alleging that on that day while she was going to attend her tuition alongwith her friend Nilufa Khatun, she met the Appellant on the way who suddenly came and forcibly caught hold of her hair and planted a kiss, resultantly, she suffered a cut over her lower lip and started bleeding. Appellant was held guilty in trial for the offence punishable under Section 354 of Indian Penal Code, 1860. Appellant contended that since the incident occurred more than 18 years ago and at that time the Appellant as well as the complainant were about 16 years of age, the court should not send the Appellant to jail at such a belated stage. Considering the fact that the Appellant was juvenile in view of the provisions of Juvenile Justice Act, 2000, he ought to have been tried before the Juvenile Justice Board and not by the criminal court, as was done. Even otherwise, considering the time gap of 18 years and the fact that the Appellant as well as the complainant have settled in life and both of them are married and have children, their lives should not be disturbed. In all circumstances, the court should give the benefit to the Appellant under the provisions of Probation of Offenders Act, 1958. State of West Bengal has opposed the appeal contending that considering the nature of offence wherein the modesty of a young girl was outraged, the question of showing any leniency or granting the benefit of the Act 1958 is not warranted. Even if the case of the Appellant is considered under the JJ Act 2000, the maximum punishment that can be awarded is of 3 years, while in the instant case, the Appellant had been sentenced only for a period of six months. Therefore, it will be a futile exercise to consider the case of the Appellant on that anvil. Nasima Begum who had no enmity against the Appellant has been very consistent about the factual matrix not only in her statement under Section 161 of Code of Criminal Procedure, 1973 but also before the court and had supported the prosecution case fully. Her version was corroborated by several other witnesses and the courts below have recorded a finding that the Appellant was guilty beyond reasonable doubt.

**Held:** In the instant case, as the Appellant has committed a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded and as the **Appellant behaved like a road side Romeo, we do not think it is a fit case where the benefit of the Act 1958 should be given to the Appellant.** In view of the above, we are of considered opinion that as the Appellant had been awarded only six months imprisonment, considering the matter under the JJ Act, 2000 would not serve any purpose at such a belated stage. The High Court had been of the opinion that Appellant had been dealt with very leniently and it was a fit case where the High Court wanted to enhance the sentence but considering the fact that the incident occurred long back, the High Court refrained to do so. Thus, the appeal fails and is accordingly dismissed. The Appellant is directed to surrender within a period of four weeks to serve out the sentence.

**Subject Matter : Stalking**

**Relevant Section : D:** Any man who follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or

monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking. It is not an offence if such an act is done while trying to detect a crime by the state.

**Key Issue :** Whether the appellant is eligible to get the benefit under the Probation of Offenders Act, 1958 ('Act 1958')?

**Citation Details :** Ajahar Ali vs. State of West Bengal (04.10.2013 - SC):

[MANU/SC/1016/2013](#)

**Summary Judgment :**

**Facts:** On 6.11.1995, Nasima Begum (PW. 1), aged about 16 years filed a complaint alleging that on that day while she was going to attend her tuition alongwith her friend Nilufa Khatun, she met the Appellant on the way who suddenly came and forcibly caught hold of her hair and planted a kiss, resultantly, she suffered a cut over her lower lip and started bleeding. Appellant was held guilty in trial for the offence punishable under Section 354 of Indian Penal Code, 1860. Appellant contended that since the incident occurred more than 18 years ago and at that time the Appellant as well as the complainant were about 16 years of age, the court should not send the Appellant to jail at such a belated stage. Considering the fact that the Appellant was juvenile in view of the provisions of Juvenile Justice Act, 2000, he ought to have been tried before the Juvenile Justice Board and not by the criminal court, as was done. Even otherwise, considering the time gap of 18 years and the fact that the Appellant as well as the complainant have settled in life and both of them are married and have children, their lives should not be disturbed. In all circumstances, the court should give the benefit to the Appellant under the provisions of Probation of Offenders Act, 1958. State of West Bengal has opposed the appeal contending that considering the nature of offence wherein the modesty of a young girl was outraged, the question of showing any leniency or granting the benefit of the Act 1958 is not warranted. Even if the case of the Appellant is considered under the JJ Act 2000, the maximum punishment that can be awarded is of 3 years, while in the instant case, the Appellant had been sentenced only for a period of six months. Therefore, it will be a futile exercise to consider the case of the Appellant on that anvil. Nasima Begum who had no enmity against the Appellant has been very consistent about the factual matrix not only in her statement under Section 161 of Code of Criminal Procedure, 1973 but also before the court and had supported the prosecution case fully. Her version was corroborated by several other witnesses and the courts below have recorded a finding that the Appellant was guilty beyond reasonable doubt.

**Held:** In the instant case, as the Appellant has committed a heinous crime and with the social condition prevailing in the society, the modesty of a woman has to be strongly guarded and as the **Appellant behaved like a road side Romeo, we do not think it is a fit case where the benefit of the Act 1958 should be given to the Appellant.** In view of the above, we are of considered opinion that as the Appellant had been awarded only six months imprisonment, considering the matter under the JJ Act, 2000 would not serve any purpose at such a belated stage. The High Court had been of the opinion that Appellant had been dealt with very leniently and it was a fit case where the High Court wanted to enhance the sentence but considering the fact that the incident occurred long back, the High Court refrained to do so. Thus, the appeal fails and is accordingly dismissed. The Appellant is directed to surrender within a period of four weeks to serve out the sentence.

**Subject Matter :** Rape

**Relevant Section : Section 375:** A man is said to commit rape if he penetrates his penis, any foreign object or manipulates the body of the woman to cause such penetration into any body part of a woman without her consent and will.

**Note:** Free consent and free will, both are required for a sexual act to not be rape.

**Key Issue :** Whether the accused is guilty of the offence of rape?

**Citation Details :** State through reference vs. Ram Singh and Ors. (13.03.2014 - DELHC):

[MANU/DE/0649/2014](#)

**Note:** This case came to be commonly known as Nirbhaya gang rape case which led to the Criminal Amendment Act of 2013.

**Summary Judgment :**

**Facts:** In the evening of 16.12.2012, the prosecutrix had gone for a movie with her friend, PW-1. Both the prosecutrix and PW-1 left the movie theatre and reached Munirka bus stand and they boarded the bus. This bus was being driven by Accused Ram Singh and the Petitioner-Akshay Kumar Singh @ Thakur was the helper thereof. The Accused misbehaved with the prosecutrix and have committed gang rape of the prosecutrix in the moving bus. They also committed unnatural offence and inserted iron rod in the private parts of the prosecutrix. The Accused persons had beaten up PW-1 with iron rods and his clothes were torn off. The Accused also took away all the belongings of the prosecutrix and PW-1 and thereafter, threw the prosecutrix and PW-1 in a naked condition from the moving bus. The prosecutrix was treated at Safdarjung Hospital, Delhi where her three dying declarations were recorded. Since the condition of the prosecutrix became critical, she was shifted for further treatment to Mt. Elizabeth Hospital, Singapore where, she died on 29.12.2012. The trial court convicted the accused which was confirmed by the High court. Hence, the present appeal.

**Held:** The victim and her friend had reposed complete confidence in occupants of contract bus while boarding same to reach their destination. Convicts misused confidence and faith of victim and her friend, made them to board bus so as to overpower them on way and satisfy their lust. Crime was pre-planned and executed by resorting to diabolical method, exhibiting inhuman conduct in ghastly manner. Convicts behaved in barbaric and inhuman manner by inserting rods and hand in victim's private parts and taking out her internal organs, committing the offence of rape. Convicts also pulled victim with hair, dragged her from rear portion of bus to front gate and threw her out of bus alongwith her friend in nude condition on road side. Not only to deter others from committing such atrocious crimes, but also to give emphatic expression to society's abhorrence of such crimes, death penalty needed to be confirmed. Appeal dismissed.

**Subject Matter :** Punishment for rape

**Relevant Section :** Section 376: The perpetrator shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

**Key Issue :** Whether the accused is guilty of the offence of rape?

**Citation Details :** State through reference vs. Ram Singh and Ors. (13.03.2014 - DELHC): [MANU/DE/0649/2014](#)

**Note:** This case came to be commonly known as Nirbhaya gang rape case which led to the Criminal Amendment Act of 2013.

**Summary Judgment :**

**Facts:** In the evening of 16.12.2012, the prosecutrix had gone for a movie with her friend, PW-1. Both the prosecutrix and PW-1 left the movie theatre and reached Munirka bus stand and they boarded the bus. This bus was being driven by Accused Ram Singh and the Petitioner-Akshay Kumar Singh @ Thakur was the helper thereof. The Accused misbehaved with the prosecutrix and have committed gang rape of the prosecutrix in the moving bus. They also committed unnatural offence and inserted iron rod in the private parts of the prosecutrix. The Accused persons had beaten up PW-1 with iron rods and his clothes were torn off. The Accused also took away all the belongings of the prosecutrix and PW-1 and thereafter, threw the prosecutrix and PW-1 in a naked condition from the moving bus. The prosecutrix was treated at Safdarjung Hospital, Delhi where her three dying declarations were

recorded. Since the condition of the prosecutrix became critical, she was shifted for further treatment to Mt. Elizabeth Hospital, Singapore where, she died on 29.12.2012. The trial court convicted the accused which was confirmed by the High court. Hence, the present appeal.

**Held:** The victim and her friend had reposed complete confidence in occupants of contract bus while boarding same to reach their destination. Convicts misused confidence and faith of victim and her friend, made them to board bus so as to overpower them on way and satisfy their lust. Crime was pre-planned and executed by resorting to diabolical method, exhibiting inhuman conduct in ghastly manner. Convicts behaved in barbaric and inhuman manner by inserting rods and hand in victim's private parts and taking out her internal organs, committing the offence of rape. Convicts also pulled victim with hair, dragged her from rear portion of bus to front gate and threw her out of bus alongwith her friend in nude condition on road side. Not only to deter others from committing such atrocious crimes, but also to give emphatic expression to society's abhorrence of such crimes, death penalty needed to be confirmed. Appeal dismissed.

**Subject Matter :** Distinction between Sexual Assault under POCSO Act and IPC.

**Relevant Section : Section 7, POCSO Act, 2012:** If a person,-

- (i) **touches** the vagina, penis or anus or breast of the child,
- (ii) **makes the child touch** the vagina, penis, anus or breast of such person or any other person or
- (iii) does any other act which involves **physical contact without penetration, all with sexual intent**, then that person is said to have committed sexual assault.

**Section 354, IPC 1860:** Whoever assaults or uses criminal force to any woman, **intending to outrage or knowing it to be likely to outrage her modesty**, shall be punished with imprisonment of one to five years.

**Key Issue :** Whether the act committed by the accused is sexual assault under POCSO Act?

**Citation Details :** Satish vs. The State of Maharashtra (19.01.2021 - BOMHC):

[MANU/MH/0064/2021](#)

**Summary Judgment :**

**Facts:** On 14.12.2016, the informant (mother of the prosecutrix) lodged a report at police station Gittikhadan, Nagpur, stating therein that the appellant took her daughter (prosecutrix) aged about 12 years, on the pretext of giving her guava, in his house and pressed her breast and attempted to remove her salwar. At that point of time, the informant reached the spot and rescued her daughter. Immediately, she lodged First Information Report. On the basis of the said FIR, crime came to be registered against the appellant/accused.

**Held:** The act of pressing of breast of the child aged 12 years, in the absence of any specific detail as to whether the top was removed or whether he inserted his hand inside top and pressed her breast, would not fall in the definition of 'sexual assault'. **The act of pressing breast can be a criminal force to a woman/ girl with the intention to outrage her modesty.** It is not possible to accept this submission for the aforesaid reasons. Admittedly, it is not the case of the prosecution that the appellant removed her top and pressed her breast. As such, there is no direct physical contact i.e. skin to skin with sexual intent without penetration. In view of the above discussion, **this Court holds that the appellant is acquitted under Section 8 of the POCSO Act and convicted under minor offence u/s. 354 of IPC and sentenced him to undergo R.I. for one year and to pay fine of Rs. 500/-, in default of fine to suffer R.I. for one month.** The sentence for the offence punishable under Section 342 of the Indian Penal Code i.e. six months and fine of Rs. 500/-, in default to suffer R.I. for one month, is maintained.

# THEFT, ROBBERY, DACOITY

**Subject Matter :** Theft

**Relevant Section : Section 378:** Whoever takes any moveable property out of the possession of any person without that person's consent (expresss or implied), with dishonest intentions, is said to commit theft.

**Note:** Theft pertains to only moveable properties.

**But,** if a thing attached to Earth is removed and then taken out of the possession dishonestly, also amounts to theft.

**Key Issue :** Whether repossession of vehicle by appellant financiers in terms of agreement on failure of respondent to pay installments amounts to the offence of theft?

**Citation Details :** Charanjit Singh Chadha and Ors. vs. Sudhir Mehra (31.08.2001 - SC):

[MANU/SC/0514/2001](#)

**Summary Judgment :**

**Facts:** The respondent, Sudhir Mehra, partner of a partnership firm, entered into a hire purchase agreement with the appellants whereunder a motor vehicle was handed over to the respondent. The total consideration agreed to be paid by the respondent was Rs. 3,02,884/- and the respondent made an initial payment of Rs. 69,308/- and the balance amount was to be paid in 36 monthly installments of Rs. 8,400/- each starting from 3.6.1994. According to the respondent, he had been paying the installments regularly. The respondent filed a criminal complaint before the Judicial Magistrate, Amritsar alleging that the motor vehicle in question had developed some trouble and it was entrusted to a motor mechanic for carrying out repairs and that in the night of 16.9.1996 the appellants forcibly took away the vehicle from the motor mechanic. Pursuant to the complaint, the Magistrate took cognizance of the offences. It was alleged by the appellants that respondent had committed default in paying the installments and that an amount of Rs. 1,34,887/- was outstanding against the respondent and therefore the appellants were constrained to terminate the hire purchase agreement and that the respondent surrendered the motor vehicle to the appellants. The High Court declined to quash the proceedings and held that the allegations in the complaint were capable of making out offences punishable especially under Section 379 IPC. Aggrieved by the same, the appellants have filed the instant appeal.

**Held:** In view of the stringent terms incorporated in the agreement, if the hirer himself has committed default by not paying the installments and the appellants have taken repossession of the vehicle, the respondent cannot have any grievance. The respondent cannot be permitted to say that the owner of the vehicle has committed theft of the vehicle or criminal breach of trust or cheating or criminal conspiracy as alleged in the complaint. When the agreement specifically says that the owner has got a right to re-possess the vehicle, there cannot be any basis for alleging that the appellants have committed criminal breach of trust or cheating. **The owner repossessing the vehicle delivered to the hirer under the hire purchase agreement will not amount to theft as the vital element of 'dishonest intention' is lacking.** The element of 'dishonest intention' which is an essential element to constitute the offence of theft cannot be attributed to a person exercising his right under an agreement entered into between the parties as he may not have an intention of causing wrongful gain or to cause wrongful loss to the hirer. The hire-purchase agreement in law is an executory contract of sale and confers no right in rem on hirer until the conditions for transfer of the property to him have been fulfilled. Therefore, the repossession of goods as per the term of the agreement may not amount to any criminal offence. The agreement specifically gave authority to the appellants

to re-possess the vehicle and their agents have been given the right to enter any property or building wherein the motor vehicle was likely to be kept.

**Subject Matter :** Robbery: In all robbery there is either theft or extortion.

**Relevant Section : Section 390:** **a.** Theft is robbery when in order to commit theft, one uses force in such a manner that it causes fear of hurt, death or wrongful restraint or ends up causing death, hurt or wrongful restraint of the person against whom such an offence is being committed.

**b.** Extortion is robbery when in order to commit extortion, one uses force as mentioned above.

**Note:** In order to turn theft or extortion to robbery, the element of instant threat, instant injury or instant death must be present.

**Key Issue :** Whether the materials on record make out a *prima facie* case of robbery?

**Citation Details :** Abdul Rashid and Ors. vs. Nausher Ali (10.04.1979 - CALHC):

MANU/WB/0289/1979

**Summary Judgment :**

**Facts:** On June 5, 1978 the petitioners formed an unlawful assembly along with some unknown others and trespassed into the land of the complainant, armed with various weapons. They then started removing the til crops which were cultivated by the complainant. On getting this information the complainant went to the land and protested when the accused persons threatened him saying that in case he attempted to enter into the land in future, he will be done to death. His further allegation is that the accused persons were frequently giving out that they would set fire to the house of the complainant and do other mischief. In his initial deposition the complainant stated that when he protested, the accused persons abused him in filthy language and chased him with lathis. Some of his witnesses, deposed to the effect that when the complainant protested, the accused abused him and threatened to kill him.

**Held:** For transformation of an offence of theft to one under robbery it has to satisfy the requirement of Section 390 of the I.P.C. "Theft" is "robbery" under the said section if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt, or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. When "robbery" is committed by five or more persons, it answers to the definition of "dacoity" under Section 391 of the I.P.C. **The essence of the offence of robbery therefore is that the offender for the end of committing theft, or carrying away or attempting to carry away the looted property, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint or fear of instant death or of instant hurt or of instant wrongful restraint.** The use of violence will not, therefore, ipso facto convert the offence of theft into robbery unless the violence is committed for one of the ends specified in that section. Judging the facts of the instant case in the light of Section 390 of I.P.C. I do not find any allegation whatsoever to show *prima facie* that the threat was meted out by the petitioners for any of the ends mentioned in the Section 390 of the I.P.C. Application allowed.

**Subject Matter :** Dacoity

**Relevant Section : Section 391:** When five or more persons conjointly commit or attempt to commit a robbery including persons present and aiding such commission or attempt, every person so committing, attempting or aiding, is said to commit "dacoity".

**Key Issue :** Whether Sessions Judge was correct in holding that three Appellant were amongst dacoits and liable for conviction?

**Citation Details :** Laliya and Ors. vs. State of Rajasthan (18.07.1966 - RAJHC):

MANU/RH/0023/1967

**Summary Judgment :**

**Facts:** It is alleged that on 7-8-1964 at about 4 of 5 O Clock seven persons including the five appellants, armed with guns and lathis, arrived in the 'Bazar' of village Bamanwas and looted a few shops. After the commission of dacoity they left the village along with booty. A good number of villagers collected and immediately chased the offenders and over-took them at about a distance of four furlongs to one mile. The alleged dacoits finding them pursued by the villagers took their positions and there was an encounter between the dacoits and the villagers. There was exchange of fire between them. During the encounter the alleged dacoits and some of the villagers received injuries. One Bodia, a villager, died on the spot.

Ultimately, the villagers overpowered the dacoits and captured four out of the seven offenders viz., the three appellants Laliya, Jeewan and Jagannath and one Prabhu, with some of the looted property. The Sessions Judge after review of the entire evidence observed in the first instance that "again there is nothing to suggest that these three accused (Laliya, Jeewan and Jagannath) were captured and beaten by the villagers on a mistaken identity. The dacoity took place in broad day light between 4 and 5 p.m. In the month of August. The villagers chased the dacoits as soon as they left the bazar and overpowered them at a short distance from the village in broad day light. In these circumstances, it cannot be said that the villagers captured them on a mistaken identity". Then referring to the encounter between the alleged dacoits and the capture of the three dacoits, he recorded the conclusion "All these circumstances lead to irresistible conclusion that a dacoity was committed on 7-8-1964 by seven persons armed with deadly weapons, that Laliya, Jeewan and Jagannath were amongst the dacoits and that the murder of Bodia was committed in the course of the dacoity, when the dacoits were in flight with the looted property." Hence, the present appeal.

**Held:** "A dacoity, begins as soon as there is an attempt, to commit robbery. A shot fired in order to keep off the rescue party, and allow the theft to be committed, is an act committed in committing dacoity." Placing reliance on this principal and the facts and evidences produced, in my opinion, the recovery of the property from the possession of Gheesa and Chothia has not been established beyond all doubt and they are entitled to benefit of doubt. The appeal is partially accepted. Convictions and substantive sentences of Laliya, Jeewan and Jagannath are maintained. I do not feel inclined to maintain sentences of fine. Convictions and sentences of Gheesa and Chothia are set aside.

## **JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015**

**Subject Matter :** Juvenile offender under 18 years and above 16 years to be remitted to jurisdictional Juvenile Justice Board.

**Relevant Section :** JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 [REPEALED]

**Section 20** - Special provision in respect of pending cases: Explanation: In all pending cases in respect of a juvenile in conflict with law, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.

**Key Issue :** Whether the conviction would need modification?

**Citation Details :** Devilal and Ors. vs. State of Madhya Pradesh (25.02.2021 - SC) :

[MANU/SC/0118/2021](#)

**Summary Judgment :**

**Facts:** The Appellants were convicted for murder under IPC, 1860 and were sentenced to suffer imprisonment for life with fine. Trial Court found that the FIR recorded at the instance of the deceased could be relied upon as dying declaration and that the statements of the witnesses as well as the recoveries at the instance of Accused proved the case of prosecution. It was, however, found that the case was not proved against the fourth Accused and none of the Accused could be held guilty under offences punishable under SC/ST Act. In the appeal it was contended that witnesses were tutored which however was not accepted by High Court. An application was also filed submitting that one Accused was a juvenile on the day the offence was committed and sought relief accordingly.

**Held:** Even while holding the Appellant to be juvenile in terms of the 2000 Act and guilty of the offence with which he was charged, sentence of life imprisonment is set aside and matter remitted to the jurisdictional Juvenile Justice Board for determining appropriate quantum of fine to be levied on Appellant.

**Subject Matter :** Treatment of persons, who committed an offence, when person was below the age of eighteen years

**Relevant Section : Section 6:** If any person committed an offence when he/she was below the age of eighteen, he/she shall be processed as a juvenile. If not released on bail, such a person shall be kept in place of safety during the inquiry. Such a person shall be treated as per the provisions of this Act.

**Key Issue :** Whether the petitioner is eligible to be benefited under this provision based on his age?

**Citation Details :** Abdul Riyaz vs. The State of Maharashtra (24.09.2009 - BOMHC):

[MANU/MH/1085/2009](#)

**Summary Judgment :**

**Facts:** The petitioner, namely Abdul Riyaz, who has been convicted for murder and conspiracy along with his father and 3 elder brothers, was sentenced to suffer R.I. for life and fine by the sessions court. The petitioner challenged the said judgment and order before this Court and this Court confirmed the said judgment and order of the conviction. Thereafter the petitioner preferred Special Leave Petition before Honorable Supreme Court along with application for delay condonation. The Honorable Supreme Court allowed the said application for condonation of delay, but rejected the Special Leave Petition. Accordingly, the conviction and sentence of life imprisonment inflicted upon the petitioner herein was confirmed up to the Honorable Supreme Court. By the present petition, the petitioner has raised the contention that his date of birth is 15.6.1986 and hence, on the date of commission of offence i.e. 12.8.2003 his age was 17 years 1 month and 27 days. To substantiate the date of birth, the petitioner produced his school leaving certificate disclosing his afore said date of birth therein. Basing upon the afore said date of birth and the provisions of this Act, the

petitioner claims juvenility and contends that he was juvenile in conflict with law on the date of commission of offence i.e. 12.8.2003. Accordingly, the petitioner prays that benefit of the said provisions be given to the petitioner and he be released from the jail forthwith.

**Held:** The Lecturer in Radiology, Medical College, Aurangabad submitted the Radiological (Bone) Assessment report through the learned Additional Public Prosecutor before us on 8.9.2009. On perusal of the said report, it is seen that the present approximate age of the petitioner convict is given as 20 years. Even after giving latitude of 2 years plus/minus and considering the present age of the petitioner on the higher side i.e. 22 years, it is apparently clear that the petitioners age on the date of commission of the offence i.e. on 12.8.2003 would be 16 years and, therefore, it is amply clear that the petitioner was the juvenile in conflict with law on the date of commission of the offence. Even basing upon the school leaving certificate produced by the petitioner and also the school leaving certificate, bona fide certificate and the school admission register produced by the respondent, the date of birth of the petitioner is disclosed therein as 15.6.1986 and considering the date of the commission of the offence i.e. 12.8.2003, it is crystal clear that the age of the petitioner was of 17 years 1 month and 27 days i.e. below 18 years on the said date and he was juvenile in conflict with law on the date of commission of the offence. Hence petition allowed.

**Subject Matter :** Bail to a person who is apparently a child and has committed any offence  
**Relevant Section : Section 12:** When any person, who is apparently a child and is alleged to have committed a bailable or non-bailable offence, is apprehended or detained by the police, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, be released on bail with or without surety or placed under the supervision of a probation officer or under the care of any fit person: Provided that such person shall not be released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person's release would defeat the ends of justice.

**Key Issue :** Whether the accused is liable to bail or not?

**Citation Details :** Fatma vs. State of U.P. and Ors. (02.06.2017 - ALLHC):

[MANU/UP/1922/2017](#)

**Summary Judgment :**

**Facts:** A First Information Report was lodged by one Arif Khan resident of Mohalla Sarab Gyan, District Shamli against unknown persons with the averment that on 20.9.2016 at about 9.00 p.m. his father, Shamim Ahmed had gone to another house for sleeping and about 9.30 P.M. his father was murdered by some unknown assailants by causing knife injuries. Neither anyone was named in the F.I.R. nor any suspicion was laid by the first informant on anyone. During investigation the statement of first informant was recorded who repeated version of First Information Report and again he did not name any accused or laid suspicion. According to the prosecution during investigation on the information of an informer of police (Mukhbir Khas), Riyazuddin son of Aslam, Shakoor, Abid son of Shakoor, Amna, Abida and Fatma daughters of Shakoor were involved in the murder of Shamim Ahmad. The name of the revisionist emerged from the confessional statement of Riyazuddin while in custody before the police wherein he has stated that he along with revisionist and other accused persons committed murder of the deceased as the deceased used to keep evil eye on some of the women folk of their family. On the basis of the invincible confessional statement of co-accused, the revisionist and other accused were arrested from their house and since then the revisionist is in custody. The record indicates that nothing incriminating article was recovered from the possession of the revisionist and on the basis of aforesaid scanty evidence charge-

sheet was submitted against her. After the revisionist was arrested by the police an application on her behalf was moved by her mother for declaring her a juvenile. After recording evidence and perusing the material placed before it, recorded finding that on the date of the incident revisionist was thirteen years two and half months' old and she thus was declared a juvenile in conflict with law. After being adjudged juvenile the revisionist moved an application for being released on bail but her prayer for bail was refused by the Board vide its order dated 28.4.2017 by recording finding that there are chances and likelihood that after being released on bail she may fall in company of the known and unknown criminals and, therefore, her moral and psychological trait/qualities may deteriorate with the additional finding that her release on bail will defeat the cause of justice. It may be recorded that the Board has simply reproduced the conditions for grant/refusal of bail as contemplated under section 12 of the Act. He has only referred to the report of District Probation Officer dated 20.4.2017. Aggrieved by the continued decline of her prayer for bail by subordinate courts, the revisionist has moved the high court.

**Held:** It transpires that *prima facie* there is no reliable and credible evidence of involvement of the revisionist in the murder. **The bail to a juvenile cannot be refused in an uncared manner** and on conjectures and surmises which should be done in accordance with section 12 of the Act. There was total absence of material and no reasonable ground existed for believing that after being released on bail, the revisionist is likely to come in association with known or unknown criminals or expose her to moral, physical and psychological danger and the finding that the ends of justice would be defeated by granting bail, is based on no material and in my opinion it is purely conjectural and hypothetical may record that Principal Judge, Juvenile Justice Board has dealt with the case in a very casual and perfunctory manner without assigning reasons or dealing with the facts and circumstances which would disentitle her to be enlarged on bail. I am of the opinion that both the Courts below have erred in exercising their discretionary power in favour of the revisionist and the impugned orders suffer from patent error of law as well as of fact and cannot be sustained. Consequently, the revision is allowed.

**Subject Matter :** Child attained age of twenty-one years before completing the prescribed term of stay in place of safety

**Relevant Section : Section 20:** When the child in conflict with the law attains the age of twenty-one years and is yet to complete the term of stay, the Children's Court shall provide for a follow up by the probation officer or the District Child Protection Unit or a social worker or by itself, as required, to evaluate if such child has undergone reformative changes and if the child can be a contributing member of the society. After the completion of the procedure, Children's Court may--

(i) decide to release the child on such conditions as it deems fit;  
decide that the child shall complete the remainder of his term in a jail.

**Key Issue :** Whether the appellant was a juvenile at the time of commission of the crime and is liable to bail?

**Citation Details :** Daya Nand vs. State of Haryana (07.01.2011 - SC): [MANU/SC/0021/2011](#)

**Summary Judgment :**

**Facts:** On February 2, 1998, at about 10.00 A.M., the prosecutrix had gone out to the fields for relieving herself. There she was accosted by the Appellant. Seeing him take off his pants, the prosecutrix tried to run away but the Appellant caught hold of her and pulled her down to the ground. The prosecutrix freed herself by biting on the Appellant's hand and ran towards her house. The Appellant chased her and again caught hold of her. He pulled her down and grabbed her breasts and attempted to commit rape on her. She resisted him and in their

struggle some mustard crops grown in the field were also damaged. On alarm raised by the prosecutrix, her mother and uncle came to the spot and on seeing them, the Appellant ran away threatening the prosecutrix that he would kill her in case she went to the police. The Additional Sessions Judge, Narnaul, trying the offence, on a consideration of the evidence adduced before him, found and held that the charge against the Appellant was fully proved and convicted him. The convict appealed the case of juvinility. Appellant was convicted under Section 376 Indian Penal Code, 1860 and his plea of being Juvenile was rejected by Courts below. Hence this Appeal.

**Held:** In view of the Juvenile Justice Act as it stands after the amendments introduced into it and following the decision in Hari Ram and the later decisions the Appellant can not be kept in prison to undergo the sentence imposed by the Additional Sessions Judge and affirmed by the High Court. The sentence imposed against the Appellant is set aside and he is directed to be released from prison. He is further directed to be produced before the Juvenile Justice Board, Narnaul, for passing appropriate orders in accordance with the provisions of the Juvenile Justice Act. The appeal is, thus, disposed of with the aforesaid observations and directions.

## NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985

**Subject Matter :** Prohibition of certain operations & Punishment for contravention in relation to poppy straw

**Relevant Section : Section 8:** No person shall cultivate or gather any portion of coca plant and opium, poppy or any cannabis plant. One should not indulge in any activity involving these plants whatsoever.

**Section 15:** Whoever, in contravention of any provisions of this Act or any rule or order made or condition of a licence granted thereunder in respect of warehoused poppy straw shall be punishable with rigorous imprisonment for a term upto 10 years and /or fine upto 2 Lakh rupees, depending upon the quantity of the plant involved.

**Key Issue :** Whether the appellant is guilty of possession of Poppy straw?

**Citation Details :** Vijay Pandey vs. State of Uttar Pradesh (30.07.2019 - SC):

[MANU/SC/0998/2019](#)

**Summary Judgment :**

**Facts:** The Appellant was stated to have been carrying a plastic flour packet in his right hand leading to recovery of opium. No independent witness from the locality was included in the investigation and all the witnesses were police officials only. The Trial Court convicted Appellant under Sections 8 and 15 of the Act. On appeal, the High Court also upheld conviction of Appellant. The Appellant alleging false implication contends that he was apprehended as he stepped out of his house. There was no explanation for the non-availability of any independent witness in a residential locality. There was non-compliance with Section

50 of the NDPS Act. The prosecution failed to prove that the sample produced in court was the same as seized from the Appellant.

**Held:** The seizure was at the door step of the Appellant. It is difficult to believe that in a rural residential locality, the police were unable to find a single independent witness. No name of any person had been mentioned who may have declined to be a witness. Though the Laboratory Report was obtained, but the identity of the sample stated to have been seized from the Appellant was not conclusively established by the prosecution. The fact of an earlier conviction may be relevant for the purpose of sentence but could not be a ground for conviction per se. The failure of the prosecution in the present case to relate the seized sample with that seized from the Appellant makes the case no different from failure to produce the seized sample itself. In the circumstances the mere production of a laboratory report that the sample tested was narcotics cannot be conclusive proof by itself. The sample seized and that tested had to be co-related. Appellant acquitted. Appeal allowed.

**Subject Matter :** Special provision relating to cultivation of cannabis

**Relevant Section : Section 14:** Notwithstanding anything in section 8A, government may allow cultivation of any cannabis plant for, industrial purposes only of obtaining fibre or seed or for horticultural purposes.

**Key Issue :** Whether the accused is liable for the offence of cultivation of cannabis?

**Citation Details :** Kalabhai Bhavjibhai Damor vs. State of Gujarat (03.02.2020 - GUJHC):

[MANU/GJ/0387/2020](#)

**Summary Judgment :**

**Facts:** As per the prosecution case, Police Constable Kadakiyabhai Damor received a secret information through informer that appellant-Kalabhai Bhavjibhai Damor, who is a resident of village Jagola possessing and selling illegally 'Ganja' from his house. Pursuant to the said information, after observing all the formalities under the Act, services of two independent panch witnesses were requisitioned and a raid was arranged and lead by Mr. V.M. Jani, Circle Police Inspector along with in-charge P.S.I. Mr. Vasava and other police personnel. It is further the case of the prosecution that when they reached village Jagola, near one premises, one person was standing and on asking, he revealed his name to be Kalabhai Bhavjibhai Damor. Thereafter, he was informed about the secret information received and he was requested to have the search of his premises keeping him along with them. For the purpose, when he was asked about the ownership of the premises, he revealed that he owns the said premises. While search of the said premises was carried on, on a western side there was a declivous (storage for crops by the farmers) covered with sand wall and doors in between and after opening the door they found four plastic bags tied with a string and on suspecting containing 'Ganja', it was opened since the officers who carried out the raid suspected it to be 'Ganja', the services of F.S.L. officer was requisitioned and on arrival of an officer, she, after examining contraband articles found in each bags, opined primarily that, it is 'Ganja'. However, she has requested the officer concerned to send the sample to Forensic Laboratory for the purpose of examination and to have another sample as a reserved sample. The witness has denied the suggestion that panchnama Exh.8 was not prepared at the spot itself, but it was prepared while sitting in the police station and signatures of the panch witnesses were obtained in a prepared panchnama.

**Held:** Not only the handling of muddamal and the sample, even the search and seizure inspires no confidence. Search and seizure itself is doubtful in view of the evidence brought on record by the prosecution as discussed herein above. Thus, prosecution has failed to prove the case against the appellant by leading cogent, reliable and believable evidence beyond

reasonable doubt. Hence, this appeal is allowed. The appellant is ordered to be acquitted of all the charges levelled against him.

**Subject Matter :** Preparation of any illicit drugs

**Relevant Section : Section 30:** If any person makes preparation to do or omits to do anything which constitutes an offence punishable under any of the provisions of this Act, shall be punishable with rigorous imprisonment for a term which shall not be less than one-half of the minimum term (if any), but which may extend to one-half of the maximum term, of imprisonment and also with fine which shall not be less than one-half of the minimum amount (if any), of fine with which he would have been punishable, but which may extend to one-half of the maximum amount of fine.

**Key Issue :** Whether the accused is liable for the offence of cultivation of cannabis?

**Citation Details :** Kalabhai Bhavjibhai Damor vs. State of Gujarat (03.02.2020 - GUJHC):

[MANU/GJ/0387/2020](#)

**Summary Judgment :**

**Facts:** As per the prosecution case, Police Constable Kadakiyabhai Damor received a secret information through informer that appellant-Kalabhai Bhavjibhai Damor, who is a resident of village Jagola possessing and selling illegally 'Ganja' from his house. Pursuant to the said information, after observing all the formalities under the Act, services of two independent panch witnesses were requisitioned and a raid was arranged and lead by Mr. V.M. Jani, Circle Police Inspector along with in-charge P.S.I. Mr. Vasava and other police personnel. It is further the case of the prosecution that when they reached village Jagola, near one premises, one person was standing and on asking, he revealed his name to be Kalabhai Bhavjibhai Damor. Thereafter, he was informed about the secret information received and he was requested to have the search of his premises keeping him along with them. For the purpose, when he was asked about the ownership of the premises, he revealed that he owns the said premises. While search of the said premises was carried on, on a western side there was a declivous (storage for crops by the farmers) covered with sand wall and doors in between and after opening the door they found four plastic bags tied with a string and on suspecting containing 'Ganja', it was opened since the officers who carried out the raid suspected it to be 'Ganja', the services of F.S.L. officer was requisitioned and on arrival of an officer, she, after examining contraband articles found in each bags, opined primarily that, it is 'Ganja'. However, she has requested the officer concerned to send the sample to Forensic Laboratory for the purpose of examination and to have another sample as a reserved sample. The witness has denied the suggestion that panchnama Exh.8 was not prepared at the spot itself, but it was prepared while sitting in the police station and signatures of the panch witnesses were obtained in a prepared panchnama.

**Held:** Not only the handling of muddamal and the sample, even the search and seizure inspires no confidence. Search and seizure itself is doubtful in view of the evidence brought on record by the prosecution as discussed herein above. Thus, prosecution has failed to prove the case against the appellant by leading cogent, reliable and believable evidence beyond reasonable doubt. Hence, this appeal is allowed. The appellant is ordered to be acquitted of all the charges levelled against him.

**Subject Matter :** Confiscation of sale proceeds of illicit drugs or substances

**Relevant Section : Section 62:** Where any narcotic drug, psychotropic substance or controlled substance is sold by a person having knowledge or reason to believe that the drug or substance is liable to confiscation under this Act the sale proceeds thereof shall also be liable to confiscation.

**Key Issue :** Whether the seizure of the vehicle that was found to be involved in offences under this Act is correct?

**Citation Details :** Raees Khan vs. The State of Madhya Pradesh (02.12.2019 - MPHC):  
[MANU/MP/1992/2019](#)

**Summary Judgment :**

**Facts:** It is alleged that the Police seized motorcycle in connection with the offence punishable under Section 8, 20 of the NDPS Act and after investigation, police filed the charge-sheet on which a case was registered, which is pending before Special Judge (NDPS), Khandwa. During pendency of the case, the applicant, who is the registered owner of the said motorcycle filed an application under Section 457/451 of Cr.P.C. before Special Judge Khandwa for getting interim custody of the said vehicle. The learned Special Judge rejected the application. Being aggrieved by that order, applicant filed this petition.

**Held:** This Court has gone through the record and arguments put forth by both the parties. It appears from the record that learned Special Judge rejected the applicant's prayer only on the ground that as per the notification issued by the Central Government under Section 52A of the Act, **all narcotic drugs and psychotropic substances, controlled substances or conveyances seized under the NDPS Act shall be disposed of by the Drugs Disposal Committee** and according to Sub-rule (5) of the Rule 9 of the said notification, **seized vehicles can be disposed off by the Committee through auction. If the vehicle is given in the interim custody to the applicant, then the proceedings of the Drug Disposal Committee will be hampered.** But the reasons assigned by the learned Special Judge for rejecting the applicant's application does not appear to be correct. **There is also no evidence on record to show that applicant has a criminal past** and he was involved in similar crimes in the past too. **If the seized vehicle is kept lying at the Police Station, the value of the said vehicle would be diminished and its parts would be damaged.** So in the considered opinion of this Court learned Special Judge committed mistake in rejecting the applicant's application to get the interim custody of the vehicle. Hence, petition is allowed.

**Subject Matter :** Presumption of culpable mental state

**Relevant Section : Section 35:** For an offence under this Act which requires a culpable mental state of the accused, the **Court shall presume the existence of such mental state** but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence.

Above, "**culpable mental state**" includes intention, motive knowledge of a fact and belief in, or reason to believe, a fact. Under this, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.

**Key Issue :** Whether the Appellant has been able to discharge the burden of proof cast upon him under Section 35 of NDPS Act?

**Citation Details :** Baldev Singh vs. State of Haryana (04.11.2015 - SC):  
[MANU/SC/1268/2015](#)

**Summary Judgment :**

**Facts:** On 16/17.09.1990 mid night, SI alongwith ASI and team of police personnel with Government Jeep and a private jeep were holding Nakabandi on both sides of Kacha path leading to village Kingre from G.T. Road for detection of the contraband. At that time, a tractor with trolley was heading towards the road from the village and the same was stopped and the Appellant was apprehended and he was inquired about the gunny bags of poppy husk lying in the trolley. Thirty three yellow coloured gunny bags containing poppy husk were

recovered from the trolley attached to tractor and on weighing the bags, total about thirteen quintals and twenty kilograms of poppy husk was recovered. From each bag, sample of hundred grams was taken out and parcels were made and remaining poppy husk lying in the gunny bags were sealed and were seized and taken into police possession alongwith the said tractor with its trolley. He was acquitted by the trial court but convicted by the high court. Hence, the present appeal.

**Held:** Burden of proof cast on the accused Under Section 35 of the NDPS Act can be discharged through different modes. One of such modes is that the accused can rely on the materials available in the prosecution case raising doubts about the prosecution case. If the circumstances appearing in the prosecution case give reasonable assurance to the Court that the accused could not have had the knowledge of the required intention, the burden cast on him Under Section 35 of the NDPS Act would stand discharged even if the accused had not adduced any other evidence of his own when he is called upon to enter on his defence. From the evidence led by the prosecution, **it has been proved beyond reasonable doubt** that the accused being the driver of the tractor was in conscious possession of the thirty three bags of poppy husk in the trolley attached to the tractor. The conviction of the Appellant Under Section 15 of the NDPS Act is confirmed and the sentence of imprisonment imposed on the Appellant is reduced to ten years and the appeal is partly allowed.

**Subject Matter :** Offences to be cognizable and non-bailable under this Act

**Relevant Section : Section 37:** (1) Every offence punishable under this Act **(a) shall be cognizable; (b) no person accused** of an offence **involving commercial quantity** shall be released on bail or on his own bond unless the twin conditions are satisfied, which are--

(i) prosecution must be given an opportunity to oppose the application, and

(ii) the court must have resonable grounds to believe the innocence of the accused.

(2) The limitations on granting of bail are in addition to the limitations under the Code of Criminal Procedure.

#### **UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967**

**Section 43D(5):** Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release.

**Key Issue :** Whether the High Court was erroneous to grant bail to the accused?

**Citation Details :** Union of India (UOI) vs. K.A. Najeeb (01.02.2021 - SC) :

MANU/SC/0046/2021

#### **Summary Judgment :**

**Facts:** An FIR was lodged pertaining to explosive substances. It emerged over the course of investigation that the attack was part of a larger conspiracy involving meticulous pre-planning, numerous failed attempts and use of dangerous weapons. It was alleged that the Respondent was one of the main conspirators and was charged as such. Being untraceable, the Respondent was declared an absconder and his trial was split up from the rest of his co-conspirators. The Respondent was arrested and a chargesheet was re-filed by the National Investigation Agency against him, pursuant to which the Respondent is now facing trial. The Respondent approached the Special Court and the High Court for bail six times. Bail was declined to the Respondent, observing that prima facie he had prior knowledge of the offence, had assisted and facilitated the attack. The Courts were, therefore, of the view that the bar against grant of bail under Section 43-D(5) of the UAPA was attracted. The Respondent again approached the High Court questioning the Special Court's order denying bail. The

High Court through the impugned order, released the Respondent on bail noting that the trial was yet to begin though the Respondent had been in custody for four years.

**Held:** The High Court in the instant case had not determined the likelihood of the Respondent being guilty or not, or whether rigours of Section 43-D(5) of UAPA are alien to him. It instead appears to have exercised its power to grant bail owing to the long period of incarceration and the unlikelihood of the trial being completed anytime in the near future. The reasons assigned by the High Court were apparently traceable back to Article 21 of Constitution, of course without addressing the statutory embargo created by Section 43-D(5) of UAPA. The presence of statutory restrictions like Section 43-D(5) of UAPA per-se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Appeal Dismissed.

**Subject Matter :** Offences to be cognizable and non-bailable under this Act

**Relevant Section : Section 37:** (1) Every offence punishable under this Act (a) shall be cognizable; (b) no person accused of an offence involving commercial quantity shall be released on bail or on his own bond unless the twin conditions are satisfied, which are--  
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**Key Issue :** Whether the decision of the High Court to grant bail to the accused was in defiance to Section 37 of the said Act?

**Citation Details :** State of Kerala and Ors. vs. Rajesh and Ors. (24.01.2020 - SC):

[MANU/SC/0084/2020](#)

**Summary Judgment :**

**Facts:** The Circle Inspector of Excise arrested accused persons and seized the hashish oil, money and the vehicles which were used by them for transporting oil. The allegation against the Accused Respondent was that he entrusted hashish oil to A-1 through A-2 for sale in the International market and Crime was registered against him and after investigation, charge-sheet was filed. On an application filed for post-arrest bail by Accused Respondent, Additional Sessions Judge while noticing the mandate of **Section 37(1)(b)(i) and (ii) of the NDPS Act** observed that there was a prima facie material to presume that the Accused committed the offence punishable under Section 20(b)(ii)(c) and Section 29 of the NDPS Act and rejected the application for post-arrest bail which came to be challenged at the instance of the Accused Respondent filing bail application before the High Court. The High Court without even noticing Section 37 of the NDPS Act and taking note of the fact that other Accused persons in Crime since have been released on bail, granted him post-arrest bail. Hence, the present appeal is preferred by the State.

**Held:** The scheme of **Section 37** of Act reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the Code of Criminal Procedure, but is also subject to the limitation placed by Section 37 which commences with non-obstante clause. The operative part of the said Section is in the negative form prescribing the enlargement of bail to any person Accused of commission of an offence under the Act,

unless twin conditions are satisfied. The expression reasonable grounds means something more than *prima facie* grounds. It contemplates substantial probable causes for believing that the Accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the Accused is not guilty of the alleged offence. **In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the Code of Criminal Procedure, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act was indeed uncalled for.** Appeal allowed.

**Subject Matter :** Presumption from possession of illicit articles

**Relevant Section : Section 54:** In trials under this Act, **it may be presumed, unless and until the contrary is proved,** that the accused has committed an offence under this Act in respect of any narcotic drug, controlled substance, any opium, poppy, cannabis plant or coca plant growing on any land which he has cultivated, any apparatus or any group of utensils specially adopted for the manufacture of any narcotic drug or controlled substance or any other such material, **for the possession of which he fails to account satisfactorily.**

**Key Issue :** Whether, Appellants could be held to have conscious possession of contraband substances?

**Citation Details :** Gian Chand and Ors. vs. State of Haryana (23.07.2013 - SC):

[MANU/SC/0744/2013](#)

**Summary Judgment :**

**Facts:** On 5.9.1996, Bhan Singh, ASI of Police Station, Rania alongwith other police officials was present in the village Chakka Bhuna in an official jeep. The police party saw a jeep coming at high speed from the opposite direction and asked the said jeep to stop. However, instead of stopping, the driver accelerated the speed of the jeep. This created suspicion in the minds of the police officials. Thus, they chased the jeep. The occupants of the jeep took a U-turn and in that process the jeep struck the wall of a house in the village. The three occupants of the jeep tried to run away but they were caught by the police. The said three occupants were later identified as the Appellants. The vehicle had 10 bags containing 41 kg poppy husk each. The police party took samples of 200 grams of poppy husk from each bag and the same was sealed by the Dy. S.P. The prosecution led the evidence in support of its case and also produced the case property in the court alongwith the damaged jeep in which the Appellants were carrying 410 kg. Poppy husk. In the FSL report all positive results were shown. Appellants did not lead any evidence in defence and pleaded that they had falsely been implicated in the crime. After conclusion of the trial, the Appellants were convicted. Hence, the present appeal.

**Held:** The provisions of **Section 35 and 54** of the Act, became clear that **if Accused was found to be in possession of contraband article, he was presumed to have committed offence under relevant provisions of Act until contrary was proved.** It is a well settled legal proposition that once possession of contraband articles is established, burden shifts on Accused to establish that he had no knowledge of same. Once possession of contraband material with Accused was established, Accused had to establish how he came to be in possession of same as it was within his special knowledge. Appellants could not point out what prejudice had been caused to them if fact of conscious possession had not been put to them. Appeal dismissed.

# **PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012**

**Subject Matter :** Penetrative sexual assault

**Relevant Section : Section 3:** A person is said to commit "penetrative sexual assault" if he causes or manipulates the body parts of the child to penetrate his penis or any foreign object into the child's vagina, mouth, urethra or anus or applies his mouth to any of the said areas.

**Key Issue :** Whether the act of penetrative sexual assault has been committed on the prosecutrix?

**Citation Details :** Lokesh vs. State (07.06.2019 - DELHC): [MANU/DE/2004/2019](#)

**Summary Judgment :**

**Facts:** In 2013, the complainant Guddi, arrived at the Police Station, with her daughter, the prosecutrix, about 4 years of age, and tendered her statement, on the basis whereof prosecution was lodged against the present appellant. According to the said statement, Guddi, along with the prosecutrix and her 9-year-old son, had gone to the Rama Market, Munirka, to meet the appellant, who worked at a cycle shop, the occasion being that of "Bhai Duj". After performing the ceremony, the appellant told her that his mother had invited them to his house. She, i.e. Guddi, along with her son, proceeded to the house of the appellant, at Kakrola Vihar, where he resided with his mother. The appellant, however, reached his house, accompanied by the prosecutrix only at about 10 p.m. As the prosecutrix appeared distressed, she asked her what had happened, whereupon the prosecutrix informed her that the appellant had taken her to a jungle, removed her clothes, inserted something in her vagina (referred to, by her, as "susu" which, in the context, may be taken to be a euphemism for "genitals") and, thereafter, inserted his susu in her anus. The prosecutrix further disclosed, to her mother, that, as the act had caused her severe pain, she started crying, whereupon the appellant beat her and threatened to kill her mother and brother, if she were to disclose, to her mother what had happened. On removing the underwear of the prosecutrix, she found bloodstains in her pelvic region, which was also swollen. She further stated that, as she was apprehensive, she did not disclose what had happened to anybody and got her daughter, i.e. the prosecutrix, treated privately. However, when she did not recover, and the pain continued, she informed her relatives, who encouraged her to report the matter to the Police. The accused was convicted by the sessions court u/s. 376 of IPC and Section 3,4,5,6 of POCSO Act. Hence, the present appeal.

**Held:** In cases of sexual assault against children, the first, and most important, piece of evidence, is always the statement of the child prosecutrix herself/himself. At the outset, one may note that there is no serious dispute, in the present case, regarding the age of the child prosecutrix, which stands established by the records from the office of the Registrar of Births and Deaths as 4 years. Guddi, in her testimony during trial, deposed, first, that, in the toilet, she had noticed cut marks around the anal area of her daughter, i.e. the prosecutrix, and that, on her carrying her as to what had happened, the prosecutrix informed her that the appellant had, in the jungle, taken off undergarments and, after gagging her with a cloth, "put her (penis) private organ in her anus as well as on her urinating part." PW-6 went on to state that, on further examination, she noticed injury marks on the body of her daughter, along with two-three cut marks on her anus. Seen holistically, these testimonies, **in my view, leave no**

**manner of doubt that penetrative anal assault had been committed, by the appellant, on the prosecutrix.** The innocence of the prosecutrix in the present case, who had barely savoured the first fragrance of childhood, let alone adolescence, was brutally plundered by the appellant, the deviancy of his act being augmented by the fact that he chose to sodomise her. The trauma that the prosecutrix is bound to suffer, on account of the appellant, is bound to be lifelong. Therefore, the conviction stands but the sentence is not enhanced.

**Subject Matter :** Aggravated penetrative sexual assault

**Relevant Section : Section 5:** A person who is a police officer, member of the armed forces or security forces or a public servant is said to commit "penetrative sexual assault" if he causes or manipulates the body parts of the child to penetrate his penis or any foreign object into the child's vagina, mouth, urethra or anus or applies his mouth to any of the said areas.

**Key Issue :** Whether the act of penetrative sexual assault has been committed on the prosecutrix?

**Citation Details :** Lokesh vs. State (07.06.2019 - DELHC): [MANU/DE/2004/2019](#)

**Summary Judgment :**

**Facts:** In 2013, the complainant Guddi, arrived at the Police Station, with her daughter, the prosecutrix, about 4 years of age, and tendered her statement, on the basis whereof prosecution was lodged against the present appellant. According to the said statement, Guddi, along with the prosecutrix and her 9-year-old son, had gone to the Rama Market, Munirka, to meet the appellant, who worked at a cycle shop, the occasion being that of "Bhai Duj". After performing the ceremony, the appellant told her that his mother had invited them to his house. She, i.e. Guddi, along with her son, proceeded to the house of the appellant, at Kakrola Vihar, where he resided with his mother. The appellant, however, reached his house, accompanied by the prosecutrix only at about 10 p.m. As the prosecutrix appeared distressed, she asked her what had happened, whereupon the prosecutrix informed her that the appellant had taken her to a jungle, removed her clothes, inserted something in her vagina (referred to, by her, as "susu" which, in the context, may be taken to be a euphemism for "genitals") and, thereafter, inserted his susu in her anus. The prosecutrix further disclosed, to her mother, that, as the act had caused her severe pain, she started crying, whereupon the appellant beat her and threatened to kill her mother and brother, if she were to disclose, to her mother what had happened. On removing the underwear of the prosecutrix, she found bloodstains in her pelvic region, which was also swollen. She further stated that, as she was apprehensive, she did not disclose what had happened to anybody and got her daughter, i.e. the prosecutrix, treated privately. However, when she did not recover, and the pain continued, she informed her relatives, who encouraged her to report the matter to the Police. The accused was convicted by the sessions court u/s. 376 of IPC and Section 3,4,5,6 of POCSO Act. Hence, the present appeal.

**Held:** In cases of sexual assault against children, the first, and most important, piece of evidence, is always the statement of the child prosecutrix herself/himself. At the outset, one may note that there is no serious dispute, in the present case, regarding the age of the child prosecutrix, which stands established by the records from the office of the Registrar of Births and Deaths as 4 years. Guddi, in her testimony during trial, deposed, first, that, in the toilet, she had noticed cut marks around the anal area of her daughter, i.e. the prosecutrix, and that, on her carrying her as to what had happened, the prosecutrix informed her that the appellant had, in the jungle, taken off undergarments and, after gagging her with a cloth, "put her (penis) private organ in her anus as well as on her urinating part." PW-6 went on to state that, on further examination, she noticed injury marks on the body of her daughter, along with two-three cut marks on her anus. Seen holistically, these testimonies, **in my view, leave no**

**manner of doubt that penetrative anal assault had been committed, by the appellant, on the prosecutrix.** The innocence of the prosecutrix in the present case, who had barely savoured the first fragrance of childhood, let alone adolescence, was brutally plundered by the appellant, the deviancy of his act being augmented by the fact that he chose to sodomise her. The trauma that the prosecutrix is bound to suffer, on account of the appellant, is bound to be lifelong. Therefore, the conviction stands but the sentence is not enhanced.

**Subject Matter :** Sexual assault

**Relevant Section : Section 7:** Whoever, with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

**Key Issue :** a. Whether the offences committed by the accused amount to sexual harrassment or sexual assault?

b. Whether the facts of the case constitute any offence punishable under the provisions of the POCSO Act?

**Citation Details :** Mondi Murali Krishna vs. Dumpy Hanisha Naga Lakshmi and Ors.  
(07.05.2020 - APHC): [MANU/AP/0033/2020](#)

**Note:** This case laid down the rule that "POCSO Act will cover adults who faced sexual offence as a child."

**Summary Judgment :**

**Facts:** The investigation revealed that the accused were the seniors of the deceased. They made sexual advances towards her on several occassions desppite her reluctance. One of the accused also followed her to her hometown. They used to harrass her by calling her on the phone and many times alone in the college campus and by talking to her indecently. She mentioned all these activities in detail in the journal that she maintained on a daily basis. She also informed her father about this who asked the Principal and the HOD to look into the matter. But it was of no use. The last nail in the deceased's coffin was the indecent and vulgar behaviour of the accused during the award ceremony of the fresher's party where they touched her inappropriately on the stage and humiliated her infront of everyone. This affected her mentally so much so that she hung herself in her hostel room. The Investigating Officer stated that the facts of the case satisfy the ingredients of commission of offences of sexual assault and sexual harassment punishable under **Sections 7, 8, 9, 11 and 12 of the POCSO Act** by the accused against the deceased and as the deceased was a child below the age of 18 years at the time of commission of the said acts of sexual assault and sexual harassment that a case under the POCSO Act is made out. The sessions court held that since at the time of commission of suicide the deceased was not a minor, hence POCSO Act is no applicable. Hence the present appeal.

**Held:** a. The said acts of sexual assault and sexual harassment committed by the accused clearly constitute an offence punishable under Sections 8 and 12 of the said Act. The acts of catching her hands and her waist with sexual intent and constantly following her and making a proposal to her or insisting her to satisfy their sexual desire are all the acts which clearly constitute an offence punishable under Sections 7 and 11 of the Act. The expression "doing any other act with sexual intent" used in the second part is wide enough to include in it various other acts which are committed by the culprits against a child with sexual intent. Therefore, in the considered view of this Court, the second part of the above Section attracts to the present facts of the case.

b. It may be seen here that touching the private parts like vagina, penis, anus or breast of a

child is made an offence of sexual assault under the first part and doing any other act with sexual intent which involves physical contact without penetration is also made an offence of sexual assault under the second part of the Section. So, these acts regarding which evidence was collected during the course of investigation, which were committed against the deceased by the accused 2 and 3 on 18-4-2015, by which time she was a child and not a major, *prima facie*, constitute an offence of sexual assault under Section 7 of the Act. these acts of following her constantly both physically and by mobile phone clearly attracts the offence under Clause (iv) of Section 11 which says when any person with sexual intention repeatedly or constantly follows or watches or contacts such child either directly or through electronic, digital or any other means is said to have committed the offence of sexual harassment as contemplated under Section 11 of the Act.

**Subject Matter :** Aggravated sexual assault

**Relevant Section : Section 9:** A person who is a police officer, member of the armed forces or security forces or a public servant with sexual intent, touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit aggravated sexual assault.

**Key Issue :** a. Whether the offences committed by the accused amount to sexual harrassment or sexual assault?

b. Whether the facts of the case constitute any offence punishable under the provisions of the POCSO Act?

**Citation Details :** Mondi Murali Krishna vs. Dumpy Hanisha Naga Lakshmi and Ors. (07.05.2020 - APHC): [MANU/AP/0033/2020](#)

**Note:** This case laid down the rule that "POCSO Act will cover adults who faced sexual offence as a child."

**Summary Judgment :**

**Facts:** The investigation revealed that the accused were the seniors of the deceased. They made sexual advances towards her on several occassions desppite her reluctance. One of the accused also followed her to her hometown. They used to harrass her by calling her on the phone and many times alone in the college campus and by talking to her indecently. She mentioned all these activities in detail in the journal that she maintained on a daily basis. She also informed her father about this who asked the Principal and the HOD to look into the matter. But it was of no use. The last nail in the deceased's coffin was the indecent and vulgar behaviour of the accused during the award ceremony of the fresher's party where they touched her inappropriately on the stage and humiliated her infront of everyone. This affected her mentally so much so that she hung herself in her hostel room. The Investigating Officer stated that the facts of the case satisfy the ingredients of commission of offences of sexual assault and sexual harassment punishable under **Sections 7, 8, 9, 11 and 12 of the POCSO Act** by the accused against the deceased and as the deceased was a child below the age of 18 years at the time of commission of the said acts of sexual assault and sexual harassment that a case under the POCSO Act is made out. The sessions court held that since at the time of commission of suicide the deceased was not a minor, hence POCSO Act is no applicable. Hence the present appeal.

**Held:** a. The said acts of sexual assault and sexual harassment committed by the accused clearly constitute an offence punishable under Sections 8 and 12 of the said Act. The acts of catching her hands and her waist with sexual intent and constantly following her and making a proposal to her or insisting her to satisfy their sexual desire are all the acts which clearly constitute an offence punishable under Sections 7 and 11 of the Act. The expression "doing

any other act with sexual intent" used in the second part is wide enough to include in it various other acts which are committed by the culprits against a child with sexual intent. Therefore, in the considered view of this Court, the second part of the above Section attracts to the present facts of the case.

**b.** It may be seen here that touching the private parts like vagina, penis, anus or breast of a child is made an offence of sexual assault under the first part and doing any other act with sexual intent which involves physical contact without penetration is also made an offence of sexual assault under the second part of the Section. So, these acts regarding which evidence was collected during the course of investigation, which were committed against the deceased by the accused 2 and 3 on 18-4-2015, by which time she was a child and not a major, *prima facie*, constitute an offence of sexual assault under Section 7 of the Act. these acts of following her constantly both physically and by mobile phone clearly attracts the offence under Clause (iv) of Section 11 which says when any person with sexual intention repeatedly or constantly follows or watches or contacts such child either directly or through electronic, digital or any other means is said to have committed the offence of sexual harassment as contemplated under Section 11 of the Act.

**Subject Matter :** Medical examination of a child

**Relevant Section : Section 27:** The medical examination of a child in respect of whom any offence has been committed under this Act, shall, whether or not an FIR has been registered, be conducted in accordance with section 164A of the Code of Criminal Procedure, 1973. In case the victim is a girl child, the medical examination shall be conducted by a woman doctor.

The medical examination shall be conducted in the presence of the parent of the child or any other person in whom the child reposes trust or confidence.

Where, in case the parent of the child or other person referred to in sub-section (3) cannot be present, for any reason, during the medical examination of the child, the medical examination shall be conducted in the presence of a woman nominated by the head of the medical institution.

**Key Issue :** **a.** Whether the offences committed by the accused amount to sexual harrassment or sexual assault?

**b.** Whether the facts of the case constitute any offence punishable under the provisions of the POCSO Act?

**Citation Details :** Mondi Murali Krishna vs. Dumpy Hanisha Naga Lakshmi and Ors.

(07.05.2020 - APHC): [MANU/AP/0033/2020](#)

**Note:** This case laid down the rule that "POCSO Act will cover adults who faced sexual offence as a child."

**Summary Judgment :**

**Facts:** The investigation revealed that the accused were the seniors of the deceased. They made sexual advances towards her on several occassions desppite her reluctance. One of the accused also followed her to her hometown. They used to harrass her by calling her on the phone and many times alone in the college campus and by talking to her indecently. She mentioned all these activities in detail in the journal that she maintained on a daily basis. She also informed her father about this who asked the Principal and the HOD to look into the matter. But it was of no use. The last nail in the deceased's coffin was the indecent and vulgar behaviour of the accused during the award ceremony of the fresher's party where they touched her inappropriately on the stage and humiliated her infront of everyone. This affected her mentally so much so that she hung herself in her hostel room. The Investigating Officer stated that the facts of the case satisfy the ingredients of commission of offences of sexual

assault and sexual harassment punishable under **Sections 7, 8, 9, 11 and 12 of the POCSO Act** by the accused against the deceased and as the deceased was a child below the age of 18 years at the time of commission of the said acts of sexual assault and sexual harassment that a case under the POCSO Act is made out. The sessions court held that since at the time of commission of suicide the deceased was not a minor, hence POCSO Act is no applicable. Hence the present appeal.

**Held:** **a.** The said acts of sexual assault and sexual harassment committed by the accused clearly constitute an offence punishable under Sections 8 and 12 of the said Act. The acts of catching her hands and her waist with sexual intent and constantly following her and making a proposal to her or insisting her to satisfy their sexual desire are all the acts which clearly constitute an offence punishable under Sections 7 and 11 of the Act. The expression "doing any other act with sexual intent" used in the second part is wide enough to include in it various other acts which are committed by the culprits against a child with sexual intent. Therefore, in the considered view of this Court, the second part of the above Section attracts to the present facts of the case.

**b.** It may be seen here that touching the private parts like vagina, penis, anus or breast of a child is made an offence of sexual assault under the first part and doing any other act with sexual intent which involves physical contact without penetration is also made an offence of sexual assault under the second part of the Section. So, these acts regarding which evidence was collected during the course of investigation, which were committed against the deceased by the accused 2 and 3 on 18-4-2015, by which time she was a child and not a major, *prima facie*, constitute an offence of sexual assault under Section 7 of the Act. These acts of following her constantly both physically and by mobile phone clearly attracts the offence under Clause (iv) of Section 11 which says when any person with sexual intention repeatedly or constantly follows or watches or contacts such child either directly or through electronic, digital or any other means is said to have committed the offence of sexual harassment as contemplated under Section 11 of the Act.

**Subject Matter :** Use of a child for pornographic purposes

**Relevant Section : Section 13:** Whoever, uses a child in any form of media for the purposes of sexual gratification, which includes representation of the sexual organs of a child; usage of a child engaged in real or simulated sexual acts (with or without penetration); the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes.

**Key Issue :** Whether the act of the accused is covered under the provision of using a child for pornographic purposes?

**Citation Details :** Vanita Vasant Patil and Ors. vs. The State of Maharashtra and Ors.

(02.11.2018 - BOMHC): [MANU/MH/3022/2018](#)

**Summary Judgment :**

**Facts:** The informant/victim girl resides at village Mothi Jui, Taluka Uran along with her parents, brother and sisters and was learning in 5th standard in Z.P. Primary School at village Mothi Jui. Accused No. 1 was working as teacher, while accused No. 2 was working as headmistress in the said School. Two months prior to the filing of the report, informant/victim girl was playing in the school premises along with other students. At that time, accused No. 1 called informant and 2-3 girls and then took informant alone in 6th-A Class room by sending remaining girls to their class room. Then accused No. 1 bolted the said class room from inside and gave Kachha Aam chocolate to the informant and kept the informant on a bench by saying that he wants to snap her photographs. Then accused No. 1

laid the informant on the bench and removed her clothes and snapped photographs of the chest and private part of the informant on his mobile by assuring to give money. Informant did not narrate the incident to others. The informant along with her parents came to Uran Police Station and lodged the report on 20th January, 2013, regarding aforesaid incident. PI Patil referred the informant for medical examination and Dr. Jaya Shrinivasan examined the informant and opined that there was possibility of evidence of sexual abuse. PI Patil arrested the accused and referred accused No. 1 for medical examination. Charges u/s. 13 and 14 and other provisions were filed against the accused. The trial court convicted the accused for the said offence. Hence the present appeal.

**Held:** Thus upon re-appreciation of entire evidence, we are of the considered opinion that, the evidence of the victim girl-Y, medical officer (PW-14) and other prosecution witnesses is not acceptable and cannot form basis for conviction. So also, the evidence on record do not establish that actually the alleged incident of sexual assault took place. The evidence on record is not sufficient to prove the guilt of accused beyond reasonable doubt. There is no clinching and credible evidence to convict the accused for the offences levelled against them. The reasons and findings recorded by the trial court are found to be perverse and based upon improper appreciation of evidence on record and not sustainable in law. We are of the view that prosecution has failed to prove the guilt against both the accused beyond reasonable doubt. Therefore, both the accused deserves to be given benefit of doubt.

**Subject Matter :** Obligation of media, studio and photographic facilities to report cases of sexual exploitation of a child

**Relevant Section : Section 20:** Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

**Key Issue :** Whether the accused was obliged to report the offence to the police authorities?

**Citation Details :** Balasaheb vs. The State of Maharashtra (22.03.2017 - BOMHC):

[MANU/MH/0533/2017](#)

**Summary Judgment :**

**Facts:** The victim girl child was taking school education in a residential school named as Shri Sant Gadge Maharaj Madhyamik Ashramshala at Gondavale. Being a residential ashram school, the victim female child used to stay in the school itself along with her colleagues. It is case of the prosecution that accused No. 1 Shahaji Patole used to work as the Cook in the Ashram School where the victim female child was staying for taking education. It is alleged that on 11th September 2015 when because of her ill-health, the victim female child instead of attending her classes was staying in her room, accused No. 1 Shahaji Patole - cook of the ashram school committed rape on her by taking her to the nearby bathroom. This incident is witnessed by Bharti D. Lokhande and Sonia Ovhal - colleagues of the victim female child. The victim female child then reported the incident to the present revision petitioner/original accused No. 2, who happens to be the Director of the Trust running the Ashram School. Thereafter, informant Anjana - aunt of the victim female girl, so also her other relatives, disclosed the incident to the revision petitioner/original accused No. 2. However, instead of reporting the matter to the police, according to the prosecution case, the revision petitioner/original accused No. 2 insisted the informant and other relatives of the victim female child to settle the matter on a cup of tea in order to prevent defamation of the school. Statement of the victim female child, her colleague Bharti, so also the FIR and other

statements reflect the fact that the incident of aggravated penetrative sexual on the victim female child by the cook of the Ashram School came to be reported to the revision petitioner/original accused No. 2 - Director of the Trust, but, he insisted for settling the matter instead of reporting the same to the police, in order to prevent defamation of his school.

**Held:** In the wake of the fact that the revision petitioner/original accused No. 2 was certainly having the knowledge of commission of the alleged offence, I am unable to persuade myself to endorse the view taken by the learned Single Judge of Chhattisgarh High Court to the effect that it is initially for the prosecution to establish first commission of the main offence under the POCSO Act for making a person liable for the offence punishable under Section 20 and 21(2) of the POCSO Act. If such view is accepted, then, it will not only defeat the very object of enactment of the POCSO Act i.e. to protect the child from sexual offences, but it will also violate the provision of Section 33(5) of the POCSO Act, which provides that the child should not be called repeatedly to testify in the court. Revision petition dismissed.

**Subject Matter :** Distinction between Sexual Assault under POCSO Act and IPC.

**Relevant Section : Section 7, POCSO Act, 2012:** If a person,-

- (i) **touches** the vagina, penis or anus or breast of the child,
- (ii) **makes the child touch** the vagina, penis, anus or breast of such person or any other person or
- (iii) does any other act which involves **physical contact without penetration**, all with **sexual intent**, then that person is said to have committed sexual assault.

**Section 354, IPC 1860:** Whoever assaults or uses criminal force to any woman, **intending to outrage or knowing it to be likely to outrage her modesty**, shall be punished with imprisonment of one to five years.

**Key Issue :** Whether the act committed by the accused is sexual assault under POCSO Act?

**Citation Details :** Satish vs. The State of Maharashtra (19.01.2021 - BOMHC):

[MANU/MH/0064/2021](#)

**Summary Judgment :**

**Facts:** On 14.12.2016, the informant (mother of the prosecutrix) lodged a report at police station Gittikhadan, Nagpur, stating therein that the appellant took her daughter (prosecutrix) aged about 12 years, on the pretext of giving her guava, in his house and pressed her breast and attempted to remove her salwar. At that point of time, the informant reached the spot and rescued her daughter. Immediately, she lodged First Information Report. On the basis of the said FIR, crime came to be registered against the appellant/accused.

**Held:** The act of pressing of breast of the child aged 12 years, in the absence of any specific detail as to whether the top was removed or whether he inserted his hand inside top and pressed her breast, would not fall in the definition of 'sexual assault'. **The act of pressing breast can be a criminal force to a woman/ girl with the intention to outrage her modesty.** It is not possible to accept this submission for the aforesaid reasons. Admittedly, it is not the case of the prosecution that the appellant removed her top and pressed her breast. As such, there is no direct physical contact i.e. skin to skin with sexual intent without penetration. In view of the above discussion, **this Court holds that the appellant is acquitted under Section 8 of the POCSO Act and convicted under minor offence u/s. 354 of IPC and sentenced him to undergo R.I. for one year and to pay fine of Rs. 500/-, in default of fine to suffer R.I. for one month.** The sentence for the offence punishable under Section 342 of the Indian Penal Code i.e. six months and fine of Rs. 500/-, in default to suffer R.I. for one month, is maintained.

# **PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005**

**Subject Matter :** What exactly is Domestic Violence?

**Relevant Section : Section 3:** The act, whether committed or omitted, **constitutes domestic violence** when- it harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person and **includes** causing **physical abuse, sexual abuse, verbal and emotional abuse** and economic abuse or coerces the aggrieved party or any other person related to them to meet any unlawful demand for any dowry or other property or valuable security.

**Section 2(f):** "**domestic relationship**" means a relationship between two persons who live or lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.

**Key Issue : a.** Whether a “**live-in relationship**” would **amount to a “relationship in the nature of marriage”** falling within the definition of “**domestic relationship**” under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005?

**b.** Whether the disruption of such a relationship by failure to maintain a women involved in such a relationship amounts to “**domestic violence**” within the meaning of Section 3 of the Act?

**Citation Details :** Indra Sarma vs. V.K.V. Sarma (26.11.2013 - SC): [MANU/SC/1230/2013](#)

**Summary Judgment :**

**Facts:** Appellant and Respondent were working together in a private company. The Respondent, working as a Personal Officer of the Company, was married having two children and the Appellant, aged 33 years, was unmarried. Constant contacts between them developed intimacy and in the year 1992, Appellant left the job from the above-mentioned Company and started living with the Respondent in a shared household. Appellant's family members, including her father, brother and sister, and also the wife of the Respondent, opposed that live-in-relationship. Respondent started a business in her name and that they were earning from that business. After some time, the Respondent shifted the business to his residence and continued the business with the help of his son, thereby depriving her right of working and earning. Due to their relationship, Appellant became pregnant on three occasions, though all resulted in abortion. Respondent used to force the Appellant to take contraceptive methods to avoid pregnancy. Respondent took a sum of Rs. 1,00,000/- from the Appellant stating that he would buy a land in her name, but the same was not done. Respondent also took money from the Appellant to start a beauty parlour for his wife. During the year 2006, Respondent took a loan of Rs. 2,50,000/- from her and had not returned. Respondent, all along, was harassing the Appellant by not exposing her as his wife publicly, or permitting to suffix his name after the name of the Appellant. Respondent never used to take her anywhere, either to the houses of relatives or friends or functions. Respondent never used to accompany her to the hospital or make joint Bank account, execute documents, etc. Respondent's family constantly opposed their live-in relationship and ultimately forced him to leave the company of the Appellant and it was alleged that he left the company of the Appellant without maintaining her.

**Held:** **a.** The Appellant, having been fully aware of the fact that the Respondent was a married person, could not have entered into a live-in relationship in the nature of marriage. All live-in-relationships are not relationships in the nature of marriage. Appellant's and the Respondent's relationship is, therefore, **not a "relationship in the nature of marriage"** because it has no inherent or essential characteristic of a marriage. The Appellant's status is lower than the status of a wife and that relationship would not fall within the definition of "**domestic relationship**" Under Section 2(f) of the Act.  
**b.** Since appellant was aware that the respondent was a married person having two children even before the commencement of relationship hence the status of appellant is that of a concubine or mistress and **cannot fall under Section 2(f) of Act of 2005** and cannot be come within "domestic relationship" and therefore **not entitled for any relief on the grounds of domestic violence.** We are conscious of the fact that if any direction is given to the Respondent to pay maintenance or monetary consideration to the Appellant, that would be at the cost of the legally wedded wife and children of the Respondent, especially when they had opposed that relationship and have a cause of action against the Appellant for alienating the companionship and affection of the husband/parent which is an intentional tort. Appeal dismissed.

**Subject Matter :** Right to reside in a shared household

**Relevant Section : Section 17:** Every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same. The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law.

**Key Issue :** Whether the wife is entitled to an enhanced maintenance as well as sharing the household?

**Citation Details :** Sumita Acharya vs. State of West Bengal and Ors. (27.02.2020 - CALHC): [MANU/WB/0376/2020](#)

**Summary Judgment :**

**Facts:** The petitioner got married with the opposite party no. 2 as per Hindu rites and customs on November 7, 2012 at her parental home and after marriage went to her matrimonial home and started to perform her conjugal life. It is alleged by the petitioner that at the time of marriage, her father gave her several gold ornaments and cash amounting to Rs. 63,000/- as per the demand of the husband and his family members. For not fulfilling the increasing demand of the husband and his family members, the petitioner was subjected to torture - physical and mental - and sexual assault instigating her to commit suicide. Ultimately, the petitioner was compelled to leave her matrimonial home and to lodge a criminal case under Sections 498A/34/406 of the Indian Penal Code against the opposite parties no. 2 to 5. The petitioner also filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005.

The learned Judicial Magistrate by his judgment dated September 5, 2017 directed the husband to pay monetary relief to the tune of Rs. 6,000/- to the petitioner/wife and to pay a sum of Rs. 1,00,000/- to her as damages. The learned Magistrate further directed the husband/opposite party no. 2 not to cause violence of any kind upon the petitioner/wife and in this context directed the officer in-charge of the concerned police station to provide necessary police protection to the petitioner/wife in case of any domestic violence. The order passed by the learned Judicial Magistrate, as above, was appealed against and the appellate court below dismissed the appeal thereby affirming the judgment and order passed by the learned Judicial Magistrate. It is admitted on evidence by the opposite party no. 2/husband that he is a primary school teacher, but in his written objection to the application under Section 12 of the Act he has not disclosed his monthly income which he was supposed to disclose. However, it is

submitted on behalf of the petitioner that the opposite party no. 2 is a primary school teacher belonging to the category of Graduate (IX-X) & Upper Primary and his net pay must be Rs. 30,751/- as per Revision of Pay and Allowances, 2009. In this regard, it is submitted that the monetary relief of Rs. 6,000/- per month, which has been awarded to the petitioner, is meagre and not having been considered in accordance with the social status of the parties.

**Held:** In the facts and circumstances of the case and in the context of the discussion, as above, this court is pleased to enhance the monetary relief to the tune of Rs. 10,000/- per month and award Rs. 5,000/- per month towards rental charges for the alternative accommodation, being a total sum of Rs. 15,000/- per month which the petitioner is entitled to from her husband. This enhanced monetary relief and the accommodation alternatively provided at the rate of Rs. 5,000/- per month would be payable by the husband/opposite party no. 2 to the petitioner/wife from the date of this order.

**Subject Matter :** Protection orders

**Relevant Section : Section 18:** The Magistrate may, on being *prima facie* satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from omitting, aiding and abetting any such act, enter the workplace of the aggrieved person, communicate in any way with them, alienating the assets or harming the relatives of the aggrieved person.

**Key Issue :** Whether the protection orders can be given for the aggrieved party after their divorce?

**Citation Details :** Juveria Abdul Majid Patni vs. Atif Iqbal Mansoori (18.09.2014 - SC):  
[MANU/SC/0861/2014](#)

**Summary Judgment :**

**Facts:** The Appellant got married to 1st Respondent according to Muslim rites and rituals on 13th May 2005. 1st Respondent was in the habit of harassing her. She was subjected to physical abuse and cruelty. 1st Respondent acted with cruelty, harassed her and had banged her against a wall on her back and stomach on 5th January, 2006, due to which she suffered severe low back pain. The 1st Respondent refused her entry into the matrimonial house on 19th February, 2006 and asked her to stay with her parents. She delivered a baby boy at Breach Candy Hospital, Mumbai on 10th August, 2006 but the 1st Respondent never visited to see the new born baby. Later, the 1st Respondent filed a petition seeking custody of the minor child. The Appellant lodged FIR on 6th September, 2007 before Agripada Police Station Under Section 498A, and 406 Indian Penal Code against the 1st Respondent, his mother and his sister. It was challenged by the respondent and a petition was filed by him. She obtained an ex parte 'Khula' from Mufti under the Muslim Personal Law on 9th May, 2008. The 1st Respondent challenged the 'Khula'. On 29th September, 2009, the Appellant filed a petition Under Section 12 of the Domestic Violence Act, 2005 against the 1st Respondent alleging that he is not providing maintenance for herself as well as for the minor child.

**Held:** In the present case, the alleged domestic violence took place between January, 2006 and 6th September, 2007 when FIR was lodged by the Appellant Under Section 498A and 406 Indian Penal Code against the 1st Respondent and his relatives. In a writ petition filed by 1st Respondent the High Court refused to quash the said FIR against him observing that *prima facie* case Under Section 498A was made out against him. Even if it is accepted that the Appellant during the pendency of the SLP before this Court has obtained ex parte Khula (divorce) under the Muslim Personal Law from the Mufti on 9th May, 2008, the petition Under Section 12 and 18 of the Domestic Violence Act, 2005 is maintainable. **An act of domestic violence once committed, subsequent decree of divorce will not absolve the**

**liability of the Respondent from the offence committed or to deny the benefit** to which the aggrieved person is entitled under the Domestic Violence Act, 2005 including monetary relief Under Section 20, Child Custody Under Section 21, Compensation Under Section 22 and interim or ex parte order Under Section 23 of the Domestic Violence Act, 2005.

**Subject Matter :** Residence Orders

**Relevant Section : Section 19:** (1) Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order directing that (b) directing the respondent to remove himself from the shared household.

The other directions include not dispossessing the person aggrieved from the shared household, not restraining the relatives of the person aggrieved from entering any part of such a household, the accused not renouncing their rights on the shared household.

**Key Issue :** Whether order directing Appellant-husband to remove himself from matrimonial home of which he was co-owner, was sustainable?

**Citation Details :** Samir Vidyasagar Bhardwaj vs. Nandita Samir Bhardwaj (09.05.2017 - SC): [MANU/SC/0630/2017](#)

**Summary Judgment :**

**Facts:** A divorce petition was filed on the ground of cruelty and the Respondent-wife had alleged in the application seeking interim relief that she had been subjected to mental and physical cruelty due to which living under one roof with the Appellant-husband had become impossible. The Family Court passed the interim order directing the Appellant-husband to remove himself out of the matrimonial house and not to visit the same till the decision of the divorce petition. The Appellant-husband approached the High Court stating that final relief sought in the main petition could not have been granted at interim stage; he being a co-owner of the premises, he cannot be evicted from that premises which amounted to his virtual dispossession of the premises of which he was a co-owner. The High Court affirmed the interim order passed by the Family Court. Hence, the present appeal.

**Held: Section 19(1)(b)** provides that the Court may direct the Appellant-husband to remove himself from the shared household. The Family Court arrived at a finding that *prima facie* material was available on record to accept the allegation of the Respondent-wife on domestic violence wherein the concerned Judge had exercised his discretion Under Section 19(1)(b) which provides that the Magistrate on being satisfied that domestic violence has taken place can remove the spouse from the shared household which in our opinion he has rightly done. Exercise of discretion by Family Court could not be said to be perverse warranting interference. The High Court also considered the factual and legal position. Having gone through the orders of the High Court and the Family Court and considering the fact that the daughters were grown up, the present Court was not inclined to exercise discretions Under Article 136 of the Constitution of India at the interlocutory stage. Hence the appeal was dismissed.

**Subject Matter :** Monetary reliefs

**Relevant Section : Section 20:** The respondent may be directed to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence.

**Key Issue : a.** Whether there is any domestic violence committed by the respondent towards the petitioner?

If yes then is she entitled to get the maintenance?

**b.** Whether the son of the petitioner can get the maintenance under the Act 2005?

**Citation Details :** Shikharani vs. Hitendra Chudasma (27.02.2020 - MPHHC):

[MANU/MP/0517/2020](#)

## **Summary Judgment :**

**Facts:** Petitioner/applicant has preferred an application under Section 12 of Act, 2005 stating that her marriage was solemnized with the respondent/non-applicant on 13.04.2011 according to Hindu rites and rituals and they have been blessed with one male child namely Ayush Kumar. The respondent and his family members maltreated the petitioner and they demanded one Maruti Car, one gold Chain and Rs. 7,00,000/- as dowry. She further contended that the respondent has blamed on her character and committed sexual assault with her. The respondent has not fulfilled basic need of the petitioner. Her son-Ayush is studying and she has no source of income to take care of him properly. She further stated that the respondent restricted her to go out from the house, moreover, without taking her consent, the respondent had sold her stridhan and other valuable article. She further alleged that the respondent tried to throw her son from the terrace. She also prays to give interim compensation under the act. On reply, the respondent stated that the petitioner has filed a false case against him and the facts narrated by her are concocted. The petitioner had suppressed the fact that she was already married with one Dhananjay Mandal and she is having two daughter to him. When this fact came to knowledge of the respondent, the petitioner started quarrel with him. He further stated that the petitioner demanded Rs. 4,00,000/- and threatened him to falsely implicate in the case. The family members of the respondent were not involved in the case in any manner even then the petitioner has also implicated them. He stated about his income saying that he is under suspension period whereas the petitioner is earning Rs. 20,000/- to 25,000/- from her beauty parlour work. After evaluating the evidence available in the case, the learned JMFC found that the respondent committed domestic violence with the petitioner and her son. The JMFC has directed the respondent to pay the maintenance and compensation amount as aforesaid.

Being aggrieved by the order passed by learned JMFC, both the parties have approached the Appellate Court by filing the appeals. By the impugned order, the learned ASJ has allowed the appeal filed by the respondent and dismissed the another which was filed by the petitioner.

**Held:** **a.** Undisputedly, the petitioner was residing in the shared household of the respondent and by their co-habitation, she had born a child. In view of the pronouncement of the Hon'ble Apex Court in the case of Lalita Toppo and Indra Sharma, *prima-facie*, her relation with the respondent is not appeared like a marriage but not less than marriage, thus, she is entitled to get the relief under DV Act 2005. After considering all the evidence available on the record, I am persuaded with the findings of the learned JMFC that the petitioner has sufficient reason to live separate with the respondent as well as looking to the other circumstance of the case, I am of the opinion that the learned JMFC has rightly decided that the act of the respondent, not providing maintenance and other basic need like medical facility etc. would comes under the purview of domestic violence, thus she is entitled to get the maintenance.

**b.** So far as maintenance to the child of the petitioner is concerned, there is specific provision of Section 20 under the Act 2005 therein while disposing of an application under Section 12(1), the Magistrate may direct the respondent to pay monitory relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence. Consequently, the judgment passed by learned JMFC dated 02.11.2017 in Criminal Case No. 3200024/2012 is hereby restored. Accordingly, this petition is hereby allowed. The respondent is directed to pay the maintenance amount as awarded by the learned JMFC vide order dated 02.11.2017 without making any fault. He shall also pay the arrears, if any, within a period of 6 months.

# **DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939**

**Subject Matter :** Effect of conversion to other faith

**Relevant Section :** Section 4: The renunciation of Islam by married Muslim woman of her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage; Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in Section 2; Provided further that provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

**Key Issue :** Whether apostate husband can be prosecuted under Section 494 for committing bigamy?

**Citation Details :** Sarla Mudgal and Ors. vs. Union of India (UOI) and Ors. (10.05.1995 - SC): [MANU/SC/0290/1995](#)

**Summary Judgment :**

**Facts:** Husband converted to another religion and married to another woman without having first marriage dissolved.

**Held:** Conversion does not ipso facto dissolve first marriage. Second marriage during subsistence of first marriage is void even if solemnised after conversion. Apostate husband guilty of bigamy.

# **MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT, 1937**

**Subject Matter :** Triple Talaq

Maintenance for Muslim Divorced Women

**Relevant Section :** Section 2: Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding interstate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law. marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

**Key Issue :** Whether triple talaq, could be interfered with on judicial side by present Court? Whether Section 125 applicable to Muslim women? Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife ?

**Citation Details :** Shayara Bano and Ors. vs. Union of India (UOI) and Ors. (22.08.2017 - SC): [MANU/SC/1031/2017](#)

Mohd. Ahmed Khan vs. Shah Bano Begum and Ors. (23.04.1985 - SC):

[MANU/SC/0194/1985](#)

**Summary Judgment :**

**Facts:** Petitioner/Wife had approached present Court, for assailing divorce pronounced by her Husband in presence of witnesses saying that I gave 'talak, talak, talak'. Petitioner had sought declaration, that talaq-e-biddat pronounced by her husband be declared as void ab initio.

**Held:** Given the fact that Triple Talaq is instant and irrevocable, it was obvious that any attempt at reconciliation between the husband and wife by two arbiters from their families, which was essential to save the marital tie, could not ever take place. Also, as understood by the Privy Council in Rashid Ahmad, such Triple Talaq was valid even if it was not for any reasonable cause, which view of the law no longer holds good after Shamim Ara. This being the case, it was clear that this form of Talaq was manifestly arbitrary in the sense that the marital tie could be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained Under Article 14 of the Constitution. The 1937 Act, insofar as it seeks to recognize and enforce Triple Talaq, was within the meaning of the expression laws in force in Article 13(1) and must be struck down as being void to the extent that it recognizes and enforces Triple Talaq. The practice of talaq-e-biddat-triple talaq was set aside.

**Facts:** The appellant, who is an advocate by profession, was married to the respondent in 1932. Three sons and two daughters were born of that marriage. In 1975 the appellant drove the respondent out of the matrimonial home. In April 1978, the respondent filed a petition against the appellant under Section 125 of the Code in the court of the learned Judicial Magistrate (First Class), Indore asking for maintenance at the rate of Rs. 500 per month. On November 6, 1978 the appellant divorced the respondent by an irrevocable talaq. His defence to the respondent's petition for maintenance was that she had ceased to be his wife by reason of the divorce granted by him, to provide that he was therefore under no obligation maintenance for her, that he had already paid maintenance to her at the rate of Rs. 200 per month for about two years and that, he had deposited a sum of Rs. 3000 in the court by way of dower during the period the of iddat. In August, 1979 the learned Magistrate directed appellant to pay a princely sum of Rs. 25 per month to the respondent by way of maintenance. It may be mentioned that the respondent had alleged that the appellant earns a professional income of about Rs. 60,000 per year. In July, 1980 in a revisional application filed by the respondent, the High court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. The husband is before us by special leave.

**Held:** Language of statute provides for no escape from conclusion that divorced Muslim wife entitled to apply for maintenance under Section 125 and 'Mahr' not a sum which under Muslim Personal Law is payable on divorce. we dismiss the appeal and confirm the judgment of the High Court. The appellant will pay the costs of the appeal to respondent 1, which we quantify at rupees ten thousand.

## **JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000**

**Subject Matter :** Adoption rights for Muslims

**Relevant Section :** Section 41: Adoption of children by persons irrespective of religion, caste, creed etc. Muslim personal law does not recognize adoption though it does not prohibit childless couple from taking care and protecting child with material and emotional support. Section 41 as amended in 2006 contemplates adoption, enabling any person, irrespective of religion he professes to take child in adoption. Prospective parents, irrespective of their religious background, are free to access provision of 2000 Act for adoption of children after following procedure prescribed.

**Key Issue :** Whether right to adopt shall be a fundamental right under Article 21 of the Constitution of India?

**Citation Details :** Shabnam Hashmi vs. Union of India (UOI) and Ors. (19.02.2014 - SC):

[MANU/SC/0119/2014](#)

**Summary Judgment :**

**Facts:** The writ Petitioner has also prayed for a declaration that the right of a child to be adopted and that of the prospective parents to adopt be declared a fundamental right under Article 21 of the Constitution. The Board objects to such a declaration on the grounds already been noticed, namely, that Muslim Personal Law does not recognize adoption though it does not prohibit a childless couple from taking care and protecting a child with material and emotional support.

**Held:** While it is correct that the dimensions and perspectives of the meaning and content of fundamental rights are in a process of constant evolution as is bound to happen in a vibrant democracy where the mind is always free, elevation of the right to adopt or to be adopted to the status of a Fundamental Right, in our considered view, will have to await a dissipation of the conflicting thought processes in this sphere of practices and belief prevailing in the country. All these impel us to take the view that the present is not an appropriate time and stage where the right to adopt and the right to be adopted can be raised to the status of a fundamental right and/or to understand such a right to be encompassed by Article 21 of the Constitution.

## **Hindu Adoptions and Maintenance Act, 1956**

**Subject Matter :** Requisites of a valid adoption.

**Relevant Section : Section 6:** No adoption shall be valid unless the person adopting and the person giving in adoption has the capacity, and also the right, to do so; the adoption is made in compliance with the other conditions mentioned.

**Key Issue :** Whether Jagsir Singh is the validly adopted son of Dharam Singh (deceased)?

Whether the Appellant is the adopted daughter of the deceased or not?

**Citation Details :** Karam Singh and Ors. vs. Jagsir Singh and Ors. (11.08.2014- PHHC):

[MANU/PH/2812/2014](#)

M. Vanaja vs. M. Sarla Devi (06.03.2020 - SC): [MANU/SC/0294/2020](#)

**Summary Judgment :**

**Facts:** The onus to prove the adoption by clear, cogent and reliable evidence lay upon the respondents. After enactment of the Hindu Adoption & Maintenance Act, 1956 (hereinafter referred to as the 'Act') an adoption has to be made by a registered written instrument. The failure of the natural father to appear before the Registrar and endorse the adoption deed, negates the adoption deed and, therefore, does not raise a presumption as to execution of a valid adoption deed as envisaged by Section 16 of the Act. The endorsement before the Sub Registrar by the natural mother of the child alone leaves no ambiguity that the adoption made, without endorsement by the natural father, is illegal and, therefore, does not confer the status of an adopted child upon Jagsir Singh (respondent No. 1). It is argued that evidence of so called ceremonies of adoption produced by the respondents was rightly rejected by the trial Court by holding that it is beyond pleadings. The first appellate Court has, however, reversed these findings without assigning any clear and cogent reasons. The adoption deed is even otherwise surrounded by suspicious circumstances and when read along with the fact that the father did not make an endorsement, before the Sub Registrar, raises a credible inference that the adoption deed is a fabricated document, prepared with the sole object of depriving the appellants of their inheritance to the estate of Dharam Singh.

**Held:** It would be appropriate to deal with a contention raised by counsel for the appellants that as the trial Court had discarded evidence regarding ceremonies of adoption for failure to plead such a fact, the first appellate Court could not have reversed this part of the judgment. Even if the respondents had not proved ceremonies of adoption the fact that a written document of adoption was executed and proved, rendered pleadings and proof of ceremonies of adoption, irrelevant, particularly as adoption took place after enactment of the Act. In view of what has been recorded herein above in the absence of any error of jurisdiction or of law, discernible in the impugned judgment, the appeal is dismissed but with no order as to costs.

**Facts:** It was averred in the plaint that both the natural parents and the Appellant died when she was very young. Her mother is the sister of the original Respondent-M. Sarla Devi (died)-Respondent herein. Appellant pleaded in the suit that she was brought up as the daughter of the Respondent-M. Sarla Devi and her husband Late Narasimhulu Naidu. In the records of School and College, the names of the original Respondent and her husband were entered as the parents of the Appellant. Even in the government records like ration card, etc., the Appellant was mentioned as the daughter of the original Respondent and her husband. Narasimhulu Naidu worked as a Lift Operator in the Andhra Pradesh State Electricity Board (APSEB) and retired on 30.06.1999. In his service record, the Appellant is referred to as his daughter. The Appellant has been nominated in the application for pension of Narasimhulu Naidu. It was the case of the Appellant in the plaint that her adoptive parents initially did not approve the marriage of the Appellant with the person of her choice, but later arranged a grand reception at Hotel Swagat, Ameerpet, Hyderabad. Narasimhulu Naidu was the absolute owner of a building situated at Srinivas Nagar East, Gayatri Nagar, Ameerpet, Hyderabad. He also purchased certain other properties. Narasimhulu Naidu supplied textile materials and clothes to the employees of the APSEB and the Appellant was looking after the business. Narasimhulu Naidu died intestate on 19.08.2003. According to the Appellant, she along with the Respondent succeeded to the entire estate of Narasimhulu Naidu and that she is entitled to half share of his properties. It was submitted that due to the ill-advice of relatives, the original Defendant-M. Sarla Devi turned against the Appellant and was making an attempt to alienate the properties. As the negotiation for an amicable settlement failed, the Appellant was constrained to file a suit for a declaration that she is the adopted daughter of the original

Respondent and Narasimhulu Naidu, and for partition of the properties belonging to Narasimhulu Naidu.

**Held:** Though the Appellant has produced evidence to show that she was treated as a daughter by (Late) Narasimhulu Naidu and the Defendant, she has not been able to establish her adoption. The mandate of the Act of 1956 is that no adoption shall be valid unless it has been made in compliance with the conditions mentioned in Chapter I of the Act of 1956. The two essential conditions i.e. the consent of the wife and the actual ceremony of adoption have not been established. In view of the aforementioned facts and circumstances, we find no error in the judgment of the High Court. Therefore, the Appeal is dismissed.

**Subject Matter :** Capacity of a male Hindu to take in adoption

**Relevant Section :** Section 7: Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption;

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

**Key Issue :** Whether the adopted son of the widow becomes the son of the deceased husband and has right to inheritance in the ancestral property?

**Citation Details :** Jhunia Mandalain and Ors. vs. Ayodhya Panjiara and Ors. (20.12.2019-JHRHC): [MANU/JH/1592/2019](#)

**Summary Judgment :**

**Facts:** Amrit Kotwar and Lilo Kotwar jointly inherited the lands appearing to Jamabandi no. 25 and they joint possessed and cultivated the suit lands and Niro Kotwar in on the death of Amrit Kotwar in the year 1945 inherited the interest of her husband Amrit. But since Niro Kotwarin subsequently adopted defendant no. 5 as a son to herself and to her deceased husband and in confirmation of the fact of this adoption she executed a registered deed of adoption (Ext. A), the defendant no. 5 became the natural born son of Amrit Kotwar and obtained coparcenary interest in the joint Jamabandi No. 25. Defendants have made out a case that on the death of Amrit Kotwar his interest in the land of Jamabandi no. 25 would be deemed, due to the adoption of the defendant no. 5, to have been jointly inherited by the widow Niro Kotwarin and defendant no. 5 and they both would be deemed to have been in joint possession of the same.

**Held:** It is well settled provision of law that the adopted son became a member of the coparcenary and is entitled to claim one half share in the joint family properties excluding the alienations made before he was adopted. In the case in hand, the coparcenary case to an end on the partition decree in T.S. (Partition) No. 29 of 1960 and since then, the joint family consisting of Niro Kotwarin and Lilo Kotwar also ceased to exist. Thus, the trial court as well as the appellate court rightly came to the conclusion that the defendant no. 5 could not be treated as coparcener in the joint family of his adoptive father and uncle and accordingly, claim of having succeeded to the ancestral property, having share equal to his adoptive mother, is untenable. In view of partition of 1960, the suit property became in the nature of self-acquired property of the widow and, after her death in 1969, all her six daughters and the adopted son are rightly to be held entitled to 1/7th share each. Thus, this Court finds that there is no illegality in the judgment of the appellate court as well as the trial court. The law point framed in the second appeal is answered accordingly. This Court further finds that two fact finding courts have come to a concurrent finding and this Court finds that there is no illegality in the facts of the case as the law point has been answered in negative. No relief can be extended in the second appeal and accordingly, Second Appeal No. 463 of 1990(P) stands dismissed. In the totality of the facts and circumstances of the case, we do not find any ground to interfere with the findings of the Family Court and the directions to the respondent

to pay maintenance at the rate of Rs. 2750/- to the 2nd petitioner and pay Rs. 1,53,637/- towards her educational expenses and Rs. 6,70,000/- towards her marriage expenses. The Mat. Appeal is devoid of any merits and is hence dismissed.

**Subject Matter :** Persons capable of giving in adoption

**Relevant Section :** Section 9: No person except the father or mother or the guardian of a child shall have the capacity to give the child in adoption. Provided that such right shall not be exercised by either of them save with the consent of the other unless one of them has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

**Key Issue :** Whether, Subordinate Judge rightly held that there was adoption?

**Citation Details :** Annapurna Sahuani vs. Narendra Prasad Sahu and Ors. (01.11.1966-ORIHC): [MANU/OR/0060/1967](#)

**Summary Judgment :**

**Facts:** Trial Court allowed Plaintiffs suit for a declaration that the 1st defendant was not adopted son and Exs. C and F were invalid. However, Subordinate Judge held that adoption ceremony where giving and taking of boy was took place. Hence, this Appeal.

**Held:** Evidence related to giving and taking was examined - Natural father (D. W. 7) and natural mother (D. W. 8) stated how giving and taking ceremony took place and was supported by family priest (D. W. 4) and by D. Ws, 5 and 6 and was closely scrutinized. However, proposal of an adoption being made was never mooted and disclosed before friends and relatives. Neighbours and relatives did not attend ceremony which was performed within 20 days of death of Plaintiffs husband. Therefore, evidence proved that there was an adoption ceremony as Exs. B to D was executed as part of same transaction and by same arrangement. Thus, once finding was that Exs. C and D were genuine and properly executed, suit for a declaration that those documents were not binding on Plaintiff must fail. Appeal dismissed.

**Subject Matter :** Persons who may be adopted

**Relevant Section :** Section 10: No person shall be taken in adoption unless he or she is Hindu; he or she has not already been adopted; he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption; he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption.

**Key Issue :** Whether the respondent no. 2 is the biological son of the deceased employee or not?

**Citation Details :** Fuliya Devi and Ors. vs. The Union of India and Ors.(28.01.2020-CAT-Patna): [MANU/CA/0137/2020](#)

**Summary Judgment :**

**Facts:** The applicants have claimed that the applicant no. 2 is the son of applicant no. 1 and the deceased employee Late Banarsi Mallick who was the husband of applicant no. 1 and was working as Trackman under DEN -II, Katihar, NF Railway, Katihar where he died in harness on 21.10.2015. They have alleged that applicant no. 2 is own son of applicant no. 1 and Late Banarsi Mallick. However, since the applicant no. 2 could not fulfill illegal desire of money of one of the lower officials at DERM office therefore this wild allegation of treating applicant no. 2 as the adopted son. The applicants have annexed copies of Birth Certificate, School Leaving Certificate, Election ID Card and Caste and Residence Certificate and Aadhar Card (from Annexure A/4 to A/10) in support of the claim for getting compassionate appointment in favour of applicant no. 2. The respondents have filed a written statement denying the claim of the applicant.

**Held:** A plain reading of the document produced at Annexure R/3 where the deceased employee has declared, by a sworn affidavit before the Executive Magistrate, "that I adopted a son, namely, Nand Kishore Mallick, aged about 20 years, is the son of Shri Narayan Mallick who is living in Railway Colony Barsoi before 15 years and I am maintaining him as my son". Such a categorical assertion in an affidavit, filed almost 20 years back, has to be given proper evidentiary value and cannot be rejected just because the learned counsel for the applicant challenges it during the course of argument. It is also seen that the birth certificate produced by the applicant (Annexure A/5) is dated 15.06.2009 while the date of birth is 12.11.1980 and hence the names of father and mother written in this certificate could well be those of his adoptive parents. Thus, when there is an affidavit filed by the deceased employee himself before a Magistrate claiming applicant no. 2 to be his adopted son the claim of the applicants to treat him as the biological son of the deceased employee cannot be accepted. Since all the reliefs claimed by the applicants is solely based on the basis of treating applicant no. 2 as the biological son of the deceased employee and since the documents produced by the respondents clearly shows this to be contrary to facts, the claim for compassionate appointment in favour of applicant no. 2 cannot be granted. The OA is, therefore, dismissed.

**Subject Matter :** Maintenance of wife

**Relevant Section :** Section 18: A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her life time.

**Key Issue :** Whether Respondent has behaved with cruelty with Appellant as alleged in plaint?

**Citation Details :** Rajesh Kumar Singh vs. Suman Yadav (27.01.2020 - ALLHC):

[MANU/UP/0245/2020](#)

**Summary Judgment :**

**Facts:** According to plaint allegations, marriage of Appellant was solemnised with respondent on 09.02.1999 in accordance with Hindu Rites and Customs. After marriage Respondent came to her matrimonial home. However, according to Appellant, Respondent failed to discharge her spousal obligations and caused mental cruelty to Appellant. Allegation of cruelty alleged to have been committed by Respondent was sought to be substantiated by alleging that Respondent by her acts has not allowed Appellant to live in peace. She has started neglecting parents as well as brothers and sisters of Appellant. She also misbehaved with family members of Appellant. She also insulted Appellant in front of his friends.

**Held:** To the contrary, D.W.-1 i.e., respondent and D.W.-2, Matadeen, father-in-law of appellant have fully supported written statement. We have carefully examined their statements. It is apparent from perusal of same that on account of non-fulfillment of additional demand of dowry by appellant and his family members, respondent was subjected to physical and mental cruelty. The stand taken by respondent that she is ready to discharge her marital obligations and live with the appellant is conclusive proof of fallacy of allegations levelled by appellant. It is for above reason that no cogent evidence could be adduced by appellant to prove the alleged theft committed by respondent.

**Subject Matter :** Maintenance of widowed daughter-in-law

**Relevant Section :** Section 19: A Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained after the death of her husband by her father-in-law; Provided and to the extent that she is unable to maintain herself out of her own earnings or other property or, where she has no property of her own, is unable to obtain maintenance- (a) from the estate of her husband or her father or mother, or (b) from her son or daughter, if any, or his or her estate.

**Key Issue :** Whether lower Court committed error in setting aside order for maintenance, rental allowance and medical expenses?

**Citation Details :** Neha Chawla vs. Virender Chawla and Ors. (04.10.2019 - PHHC):

[MANU/PH/1493/2019](#)

**Summary Judgment :**

**Facts:** The petitioner filed a complaint under Domestic Violence Act alleging therein that she is a resident of Jammu and that her marriage was solemnised with Surinder Chawla in the year 1995 who somehow expired on 24.3.2010. The petitioner alleged that her brothers-in-law namely the respondents Virender Chawla and Rajinder Chawla had, however, been harassing her and also been giving beatings to her on various occasions while stating that the petitioner had not brought dowry as per their expectations. It is alleged that when the petitioner was living in shared household she was not permitted to move alone out of home and the respondents used to threaten her that they would cause friction in her relationship with her husband. It is further alleged that earlier she had been awarded maintenance at the rate of 5000 per month by the Courts at Jammu & Kashmir which was later enhanced to 11,000 per month. However, after death of her husband the petitioner or her son had not been given a single penny towards maintenance out of the property of her husband and the entire business of her husband had been usurped by her brothers-in-law i.e. the respondents who had also misappropriated all the articles of her dowry. It is further alleged that when her husband was on death bed the respondents forged his signatures and got all the money released from banks and also operated the lockers and took out gold ornaments lying therein. The complainant alleged that she was not being allowed to enter into the shared household by respondents and was not given a single penny from the property or business of her husband. The respondents have opposed the petition.

**Held:** There was no rule that divorce between a couple would absolutely debar a wife from invoking provisions of Act and a wife despite her divorce be able to make out a case for grant of relief. However no complaint under Act or under any other penal provisions had ever been instituted before dissolution of marriage. Husband also had expired before institution of application under provisions of Act. There was no convincing evidence even to show that Petitioner had resided in shared household with Respondents or Respondents had subjected Petitioner to domestic violence. In absence of evidence to hold that complainant was residing in a shared household with Respondents or that Respondents had committed any act of domestic violence so as to hold them responsible to pay maintenance or any amount towards rentals of residential accommodation to Petitioner, Respondents who were brothers of Petitioner's husband could not be held liable in any manner to compensate Petitioner. Impugned order did not suffer from any infirmity. Revision Petition dismissed.

**Subject Matter :** Unmarried daughter can claim maintenance from her father until she is married.

Maintenance of children and aged parents

**Relevant Section :** Section 20: A Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

**Key Issue :** a. Whether the Appellant entitled to claim maintenance from her father in proceedings under Section 125 CrPC although not suffering from any physical or mental abnormality/injury?

b. Whether orders limiting the claim of the Appellant to claim maintenance till she attains majority deserves to be set aside with direction to the Respondent to continue to give maintenance till she remains unmarried?

Whether the Family Court was right in passing the judgment appealed to here?

**Citation Details :** Abhilasha vs. Parkash and Ors. (15.09.2020 - SC) : [MANU/SC/0683/2020](#)

Reghuthaman Nair vs. Sindhu K.V. and Ors. (25.02.2020 - KERHC): [MANU/KE/0751/2020](#)

**Summary Judgment :**

**Facts:** The mother of the Appellant, on her behalf, as well as on behalf of her two sons and the Appellant daughter, filed an application under Section 125 of the CrPC against her husband, the R1, claiming maintenance for herself and her three children. The application of the Applicant Nos. 1, 2 and 3 was dismissed and that of the Appellant was allowed till she attains majority. All the four applicants filed a criminal revision, which was dismissed with the only modification that Appellant would be entitled to maintenance till the date she attains majority. High Court by the impugned judgment dismissed the application filed under Section 482 of the CrPC by observing that both the Courts were consistent with regard to declining maintenance to Petitioners No. 1 to 3. As regards grant of maintenance to Appellant it was observed that there was no illegality or infirmity and accordingly the petition was dismissed. Hence, the present Appeal.

**Held:** a. The purpose and object of Section 125 Code of Criminal Procedure is to provide immediate relief to applicant in a summary proceedings, whereas right under Section 20 read with Section 3(b) of Act, 1956 contains larger right, which needs determination by a Civil Court, hence for the larger claims as enshrined under Section 20, the proceedings need to be initiated under Section 20 of the Act and the legislature never contemplated to burden the Magistrate while exercising jurisdiction under Section 125 Code of Criminal Procedure to determine the claims contemplated by Act, 1956.

b. The provision of Section 20 of Act, 1956 cast clear statutory obligation on a Hindu to maintain his unmarried daughter who is unable to maintain herself. The right of unmarried daughter under Section 20 to claim maintenance from her father when she is unable to maintain herself is absolute and the right given to unmarried daughter under Section 20 is right granted under personal law, which can very well be enforced by her against her father.

**Facts:** The 1st petitioner is the wife of the respondent. Their marriage was solemnised on 3.4.1993. In their wedlock, the 2nd petitioner was born on 4.1.1994. The respondent deserted the petitioners in 1998. He filed O.P. No. 722/1997 seeking a decree for the dissolution of his marriage with the 1st petitioner. The 1st petitioner filed O.P. No. 829/1998 seeking an order for maintenance and other consequential reliefs. The Family Court allowed O.P. 829/1998 by ordering the respondent to pay monthly maintenance allowance to the 2nd petitioner at the rate of Rs. 750/- . There has been change of circumstances, hence the 2nd petitioner needs an amount of Rs. 3000/- as monthly maintenance allowance, to meet to her present day expenses and maintenance. The respondent is financially sound. He is a licensed Electrical Consultant Supervisor and Contractor, and he earns an amount of Rs. 15,000/- per month. The respondent is taking hasty steps to dispose of his land properties in order to defeat the 2nd petitioner's right to realise maintenance from him. The 2nd petitioner has attained marriageable age and she requires an amount of Rs. 10 lakh for her marriage. Hence the order granting maintenance allowance to the 2nd petitioner at the rate of Rs. 750/- may be enhanced to Rs. 3000/- per month. The respondent may also be directed to meet to the educational and marriage expenses of the 2nd petitioner. Though the 1st petitioner is ready for a re-union, the respondent is not amenable.

**Held:** All that the petitioners sought was to give the 2nd petitioner 25 sovereigns of gold ornaments as her share in her parental properties and reasonable expenses in connection with the marriage. The Family Court directed the respondent to only pay 2/3rd of the total amount

of Rs. 10,00,000/-, which was fixed at Rs. 6,70,000/-. Thus, we are of the view that, considering the status and standard of living of the respondent, the marriage expenses fixed by the Family Court at Rs. 6,70,000/- is reasonable and moderate. The said amount is well within the paying capacity of the respondent.

**Subject Matter :** Effect of transfer of property on maintenance

**Relevant Section :** Section 28: Where a dependent has a right to receive maintenance out of an estate, and such estate or any part thereof is transferred, the right to receive maintenance may be enforced against the transferee if the transferee has notice of the right or if the transfer is gratuitous; but not against the transferee for consideration and without notice of the right.

**Key Issue :** Whether the petitioner is still entitled to get amount of Rs. 5,000/- even after the death of her father, judgment-debtor?

**Citation Details :** Kumari Jhalak vs. Rahul (20.11.2019 - MPHC): [MANU/MP/1855/2019](#)

**Summary Judgment :**

**Facts:** The marriage of Rahul Tripathi and Sonal Bhargava was solemnized on 10.5.1997. Smt. Sonal gave birth to the present petitioner on 21.7.1998. After some time, dispute arose between husband and wife and they jointly filed an application for divorce. Decree of divorce was granted. At that time, the petitioner was aged about 6 years and her custody was given to the mother - Sonal Bhargava and both have started living at 16, Race Course Road, Anand Park, Indore. According to the petitioner, her mother Sonal Bhargava had accepted only the 'Stridhan' and declined to receive permanent maintenance. The present petitioner filed an application u/s. 20 & 23 of Hindu Adoption & Maintenance Act, 1956 before the Family Court, Indore against her father - Rahul Tripathi seeking maintenance of Rs. 10,000/- per month. Rahul Tripathi appeared before the Family Court and opposed the aforesaid application for maintenance. Learned Judge, Family Court, Indore has rejected the contention of Rahul Tripathi that he has paid Rs. 5,00,000/- for maintenance of his daughter and her mother has forgone the right to claim maintenance to her. Learned Family Court has held that the mother cannot take away the right of daughter, hence she is entitled to Rs. 5,000/- as maintenance. Learned Family Court has directed Rahul Tripathi to give Rs. 5,000/- per month to the petitioner till she attains the age of majority and till marriage.

**Held:** In the present case, the petitioner is having a decree to get the maintenance till she attains the age of majority and gets married. For payment of maintenance, her father - deceased Rahul Tripathi had created a FDR from which she used to get Rs. 5,000/- per month by way of transfer to her Bank Account. After the death of her father, the respondent has broken the FDR and instructed the Bank to transfer the amount of FDR in her Account. The right of the petitioner has been created by a decree of the Court to get the maintenance and the FDR was a "estate" of the deceased from which she is entitled to get the maintenance. Therefore, even if the judgment-debtor has expired, the money decree is liable to be executed by attachment of his property.

## **JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000 [REPEALED]**

**Subject Matter :** Right of Adoption: Indian parents and overseas Indian parents

**Relevant Section :** Section 41(3): Adoption

**Key Issue :** Whether preference shall be given to the Indian parents in adoption?

**Citation Details :** Varsha Sanjay Shinde and Ors. vs. The Society of Friends of the Sassoon Hospitals and Ors. (18.10.2013 - BOMHC): [MANU/MH/1893/2013](#)

**Summary Judgment :**

**Facts:** Grievance of the Petitioners is that Respondent No. 1 has shown their inability to give the child - Isha in adoption to them on the ground that intervenors Mrs. Rachel Mathew and her husband Mr. Raj Narayan Mysore who are Overseas Indians residing in USA, have already approved the child, before the child was shown to the Petitioners. Petitioners, therefore, are seeking an appropriate writ, order and direction, directing Respondent No. 1 and other Respondents to give the said baby girl Isha in adoption to the Petitioners.

Petitioners have challenged the decision of Respondent No. 1 of giving the baby girl Isha in adoption to the Intervenors on the ground that the said decision is contrary to the guidelines which have been laid down by the Ministry of Women and Child Development in a Notification issued on 24/6/2011 which laid down the guidelines covering the adoption of children.

**Held:** Documents on record clearly establish that Overseas Indian Couple had already approved child in May 2013. However once child had been shown to Overseas Indians and approved by them then child could not have been shown to Petitioners or to other Indian parents and therefore Petitioners could not claim any right or priority to get child in adoption merely because they were Indian parents and that preference should be given to Indian parents over Overseas Indians or foreign couples - Further it was satisfied that procedure which was required to be followed by US based adoption agency/AFAA, Central Adoption Resource Authority/ CARA and referral by CARA to Respondent No. 1 was scrupulously followed and there was absolutely no infirmity in said procedure and Petition under consideration appears to have been filed on account of misconceived notions and on account of suspicion rather than concrete material against Respondent No. 1. Therefore ARC was directed to issue Letter of Recommendation within two weeks. Thus CARA was directed to comply with formalities of adoption within six weeks from today in favour of Intervenors and Petitioners should not be deprived of getting child in adoption and therefore direct Respondent No. 1 and Intervenors to ensure that within six weeks Petitioners were shown another child. Hence there was no substance in submissions made by Petitioners. Petition was disposed of.

## Hindu Marriage Act, 1955

**Subject Matter :** Joint petition- For restitution of conjugal rights and divorce.

**Relevant Section :** Section 9: When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply for restitution of conjugal rights and the court, on being satisfied of the truth of the statements, that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. Section 2(4), Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 (19 of 1946):Grounds for claiming separate residence and maintenance- if he marries again.

**Key Issue :** Whether under Section 2(4), Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 (19 of 1946), a wife is entitled to separate residence and maintenance by reason only of a second marriage by husband, effected before the Act came into force?

**Citation Details :** Kasubai vs. Bhagwan Bhagaji Wanjari (11.01.1955 - NAGPUR):  
MANU/NA/0095/1955

**Summary Judgment :**

**Facts:** The appellant is the first wife of the respondent. The wife lived with her husband for a lawful months. After that she went to reside with her father. The wife alleged that the husband had beaten her often and ill-treated her and ultimately drove her out of the house, He married a second wife and on her death he married another. The wife complained that it was not possible for her to live with her husband. The husband denied ill-treatment by him. According to him the wife's father took her away from the husband's house and would not send her back though the husband had gone to the father-in-law's place several times to bring her back. The father-in-law desired that the husband should become a 'gharjawai' (similar to an illatom son-in-law) and to this the husband would not agree. Since the wife would not come to reside with her husband, he married a second wife who subsequently died. Later he tried again to bring the wife but the father-in-law would not send her. According to the husband, he was all along and even now willing to maintain the wife and treat her well at his house.

**Held:** I hold on the findings that the wife voluntarily went away from her husband and is not justified in living apart from him merely because the husband married again when he was and is willing to receive and maintain her with him. She cannot invoke Cl. (4) which is not declaratory of the pre-existing law in respect of supersession prior to the Act.

**Subject Matter :** Divorce on the ground of desertion and willful neglect.

**Relevant Section :** Section 13: Any marriage solemnized, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has deserted the petitioner for a continuous period of at least two years immediately before the presentation of the petition.

**Key Issue :** Whether, conduct of wife amounts to 'willful neglect' on her part within the meaning of Section 13(1) of the Act?

**Citation Details :** Bhavna Adwani vs. Manohar Adwani (08.05.1991 - MPHC):  
MANU/MP/0026/1992

**Summary Judgment :**

**Facts:** The husband made repeated approaches personally, through his relations and also by sending her letters requesting her to come back home, but she persistently expressed her inability to do so. On 28-8-1984, the wife gave birth to a female child named Varsha, now about three years old. The husband sent a letter telling the wife that he would wait for at the station and would love to take her home. The wife did not reply to that letter. The petition for restitution of conjugal rights was filed by the husband against the wife. Another petition was filed against the father for wrongfully withholding the husband's wife.

**Held:** There was nothing on record to show that wife ever complained of ill-treatment by husband and his family members to her father. Further, wife merely expressed fond hope and invited Husband to her arms but did not clearly expressed any desire to go to Husband. Further, where a wife submits herself meekly to dictates of her father and had no courage to disobey and leave parental house to go to husband, she is guilty of willful neglect. Moreover, Husband made all possible efforts to persuade and bring back wife to his home and even after setting totally frustrated, made last attempt by filing petition for restitution of conjugal rights.

Hence, conduct of wife amounts to 'willful neglect' on her part proved within meaning of Section 13(1) of the Act. Thus, decree of divorce passed by Trial Court against wife under Section 13(1)(ib) of the Act was right. Appeal is accordingly dismissed.

**Relevant Section :** Section 23: If the court is satisfied that where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty.

**Key Issue :** Whether the petitioner is entitled to the decree of divorce given that he had already filed and withdrawn a petition under section 9 against the respondent and did not reveal it to the court?

**Citation Details :** Nirmala Devi vs. Ved Prakash (03.01.1992 - HPHC):  
MANU/HP/0001/1993

**Summary Judgment :**

**Facts:** The allegation of the husband was that his marriage with the respondent was solemnised 12/13 years ago. Whereafter, they continued to live happily in village Gohar. After few years, behaviour of the wife became abnormal. She started picking-up quarrels on one pretext or the other and also showing disrespect to the family members. On one occasion, she even went to the extent of levelling false allegation that her father-in-law intended to have illicit relations with her. She also started levelling false allegations of alleged misbehaviour towards her by the husband and other family members and that of not providing necessary amenities and getting hard work from her as also neglecting her. The other ground was desertion, for which it was alleged that the wife had deserted the husband (for a continuous period of more than two years immediately preceding the presentation of the petition). Petitioner alleged that in the year 1975, he fell ill and his condition started deteriorating day-by-day. The respondent wife instead of discharging her marital obligations of looking after him, left his house and she even did not pay a visit to him at Bilaspur hospital where he was under treatment. She thereafter did not come back and declared that she had no intention of doing so. The petition was contested by the wife. It was asserted by her that she had been treated with cruelty by the husband. It was due to the act and behaviour of the husband and the other members of the family that she was forced to leave her marital home and live with her parents. She in fact was turned out from the house since the husband-petitioner wanted to get rid of her as she could not bear a child. It was the conduct of husband-petitioner which forced her to move petition before the Gram Panchayat for grant of maintenance. A specific plea was raised by her that the husband had earlier filed a petition under Section 9 of the Act seeking decree for restitution of conjugal rights. After having withdrawn the said petition, now the present petition had been moved which act on the part of the husband itself was sufficient to refuse him any relief.

**Held:** The rules of the Court further require a party to the petition to make specific averments about the previous litigation, under the Act, if any, mentioning the purpose of taking of the same and the result thereof but in the present case the husband deliberately avoided to make any reference to the previous petition under Section 9 of the Act which he had admittedly taken out and which had been dismissed as withdrawn. In this view of the matter, we are satisfied that because of the condonation of the act of cruelty, the husband was not entitled to a decree for divorce in view of clear provision of Clause (b), Sub-section (1) of Section 23 of the Act.

**Subject Matter :** Dissolution of marriage- Divorce

**Relevant Section : Section 13:** Either party to a marriage, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground that there has been-  
(i) no resumption of cohabitation between the parties for a period of one year or more after the passing of a decree for judicial separation;

(ii) no restitution or conjugal rights between the parties for a period of one year or more after the passing of a decree for restitution of conjugal rights.

**Key Issue :** Whether decree of Legal Separation obtained in Illinois (U.S.A) Court be availed of in Indian Court for dissolution of marriage by a decree of divorce under Section 13 of Act when both spouses were Hindus by Personal Law and married in India according to Hindu rites?

**Citation Details :** Usha Ratilal Dave vs. Arun B. Dave (08.07.1983 - GUJHC):

MANU/GJ/0103/1983

**Summary Judgment :**

**Facts:** The husband filed a complaint for divorce in the Circuit Court of Cook County, Illinois County Department, Chancery Divorce Division (U.S.A.) alleging that the husband and wife (present appellant) stayed together at Ahmedabad till 30-12-1972, and thereafter the wife deserted the husband without any reason or cause and started living with her parents, and though several attempts were made there was no result. It is the case that the wife resisted the said complaint and made accusation against the husband. The husband is not entitled to take advantage of his own wrong. It is claimed that the husband was sponsored by the brother of the wife to go to U.S.A. for studies. The husband stayed there up to 1974 and studied in Chicago and got a job there. As the husband did not call the wife, somewhere in March 1976 the wife went to U.S.A. with her father at her own costs and went to Chicago with her younger daughter and met the husband. The husband, however, refused to keep them as he had illicit relations with one Miss Jullie. The wife has admitted that the husband had come to Ahmedabad in 1972 and the parties lived together, but denied that she deserted the husband on 30-12-1972 and failed to communicate about the normal day-to-day affairs or that the wife failed to carry out the marital obligations or that she told the husband that she was not prepared to live with him. It was further asserted that the County Court of Illinois held that the husband had deserted the wife and also held that the wife had conducted herself as a good, faithful and affectionate wife, and the decree passed by the said County Court for legal separation was on the basis of the counterclaim filed by the wife, and the claim of the husband for divorce was dismissed.

**Held:** Allegation of the wife was that she went to America but the husband did not respond and she had to stay separately. Her application for maintenance and for legal separation was granted, showing the husband to be the defaulting party. So now when the husband relies on that decree for legal separation, he cannot say that ignoring that decree for judicial separation he should be considered to be a faithful husband and the wife should be considered to be an erring wife, and the decree for judicial separation should be passed. From the facts and circumstances of the case I am not prepared to concede to this case of the husband.

Apparently it seems that he has no desire to continue the marital relations with the wife. He is keen in getting divorce, whether it is for marrying with Miss Jullie, as alleged by the wife, or for any other purpose, and for that he has made all attempts. Therefore, it cannot be said that the findings of the learned trial Judge against the husband are not justified. In the result, however, I come to the conclusion that the order of dissolution of marriage by a decree of divorce passed by the learned trial Judge is quite justified. The appeal is, therefore, dismissed.

**Subject Matter :** Child Custody/ Parenting Plan

**Relevant Section :** Section 26: The court may, pass such interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible.

**Key Issue :** Whether Court below ought not to have construed that submission of joint parenting plan was consensual act of parents?

- a) Whether, in the exercise of its writ jurisdiction, the Court should order that the custody of the minor children be restored to the Petitioner?
- b) Whether the Writ of Habeas Corpus can be issued?

Whether compelling the minor child by using police force to live with the respondent is completely inhumane approach of the learned Principal Judge and, therefore, the impugned order is violative of the fundamental rights of not only the minor child but also the petitioner/original opponent-husband?

Whether compelling the minor child by using police force to live with the respondent is completely inhumane approach of the learned Principal Judge and, therefore, the impugned order is violative of the fundamental rights of not only the minor child but also the petitioner/original opponent-husband?

**Citation Details :** Tushar Vishnu Ubale vs. Archana Tushar Ubale (15.01.2016 - BOMHC): [MANU/MH/0033/2016](#)

Kamla Devi vs. State of Himachal Pradesh and Ors. (24.07.1986 - HPHC):  
[MANU/HP/0010/1987](#)

Francis Joseph vs. Shobha Francis Joseph (15.04.2013 -GUJHC): [MANU/GJ/0141/2013](#)  
**Summary Judgment :**

**Facts:** The petitioner/father is a Surgeon and the mother is working as a nurse. They got married on 10.10.2008. It was an inter-caste and a love marriage, which was not approved by the parents of the mother. The child Mukta was born on 8.10.2009. The Court in its order had directed the parents to submit a joint parenting plan. It is submitted that the correct method was not adopted by the learned trial Judge to take forward the idea of joint parenting plan which is based on the report of the Law Commission submitted on 25.5.2015.

**Held:** Ideas of custody have changed due to economic, social developments. Parenting Plan is mutual arrangement of custody and access which is outcome of matured parenting. It was easy to grant access for longer time to mother, who was not residing in her matrimonial home. Custody of child shall at present essentially remain with father because child had stayed and had been brought up in house of father. However, parents shall have equal say on attending school meetings and on deciding child's education, day schedule, hobby classes without taxing child. Appeal partly allowed.

**Facts:** The parties were married in the month of February, 1980. After the marriage, the respondent has been living with the petitioner in a house constructed by her parents. Two sons (twins) were born out of the wedlock in the month of May, 1981. The petitioner alleges that the respondent, who is a habitual drunkard, has been maltreating her since 1982. According to the petitioner, the respondent returned home at about 9 a.m. on July 12, 1986 drunk. He asked for the custody of the children since he wanted to go away with them. When the petitioner refused to oblige, he tried to forcibly snatch away the children. On July 13, 1986 at about 9.30 a.m. the respondent once again tried to take away the children along with the belongings. The petitioner alleges that she thereupon locked the house. The respondent reported the matter to the Police who directed her to unlock the premises. The Petitioner was also summoned to the Police Chowki the next day, that is, on July 14, 1986. According to the

petitioner, on July 15, 1986, the children were ultimately taken away by the respondent. The respondent has filed a return refuting the allegations made against him and resisting the petition. His version is that he was humiliated by the parents of the petitioner on a number of occasions. On July, 12, 1986, he was asked to leave the house. He, therefore, decided to leave the house with his wife and children. The petitioner, however, refused to go with him and he was not even allowed to go into the house to collect his belongings. He thereupon went to the Police Chowki and reported the matter to the Police. On July 14, 1986, he took the children along with him to the house of one of his colleagues who resides in the BBMB quarters. According to the respondent, he has applied for the allotment of Government accommodation which was expected to be allotted very soon. Besides, he had also started constructing a house on the land belonging to the parents of the petitioner which he intends to occupy no sooner it is completed. The allegations that he is a drunkard and that he is unable to take care of the children have been stoutly denied.

**Held:** **a.** The best interests of the minors requires that their custody be given to the petitioner, we have passed the order allowing the petition. The petitioner will ensure that they continue to attend the nursery school till they attain the age when they can be admitted to a regular school and that as and when they attain such age, they will be admitted to the regular school. We are also of the view that the best interests of the minor children require that they should not be altogether deprived of the paternal affection and company and, therefore, direct that the respondent will be provided access to the minor children by the petitioner at her parents house between 4 p.m. to 6 p.m. on every Saturday. The respondent will not, however, take the children out and will not by an act or omission on his part create any situation which has the direct or indirect effect of disturbing the sense of security and emotional balance of the children and the domestic harmony.

**b.** It is well established that the writ of Habeas Corpus can be pressed into service for granting the custody of a child to the deserving spouse. "It is further well established in England that in issuing a writ of habeas corpus a court has power in the case of infants to direct its custody to be placed with a certain person. 'When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody.'

**Facts:** Learned Principal Judge ought involved the police force to take custody of the minor child when the minor child was completely unwilling to live with the respondent-wife because it would cause bad impression on the growing girl i.e. the minor child and it would jeopardize the health and progress of the minor child.

**Held:** I am of the view that the petitioner/original opponent has deliberately flouted and disobeyed the orders of the court below and with a view to prolong the said issue i.e. to keep the minor child present as far as possible and hence the initial order of notice dated 18.10.2011 and later on the order to keep the minor child present have not seen light of the day in its proper perspectives. The Hon'ble Supreme Court has rightly observed in the case referred above that the issues relating to custody of minors and tender-aged children have to be handled with love, affection, sentiments and by applying human touch to the problem. In view of the above, the orders under challenge mentioned in para 8 (A) to the petition appears just and proper and in my view, the attempt made by the petitioner to overreach the process of law cannot be tolerated for a second. There appears no substance in this Special Civil Application and accordingly the same is dismissed.

**Subject Matter :** Transfer of case

**Relevant Section : Section 21:** (2)(a) If the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;

(b) If the petitions are presented to different district courts, the petition presented later shall be transferred to the district court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district court in which the earlier petition was presented.

(3) In a case where clause (b) of sub-section (2) applies, the court or the Government, as the case may be, competent under the CPC, 1908, to transfer any suit or proceeding from the district court in which the later petition has been presented to the district court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to do under the said Code.

**Key Issue :** Whether Petitioner made out case for transfer of case?

**Citation Details :** Aarti Rana vs. Gaurav Rana and Ors. (20.11.2019 - HPHC):

[MANU/HP/2001/2019](#)

**Summary Judgment :**

**Facts:** It has been alleged that the petitioner was very much interested to settle her family life for this reason, she agreed to live together with the respondent as husband and wife, despite many differences. She joined the company of her husband at Shimla, but the respondent did not stop torturing her and ultimately the two cases were filed between that period. Hence, the petitioner was compelled to leave in the matrimonial house and went to her parents house at Pragpur, District Kangra. The respondent and his parents took the custody of the male child with them and the custody of minor girl child is with the petitioner. The transfer of the cases has been sought primarily on the ground that she neither has finances nor the capacity to bear the expenses, as she is totally dependent upon her parents who are retiree. Therefore, it will be impossible for the petitioner to visit Shimla time and again to effectively contest the above said petition. It has been averred that her minor girl got admission in a School in the same vicinity, as also the daughter of the petitioner is not keeping good health and cannot live without mother (petitioner). Further it has been averred that Shimla is at a distance of about more than 250 Kms from Pragpur and it is not possible for the petitioner to visit Shimla on each and every hearing and bear the expenses.

**Held:** Petitioner was residing at long distance from jurisdiction of Trial Court with her minor girl who is studying in school there. In such circumstances, it is convenience of Petitioner wife which was required to be considered over and above inconvenience of husband. It was convenience of wife that has to be looked in cases relating to transfer of matrimonial proceedings. Petitioner has made out case for transfer of petition. Petition allowed.

**Subject Matter :** Maintenance orders

**Relevant Section : HINDU MARRIAGE ACT, 1955, Section 28:** All decrees and orders made by the court in any proceeding under this Act shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being in force.

**CODE OF CRIMINAL PROCEDURE, 1973**

**Section 128:** The order of maintenance may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance or expenses due.

**PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005**

**Section 20:** Upon the failure to make payment in terms of the order, the Magistrate may direct the employer or a debtor, to directly pay to the aggrieved person or to deposit

**with the court a portion of the due amount, which may be adjusted towards the monetary relief payable by the respondent.**

**Key Issue :** Whether there was need to frame guidelines on certain aspects pertaining to payment of maintenance in matrimonial matters?

**Citation Details :** Rajnesh vs. Neha and Ors. (04.11.2020 - SC): [MANU/SC/0833/2020](#)

**Summary Judgment :**

**Facts:** The (R1)wife left matrimonial home shortly after the birth of the son (R2). The wife filed an application for interim maintenance under Section 125 Code of Criminal Procedure on behalf of herself and the minor son. The Family Court awarded interim maintenance to the Respondents. The Appellant-husband challenged the Order of the Family Court. The High Court dismissed the Writ Petition and affirmed the Judgment passed by the Family Court. This Court issued notice to the wife and directed the Appellant to file his Income Tax Returns and Assessment Orders. He was also directed to place a photocopy of his passport on record. By a further Order, the Appellant was directed to make payment of the arrears towards interim maintenance to the wife and a further amount which was due and payable to the wife towards arrears of maintenance, as per his own admission. By a subsequent Order, it was recorded that only a part of the arrears had been paid. A final opportunity was granted to the Appellant to make payment of the balance amount, failing which, the Court would proceed under the Contempt of Courts Act for willful disobedience with the Orders passed by this Court. **In the backdrop of the facts of this case, it was fit to frame guidelines on certain aspects pertaining to the payment of maintenance in matrimonial matters.**

**Held:** The Judgment and order passed by the Family Court, affirmed by the High Court for payment of interim maintenance to the Respondents was affirmed by this Court. The husband was directed to pay the entire arrears of maintenance within a period of twelve weeks from the date of this Judgment, and continue to comply with this Order. The Court also gave directions regarding enforcement/execution of orders of maintenance, **it is directed that an order or decree of maintenance may be enforced Under Section 28A of the Hindu Marriage Act, 1956 (sic1955); Section 20(6) of the D.V. Act; and Section 128 of Code of Criminal Procedure, as may be applicable. The order of maintenance may be enforced as a money decree of a civil court as per the provisions of the Code of Civil Procedure. To overcome the issue of overlapping jurisdiction, and avoid conflicting orders being passed in different proceedings, it had become necessary to issue directions in this regard, so that there was uniformity in the practice followed by the Family Courts/District Courts/Magistrate Courts throughout the country. It was directed that where successive claims for maintenance were made by a party under different statutes, the Court would consider an adjustment or set-off, of the amount awarded in the previous proceeding/s, while determining whether any further amount was to be awarded in the subsequent proceeding.**

## **HINDU SUCCESSION ACT, 1956**

**Subject Matter :** Property of a female Hindu to be her absolute property

**Relevant Section : Section 14:** Any property possessed by a Female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

**Key Issue :** Whether real owner could be declared to have absolute rights to property as there was no mention in settlement deed that same was on account of maintenance given by husband to his wife?

**Citation Details :** Guduru Sriramaiah and Ors. vs. Kallam Venkata Reddy and Ors. (14.10.1992 - APHC): MANU/AP/0341/1992

**Summary Judgment :**

**Facts:** Special Officer designated under the Act allowed application of Petitioner/landlord for eviction of Respondent/tenant holding that tenant denied title of landlord and committed default in payment of rent to real owner. On appeal, court set aside eviction decree on ground that title of Petitioners to land was not established and therefore question of denial of title of landlord and failure in payment of rent to them did not arise. Petition was filed to schedule that land absolutely belonged to third party/real owner who executed registered lease deed in favour of tenant. By virtue of settlement deed executed by real owner's husband and operation of Section 14(1) of the Act, wife became full owner.

**Held:** Deceased/husband of real owner settled properties on his wife with rights of enjoyment during her life time in recognition of her pre-existing right to maintenance. Mere fact that mere was no express reference in settlement-deed to maintenance of wife or her pre-existing right to claim maintenance is not material factor. There are no express words that income which real owner would get from lands was meant for her maintenance. But it is implicit that one of objects of settlement was only to provide sufficient income to wife for her maintenance. It cannot be said that property given to wife was de hors her antecedent right to get maintenance. Impugned orders were upheld. Petition dismissed.

**Subject Matter :** Full blood preferred to half blood

**Relevant Section : Section 18:** Heirs related to an interestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect.

**Key Issue :** Whether the lower Court has come to the wrong conclusion in deciding the matter that when there are stepbrothers and stepsisters are available, the Appellant ought to have made them as parties to the proceedings?

**Citation Details :** R. Balavenkatraman vs. T.L. Natarajan (05.10.2018 - MADHC):

[MANU/TN/7669/2018](#)

**Summary Judgment :**

**Facts:** The Appellant herein and one Gourammal and one R. Ayyasamy are the children of one P.L. Ranganathan. The Appellant's mother died long ago and father also followed his mother. His sister namely Gourammal was working as an Adviser at Chinmaya Vidyalaya Matriculation Higher Secondary School at Palayankottai and retired from service and died on 29.9.2005 at Kavundampalayam village, Coimbatore. The Appellant's younger brother R. Ayyasamy also died on 15.9.2005. Both brother and sister of the Appellant were not married and they have no issues. Such that, the Appellant herein is the only surviving Legal Heir of said R. Ayyasamy and Gourammal as per Indian Succession Act.

**Held:** Only class one heirs that is the brothers/sisters by full blood are entitled to succeed the estate of the deceased persons. Accordingly, when the Appellant being the brother by full blood, he alone is entitled for the said money and not the Respondent herein.

**Subject Matter :** Right of the child that is in the womb

**Relevant Section : Section 20:** A child who was in the womb at the time of death of an interestate and who is subsequently born alive has the same right to inherit to the interestate as

if he or she had been born before the death of the interestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the interestate.

**Key Issue :** Whether the defendant's right is absolute or not?

**Citation Details :** Meenakshi and Ors. vs. T. Shanmugaprasad and Ors. (17.11.2017 - MADHC): MANU/TN/3732/2017

**Summary Judgment :**

**Facts:** Rukmani Ammal executed a Settlement Deed dated 17.03.1953 in favour of Deivayanai Ammal bequeathing the suit property for life in favour of Deivayanai Ammal and vested remainder absolutely in favour of the plaintiff and defendants 2 to 6. According to the plaintiff, even if the Settlement Deed is construed as though it conveys absolute right to Deivayanai Ammal, the plaintiff and the defendants 2 to 6 are entitled, under Hindu Succession Law, to inherit as heirs of Deivayanai Ammal. If the Settlement Deed is construed as document conveying life interest to Deivayanai Ammal as claimed by the plaintiff, absolute vested remainder in favour of the plaintiff and the defendants 2 to 6, the plaintiff and the defendants 2 to 6 alone are entitled to the estate of Rukmani Ammal after the death of Deivayanai Ammal. Deivayanai Ammal was enjoying and administering the property till her life time, after the property being assessed in her name. The 1st defendant, in collusion with the defendants 2 & 3, had fraudulently prepared a Will with evil motive and with a view to deprive the plaintiff and defendants 4 to 6 of the lawful shares in the property. According to the plaintiff, the Will is a forged and fictitious document. According to the 1st defendant, Deivayanai Ammal is a house wife and the 1st defendant had performed the marriage of his daughters, by borrowing money by mortgaging the suit property, along with his wife and the 1st defendant alone had settled the dues out of his own income, without any assistance from anyone. Even during the life time of Deivayanai Ammal, the 1st defendant had given good education to his daughters. After his marriage, he was maintaining his father-in-law's family and his sister-in-law out of his self earnings. The marriage of his wife's sister was also celebrated and performed by the 1st defendant out of his self earnings. The 1st defendant's family was maintained only by him and not by Deivayanai Ammal at any point of time. The 1st defendant performed marriage of his sister-in-law in 1953. For that purpose, the suit property was mortgaged to one Shanmugam Chettiar for a sum of Rs. 700/- by the mother-in-law of the 1st defendant. The 1st defendant alone repaid the entire loan with accrued interest to the said Shanmugam Chettiar and redeemed the property out of his own funds. In this background, his mother-in-law Rukmani Ammal had settled the property in favour of his wife Deivayanai Ammal.

**Held:** So far as the application of Hindu Succession Act, 1956 is concerned, the property was settled in favour of Deivayanai Ammal under Ex. B1 Settlement Deed dated 17.03.1953. Under Section 14(1) of the Hindu Succession Act, the female's limited interest would automatically be enlarged into an absolute one by force of Section 14 and the restrictions placed, if any, under the document would have to be ignored. Ex. B1 Settlement Deed was executed prior to the coming into force of the Hindu Succession Act, 1956. After the coming into force of the Hindu Succession Act in the year 1956, the suit property settled in favour of Deivayanai Ammal under Ex. B1 Settlement Deed, even if it is construed as life interest in favour of Deivayanai Ammal would automatically be enlarged into absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored.

**Subject Matter :** Murderer is disqualified as a successor

**Relevant Section : Section 25:** A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other

property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

**Key Issue :** Whether Petitioner entitled to claim policy amount by virtue of nomination?

**Citation Details :** Khushboo Gupta vs. The Life Insurance Corporation of India and Ors. (25.09.2019 - PATNAHC): [MANU/BH/1812/2019](#)

**Summary Judgment :**

**Facts:** Petitioner in the present case is seeking a writ in the nature of mandamus directing the respondent Life Insurance Corporation of India (in short 'LIC') and its authorities to pay the death claim arising out of life insurance policy no. 517337070 which was obtained by one Prem Kumar Yadav @ Bablu Kumar (since deceased). It is the case of the petitioner that while taking the life insurance policy, the said Prem Kumar Yadav @ Bablu Kumar had nominated his mother Mahasundari Devi (respondent no. 5) and by virtue of that nomination now after death of life assured the respondent no. 5 is claiming the entire insurance proceeds. The petitioner has a grievance because after obtaining the policy the said Prem Kumar Yadav @ Bablu Kumar had solemnized marriage with the present petitioner on 22.04.2015. The petitioner is claiming herself a legally wedded wife of the deceased life assured and is looking for 50% of the proceeds of the death claim.

**Held:** Respondent No. 5 could not claim 100% of policy proceeds by virtue of nomination under Section 39 of Act. Petitioner as well as Respondent No. 5 were class-I legal heirs. Therefore, Petitioner and Respondent Nos. 5 are jointly entitled to receive claim proceeds arising out of death of life assured. Respondent authorities were directed to pay entire proceeds to Petitioner as well as Respondent No. 5 by dividing the same equally between them.

**Subject Matter :** Convert's descendants are disqualified- One who converts to another religion, his descendants are no longer eligible to be successors.

**Relevant Section : Section 26:** Where a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives, unless such children or descendants are Hindus at the time when the succession opens.

**Key Issue :** Whether the appellant has the right to challenge any party's right to inheritance to the estate of Kami Singh Rathore?

**Citation Details :** Sunita Rathore vs. Harshwardhan and Ors. (20.09.2019 - PHHC):

[MANU/PH/2631/2019](#)

**Summary Judgment :**

**Facts:** The present lis pertains to inheritance to estate of Sh. Karni Singh Rathore who died on 28.03.2011 at Bombay. The respondents/plaintiffs claimed inheritance to Sh. Karni Singh on the allegations that Sh. Karni Singh Rathore performed marriage with plaintiff No. 2 on 22.07.1996 and out of their wedlock, Harshwardhan Rathore plaintiff No. 1 was born on 24.10.1997. The appellant/defendant is stated to be the wife of Kami Singh Rathore, therefore, is not entitled to inheritance to Sh. Kami Singh Rathore. It is averred by the plaintiffs that they approached the patwari halka to get mutation of inheritance entered and sanctioned in their favour. Mutation No. 9179 was entered but later appellant/defendant filed objections before Assistant Collector 2nd Grade, Bhattu Kalan. She (appellant) claimed herself as the only legal heir and representative of deceased Kami Singh Rathore. The mutation was declared disputed and referred to SDO Civil, Fatehabad. The SDO Civil sanctioned the mutation in favour of appellant/defendant. The respondents/plaintiffs filed an appeal before the District Collector, Fatehabad. Vide order dated 23.10.2013, the matter was adjourned sine die and

parties were directed to get the matter of inheritance decided from Civil Court. The defendant is bent upon to interfere into peaceful possession of plaintiffs over the property of deceased Kami Singh Rathore. Hence the suit.

**Held:** If the appellant being a Hindu wife prior to conversion of Kami Singh Rathore to Islam is not entitle to inherit to estate of Sh. Kami Singh Rathore, in my considered opinion, she is not competent to challenge the right of any third person to inherit to the estate of deceased Kami Singh Rathore. the appellant has been held entitle to 1/2 share in suit property by the Court holding that Kami Singh Rathore never converted to Islam. The respondents/plaintiffs appear to have not challenged findings of the Courts that Kami Singh Rathore did not convert to Islam nor with regard to entitlement of the appellant to 1/2 share in the suit property, so this Court has not adverted to non entitlement of appellant to any share in suit property even though she has sought to contend that Kami Singh converted to Islam as per document relied upon by the respondents/plaintiffs.

**Subject Matter :** Succession when the heir is disqualified

**Relevant Section : Section 27:** If any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the interstestate.

**Key Issue :** Whether Courts Below erred in decreeing suit filed for specific performance of agreement of sale?

**Citation Details :** Sirdar K.B. Ramachandra Raj Urs. (Dead) through L.Rs. vs. Sarah C. Urs. and Ors. (24.10.2019 - SC): [MANU/SC/1471/2019](#)

**Summary Judgment :**

**Facts:** Plaintiff filed suit for specific performance of agreement of sale. Trial Court decreed suit filed by Plaintiff. Aggrieved against said judgment and decree, appeal was made in High Court. High Court dismissed appeal by holding that property was held by wife of father of Defendant No.1 and after her death, suit property devolved on father of Defendant No.1 and Defendant No. 1 under Section 15 of Hindu Succession Act, 1956. Hence, present appeal.

**Held:** It was clear that there was no possibility of erroneous beliefs in the mind of the Plaintiffs as to title position in the property. No doubt about it that Defendant No. 1 had acted as a power of attorney, but at the same time, did not act in his capacity as the owner of the property. The ownership of Defendant No.1 was known to the Plaintiffs. In spite of that the Plaintiffs have not set u the case to bind the share of Defendant No.1. They had not pleaded in the plaint that Defendant No.1 owned the property. There was no whisper as to the title of Defendant No.1in the plaint. They needed to plead the facts to attract the plea of estoppel. That had not been done. Thus, the agreement which had been executed was not concerning share of Defendant No. 1, but of late father of Defendant No.1 as his power of attorney.

**Subject Matter :** Failure of Heirs

**Relevant Section : Section 29:** If an interstestate has left no heir qualified to succeed to his or her property in accordance with the provisions of this Act, such property shall devolve on the government; and the government shall take the property subject to all the obligations and liabilities to which an heir would have been subjected.

**Key Issue :** Whether the authorities were within their jurisdiction to call upon the parties to produce succession certificates?

**Citation Details :** Joydeep Banerjee vs. The State of Bihar and Ors. (19.02.2020 - PATNAHC): [MANU/BH/0168/2020](#)

**Summary Judgment :**

**Facts:** The petitioner claims to be the son of Samir Kumar Banerjee, who in turn, claims to be the heir of Amarendra Kumar Banerjee with regard to a piece of land recorded in his name in the revenue records and the authorities calling upon Amarendra Kumar Banerjee and Samir Kumar Banerjee to submit succession certificate with regard to their claim.

**Held:** The Court finds that the authorities were well within their jurisdiction and also correct in calling upon the respective parties to produce succession certificate so that they can proceed in the matter in accordance with law. This was necessary as it is the Civil Court of competent jurisdiction which can go into the factual aspects where a person claims to be the successor/heir of any person since there is provision of adducing evidence and also calling of records from various places and then giving a finding based on such evidence before the Court.

**Subject Matter :** Testimentary Succession-Daughters shall have Coparcenary rights irrespective of whether their Father was not alive when the law came into force.

**Relevant Section : Section 30:** Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so disposed of by him or by her], in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus.

**Key Issue :** Whether daughter had coparcenry rights in property even if their father was not alive when Hindu Succession (Amendment) Act, 2005 came into force?

**Citation Details :** Vineeta Sharma vs. Rakesh Sharma and Ors. (11.08.2020 - SC) :

[MANU/SC/0582/2020](#)

**Summary Judgment :**

**Facts:** The conflict arose between the two contradictory verdicts pertaining to the terms and conditions for the retrospective effect of the coparcenary rights of the daughter in her father's property.

Held: The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities. **Since the right in coparcenary was by birth, it was not necessary that father coparcener should be living as on date of commencement of Amendment Act.**

**Subject Matter :** Testimentary Succession-Daughters shall have Coparcenary rights irrespective of whether their Father was not alive when the law came into force.

**Relevant Section : Section 30:** The interest of a male Hindu in a Mitaksharacoparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her.

**Key Issue :** Whether daughter had coparcenry rights in property even if their father was not alive when Hindu Succession (Amendment) Act, 2005 came into force?

**Citation Details :** M. Arumugam vs. Ammaniammal and Ors. (08.01.2020 - SC):

[MANU/SC/0015/2020](#)

**Summary Judgment :**

**Facts:** One Moola Gounder along with his two sons Palanisamy (Defendant No. 1) and Arumugam (Defendant No. 2) formed a coparcenary which owned the suit property. Moola Gounder died interestate on 28.12.1971 leaving behind no Will. On his death, 1/3 of the

property went to each son and remaining one third which was the share of Moola Gounder in the coparcenary was to be inherited by his wife (Defendant No. 5), two sons, (Defendant Nos. 1 and 2) and three daughters viz., the Plaintiff and Defendant Nos. 3 and 4. On 06.12.1989, his youngest daughter filed a suit claiming that the property falling to the share of Moola Gounder which was to be inherited by his six legal heirs had never been partitioned and therefore, it be partitioned in accordance with law. Written statement was filed by the two sons in which it was mentioned that after the death of Moola Gounder, the daughters i.e., the Plaintiff and Defendant Nos. 3 and 4 and the mother (Defendant No. 5) had jointly executed a registered release deed relinquishing their rights in the property in favour of the two sons, Defendant Nos. 1 and 2. It was also urged that in the said release deed the Plaintiff who was a minor at that time was represented by her mother, who was her natural guardian, and the mother had executed the release deed on behalf of the Plaintiff. Similarly, Defendant No. 1 had acted as the guardian of Defendant No. 2 who was also a minor at that time and signed the release deed on behalf of both of the sons. After Defendant No. 2 attained majority, a registered partition deed was executed between the two brothers, Defendant Nos. 1 and 2, on 24.04.1980 and thereafter, it is only Defendant Nos. 1 and 2 who are in possession of the said property. It was also averred that the partition deed was witnessed by the husband of the Plaintiff and she could not feign ignorance of the same. It was also alleged that the amount mentioned in the release deed had been given to the sisters.

**Held:** Though the Plaintiff was a minor when the release deed dated 10.03.1973 was executed, she was not of tender age but was aged about 17 years. On 24.04.1980, a partition took place between Defendant Nos. 1 and 2 (the two brothers) and this partition included all the properties comprising the property now claimed by the Plaintiff. The partition deed dated 24.04.1980, which was duly registered, was signed by the husband of the Plaintiff as an attesting witness. Few days later, on 30.04.1980 the two brothers executed a settlement deed in favour of their mother, Defendant No. 5 which was also signed by the Plaintiff's husband as witness. After this partition, the two brothers remained in possession of the property and executed various transfers from this property. Therefore, it is difficult to believe that the Plaintiff was not aware of the various transfers.

## SPECIAL MARRIAGE ACT, 1954

**Subject Matter :** Conditions relating to solemnization of special marriages.

**Relevant Section : Section 4:** A marriage between any two persons may be solemnized under this Act, if at the time of the marriage neither party has a spouse living, or is of unsound mind, the male has completed the age of twenty-one years and the female the age of eighteen years and the parties are not within the degrees of prohibited relationship.

**Key Issue :** Whether respondent/defendant Indu Devi is legally married wife of petitioner/plaintiff?

**Citation Details :** Sushil Kumar Yadav vs. Indu Devi (10.05.2017 - JHRHC):

MANU/JH/0601/2017

**Summary Judgment :**

**Facts:** The plaintiff/appellant's marriage was solemnised on 27.09.2002 with Indua Devi at Maldah (West Bengal) under the provisions of Special Marriage Act, 1954 and a Marriage

Certificate to this was issued by Special Marriage Officer, Maldah which is in possession of defendant/respondent. After their marriage both the parties started living together at village Lalban and was consummated. After few days of their marriage, the appellant came to know that respondent was earlier married to one Sri Ram Bilas, resident of village - Chakrafu Ekchari and out of said wedlock, she has a 13 years old son who was studying at Mundli Mission School at Mundli. The appellant further came to know that prior to her second marriage, the appellant had undergone operation for Vasectomy and as such she would not be able to conceive and give birth to the child. It is alleged that in order to claim paternal property of the appellant, the respondent had hatched a conspiracy and succeeded in solemnisation of second marriage with the appellant by playing fraud by concealing previous relationship. The defendant has denied all the allegations and disclosed that the appellant has remarried a lady Sanjay Kumar.

**Held:** Even if it is presumed that the first marriage was well within the knowledge of the plaintiff/appellant, the defendant/respondent cannot be absolved from the liability of seeking divorce from her 1st husband. In the facts and circumstances of the instant case, there is apparent violation of this provision and as such, we are of the opinion that the impugned Judgment is fit to be quashed and the marriage between the parties to suit may be declared null and void.

**Subject Matter :** Objection to marriage.

**Relevant Section : Section 7:** Any person may, before the expiration of thirty days from the date on which any such notice has been published under sub-section (2) of section 6, object to the marriage on the ground that it would contravene one or more of the conditions specified in section 4. The nature of the objection shall be recorded in writing by the Marriage Officer in the Marriage Notice Book.

**Key Issue :** Whether a marriage between a Hindu boy or girl and a Christian boy or girl is a void marriage?

**Citation Details :** K. Shanmuga Raja vs. Shanthakumari (30.11.2018 - MADHC):

[MANU/TN/7394/2018](#)

**Summary Judgment :**

**Facts:** The marriage between the two parties was solemnized as per Hindu rites. It is the specific case of the appellant that the marriage was not consummated owing to frequent desertion of the respondent to her parents house. It is also the contention of the appellant that the respondent stayed with him only for 15 days after the marriage in the matrimonial home. While so, the appellant came to know that the respondent gave birth to a female child. The appellant disowned his paternity of the female child by stating that he is always ready to subject himself to any medical test to show that the female child was not born to him. According to the appellant, he is a devotee of the deity Ayyappa Swamy and used to go on pilgrimage to Sabarimala at Kerala after wearing Thulasi malai and by observing fasting. While so, when the appellant was observing fasting by wearing Thulasi Malai, the respondent, her parents and relatives came to the matrimonial home and threatened to remove the Thulasi Malai by stating that they belonged to Christianity and insisted on him to convert himself to Christianity. At this juncture, the appellant came to know that the respondent is a Christian by religion.

**Held:** Respondent and the minor child were subjected to medical examination which had clearly pointed out that it was the appellant who had fathered the minor child. In such circumstances, according to the learned Amicus Curiae, though there is no valid marriage between the appellant and the respondent in the eye of law, there was a semblance of

marriage in the presence of elders and relatives, hence, the minor female child born to the respondent through the appellant has to be considered as a legitimate child. Appeal Dismissed.

**Subject Matter :** Effect of marriage on member of undivided family.

**Relevant Section : Section 19:** The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religions shall be deemed to effect his severance from such family.

**Key Issue :** Whether parents should be informed about proposed registration of marriages of their children?

**Citation Details :** Shashi vs. PIO, Sub Divisional Magistrate (Civil Lines) (01.08.2016 - CIC): [MANU/CI/0221/2016](#)

**Summary Judgment :**

**Facts:** The appellant had raised concern about young girls and boys getting married without informing their parents. According to him some of the parents are denied their right to information about the marriage of their sons and daughters. He stated that when parents bring up their children with love and care and take all possible steps for the welfare of child, giving custody, supervision, physical and psychological protection, health and safety, education etc. their relationship does not cease on children attaining majority age. Parental authority still subsists and they should have a right to know their choice of marriage.

Held: It's unfortunate that this Bill has lapsed and forgotten, while would be partners are being pressurized and victimized by unlawful assemblies called Khaps and Shariat Courts or Caste Elders or Religious bodies. The Government has a responsibility to prevent fraudulent or illegal or invalid marriages on one hand and to protect genuine lovers from the violence of parents and caste/religious heads. State's responsibility extends to provide safe circumstances to youth of the nation to exercise their constitutionally guaranteed right of choosing life partner and to register their marriages, if legal, after giving due notice to interested parties to raise and verify their objections. The Commission directs the respondent authority to provide point-wise information as sought by the appellant, within 21 days from the date of receipt of this order.

**Subject Matter :** Succession to property of parties married.

**Relevant Section : Section 21:** Succession to the property or any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this Act shall have effect as if Chapter III of Part V.

**Key Issue :** Whether the company was justified in refusing the transmission of shares to the petitioner on the basis of the Will in question?

**Citation Details :** Farida Ayub Khan vs. Mehboob Productions P. Ltd. and Ors. (07.08.2014 - CLB): [MANU/CL/0047/2014](#)

**Summary Judgment :**

**Facts:** Respondent No. 1 company is a family run private company limited by shares. It was incorporated on November 28, 1947, under the Indian Companies Act, 1913 and its registered office is at Mehboob Studios, 100, Hill Road, Bandra (West), Mumbai-400 050. The founder of the company late Mr. Mehboob Khan was a legendary filmmaker of India. It is pertinent to mention here that during the period April 7, 2011 to November 23, 2011, respondents Nos. 3 to 6 were the directors of respondent No. 1 company and were in its control and management. However, the said directors were removed from the directorship of respondent No. 1 company in the extraordinary general meeting held on November 23, 2011 and they are no

more directors of the company. Respondents Nos. 2 and 7 are the present directors of the company and respondent No. 8 is its managing director. under Shariat Law respondents Nos. 3 and 4 as the sons of late Ayub Mehboob Khan are entitled to 560 shares out of 1,132 shares held by late Ayub Mehboob Khan.

**Held:** I have come to the conclusion that the company for sufficient reasons has refused the transmission of shares in favour of the petitioner. I am further of the view that until the validity of the will is decided by the hon'ble High Court, it will not be appropriate and proper for the company to transmit the shares in favour of the petitioner. For the foregoing reasons, the resolution passed by the company on December 13, 2008, to the extent it relates to the petitioner cannot be said non est, void, illegal and ineffective. It shall remain intact with respect to the petitioner's 278 shares-in-question. The company petition therefore, deserves to be disposed of at this stage, with the observation that the company shall be bound by the orders to be passed by the hon'ble High Court in Civil Suit No. 2855 of 2008 pending between the parties in respect of the shares-in-question claimed by the petitioner under Will under challenge in the suit.

**Subject Matter :** Restitution of conjugal rights.

**Relevant Section : Section 22:** When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply by petition to the district court for restitution of conjugal rights.

**Key Issue :** Whether the appellant is subjected to cruelty?

**Citation Details :** K.S. Shankar vs. K. Jyothi (11.09.2019 - KARHC):

[MANU/KA/6821/2019](#)

**Summary Judgment :**

**Facts:** The undisputed facts are that the couple's marriage is solemnised on 13.11.2005 according to the Christian rites and customs. The couple have a daughter, Miss. Krupa born on 30.10.2006. The husband is working as a police constable, and just prior to the wedding, he was working at Hospet, but after the marriage, he started working at Siruguppa. The wife is a government teacher, and even as of the date of the marriage, she was working in a Government School at Halekote Village of Siruguppa taluk. The couple are estranged, and have been living separately ever since the date of the petition by the husband for divorce on 20.11.2008. The husband is staying in a lodge, and the wife is residing in the quarters allotted to the husband. The husband's case is that he is subjected to cruelty by the wife. He reasonably apprehends that it would be harmful and injurious for him to live with respondent, and therefore, he is entitled for divorce. the wife continued the pregnancy after much persuasion. The child was born in the month of October 2006 after a cesarean procedure. The wife stayed with her parents for confinement, but she returned to the matrimonial home with the child after the customary period. The wife insisted that they refrain from any physical intimacy because she did not want to go through the difficulties and pain of childbearing once again. He was denied the comforts of marital life. The wife's case is that the husband is given to different vices, and in fact, he is acquainted with a certain third person even prior to the date of marriage. This third person is working in a beauty parlour in Bellary. She has two children, and she is deserted by her husband. The husband introduced this third person as his good friend at the time of the wedding, and she did not suspect any intimacy between them. However, she has come to know that they are into a physical relationship. They clandestinely exchange SMSs over mobile (the mobile phone, a SIM and the transcription of the messages exchanged between them are marked as Exhibits). This third person's second child is born to the husband.

**Held:** whether a spouse is subjected to cruelty will have to be examined in the facts and circumstances of each case, and there can't be any strict definition for the same. Further, it is settled that if it is established that a feeling of deep anguish, disappointment, frustration is caused in one spouse by the conduct of the other for a long time, mental cruelty can be reasonably inferred. The petition filed by the wife for restitution of conjugal rights under Section 22 of the Special Marriages Act, is dismissed. The marriage solemnised on 13.11.2005 between the appellant-husband and the respondent-wife is dissolved on the ground of Cruelty by the wife-respondent.

**Subject Matter :** Void Marriages

**Relevant Section : Section 24:** Any marriage solemnized under this Act shall be null and void if any of the conditions specified in clauses (a), (b), (c) and (d) of section 4 has not been fulfilled; or the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

**Key Issue :** Whether the decree of divorce can be granted?

**Citation Details :** Sk. Maniruddin vs. Soma Banerjee (13.01.2020 - CALHC):

[MANU/WB/0046/2020](#)

**Summary Judgment :**

**Facts:** The parties were married according to Special Marriage Act on 05.01.1998 registered before the Marriage Registrar, Chinsurah, Hooghly. The respondent/wife prayed for divorce on the ground of cruelty and desertion. The case of the respondent/wife is that she is a Hindu by religion, while the appellant/husband is a Muslim male and they got acquainted through their common friend and gradually became affectionate to each other. It was the further case of the respondent/wife that since 1998, she was residing in her father's house while the appellant/ husband was living in his house and the appellant/husband had never shown any interest to bring her to his house. It was also contended that although the appellant/husband earned Rs. 50,000/- (Rupees Fifty Thousand) only per month but he never sent any money for her maintenance. It was also contended that the appellant/husband married her by suppressing material facts and he even threatened her personally as well as through his men. It was further contended that both the parties were living separately for more than fourteen (14) years and the marital tie has irretrievably broken down and, therefore, a decree of divorce may be passed in her favour.

**Held:** We are of the view, that a decree for divorce for dissolution of the marriage was thus not a legal recourse open for the respondent/wife and there was no valid ground for the same at present.

## **ARBITRATION AND CONCILIATION ACT, 1996**

**Subject Matter :** Competence of arbitral tribunal to rule on its jurisdiction

**Relevant Section :** Section 16

**Key Issue :** Whether an arbitration Clause found in a document (agreement) between two parties, could be considered binding on a person who is not a signatory to the agreement?

**Citation Details :** Huawei Telecommunications (India) Co. Pvt. Ltd. and Ors. vs. Wipro Limited (24.01.2022 - DELHC) : [MANU/DE/0232/2022](#)

**Summary Judgment :**

**Facts:** On March 22, 2006, Oil and Natural Gas Corporation Limited ("ONGC") had awarded a contract to Discovery Enterprises Private Limited ("DEPL"). An amount of INR 63.88 crores was supposedly owing to ONGC as a result of DEPL's contract defaults. Because the contract stipulated that disagreements be resolved by arbitration, ONGC filed an arbitration against DEPL and Jindal Drilling and Industries Limited ("JDIL"), a group entity, to recover INR 63.88 crores in overdue dues. JDIL was aggrieved and filed an application under Section 16 of the Arbitration and Conciliation Act, 1996 ("Act"), requesting removal from the list of parties on the grounds that it was not bound by the arbitration agreement because it was not a signatory to the contract containing it ("Section 16 Application"). Following that, ONGC filed a request for discovery and inspection to buttress its claim that DEPL is JDIL's alter ego/agent.

**Held:** The Court held that though an arbitration normally would take place between parties to the arbitration agreement, it could take place between a signatory to an arbitration agreement and a third party as well. Though the scope of the arbitration agreement is limited to parties who have entered into it and those who claim under or through them, courts under the English law have developed the group of companies doctrine. In substance, the doctrine postulates that an arbitration agreement which has been entered into by a company within a group of companies, can bind its non-signatory affiliates or sister concerns if the circumstances demonstrate a mutual intention of the parties to bind both the signatory and affiliated, non-signatory parties.

In deciding whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:

- (i) The mutual intent of the parties;
- (ii) The relationship of a non-signatory to a party which is a signatory to the agreement;
- (iii) The commonality of the subject matter;
- (iv) The composite nature of the transaction; and
- (v) The performance of the contract.

**Subject Matter :** Appointment of an Arbitrator

**Relevant Section :** Section 11

**Key Issue :** Whether Single Judge erred in concluding that arbitration Clause of MoU, having perished with MoU, owing to novation, invocation of arbitration under MoU was belied. The question arises as to Whether Single Judge erred in concluding that arbitration Clause of MoU, having perished with MoU, owing to novation, invocation of arbitration under MoU was belied.

**Citation Details :** Sanjiv Prakash vs. Seema Kukreja and Ors. (06.04.2021 - SC) :

[MANU/SC/0238/2021](#)

**Summary Judgment :**

**Facts:** Respondent No.3 formed a private corporation and paid for the entire paid-up capital with his own money. Appellant was approached by a foreign corporation seeking long-term equity investment and collaboration. A Memorandum of Knowledge (MoU) was signed by four members of the Appellant's family. The Appellant's family and the corporation then signed a Shareholders' Agreement. The Appellant's family and the corporation entered into a Share Purchase Agreement (SPA) on the same day. Respondent No.3 decided to transfer his

stock to be held jointly between Appellant and himself, and Respondent No.2 did the same to be held jointly between Respondent No.1 and herself, resulting in a dispute between the parties. As a result, the appellant filed a petition before the High Court under Section 11 of the Arbitration and Conciliation Act, 1996.

**Held:** The Supreme Court of India has considered the limiting scope of Section 11 of the Arbitration and Conciliation Act, 1996, and has concluded that the issue of novation of an agreement cannot be decided by courts in the limited *prima facie* assessment of whether the parties have entered into an arbitration agreement. Thus, set aside the judgment of the High Court. Appeal disposed of.

**Subject Matter :** Application for setting aside arbitral award

**Relevant Section :** Section 34

**Key Issue :** Whether the Ld. Single Judge's order refusing to condone the appellant's delay in filing an application under Section 34 of the Arbitration Act would be an appealable order under Section 37(1)(c) of the Arbitration Act.

**Citation Details :** Chintels India Ltd. vs. Bhayana Builders Pvt. Ltd. (11.02.2021 - SC) :

[MANU/SC/0070/2021](#)

**Summary Judgment :**

**Facts:** In the instance case, the single Judge of the High Court dismissed the application for condonation of delay in an application filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside an award and consequently dismissed the application filed under Section 34 of the Arbitration and Conciliation Act itself. The Single judge of High Court held that Sub-section (3) of Section 34 of the said Act, by use of the words but not thereafter, as interpreted in *Union of India v. Popular Construction Co.* restricts the power otherwise vested in Court to condone the delay beyond thirty days, the same also creates a ground of time bar for refusing to set aside the award and was part of the self-contained code for setting aside of the award; thus, refusal to set aside an award on the ground of the said time bar, would be a refusal within the meaning of Section 37 and appealable under Section 37.

**Held:** The impugned question of law is answered by stating that an appeal Under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 would be maintainable against an order refusing to condone delay in filing an application Under Section 34 of the said Act to set aside an award. The impugned judgment of the Division Bench under appeal is set aside. Appeal is accordingly allowed.

**Subject Matter :** Arbitral Tribunal

**Relevant Section :** Section 2(d)

**Key Issue :** Whether the private law bound Arbitral Tribunal can apply public law principles or Article 14 against a public body and whether the commercial arbitrators are entitled to settle a dispute by applying what they conceive is 'fair and reasonable'?

**Citation Details :** Board of Control for Cricket in India vs. Deccan Chronicle Holdings Ltd. (16.06.2021 - BOMHC) : [MANU/MH/1437/2021](#)

**Summary Judgment :**

**Facts:** The claimant, Deccan Chronicle Holdings Ltd (hereafter referred to as DCHL), owned and operated a cricketing franchise in the Indian Premier League known as the Deccan Chargers (IPL). An agreement was signed between Deccan Chargers and the BCCI for a period of ten years. However, Board of Control for Cricket in India (hereinafter referred to as BCCI) terminated the franchise in September 2012. The BCCI also alleged that the franchise

had breached the BCCI code. The dispute was brought to the Bombay High Court, which selected former Supreme Court Justice C K Thakker as the sole arbitrator. Deccan Chronicle Holding Ltd was granted Rs Rs 4814, 17, 00,000 by the lone arbitrator, plus interest at 10% per annum from the date of the arbitration procedures, to be paid by the Board of Control for Cricket in India (BCCI). BCCI filed a case with the Bombay High Court under section 34 of the Arbitration and Conciliation Act, 1996, to have the awards set aside.

**Held:** In the instant case, the court held that a writ court may well hold against a public body on a public law principle or by invoking Article 14; but an arbitrator, constrained as he or she is by the contract, has no such power. Consequently, it was ruled that there is absolutely no authority for the proposition that a private-law-bound tribunal has recourse to hold a public body accountable on the principles under Article 14.

Further, the Hon'ble Court held that commercial arbitrators are not entitled to settle a dispute by applying what they conceive is 'fair and reasonable', in the absence of a specific authorization in the arbitration agreement. Section 28(3) of the Arbitration and Conciliation Act, 1996 mandates the arbitral tribunal to take into account the terms of the contract while making and deciding the award. Further, under Section 28(2), the Arbitral Tribunal is required to decide ex aequo et bono or as amiable compositeur only if the parties expressly authorize it to do so. The Arbitrator is bound to implement the contractual clauses and cannot go contrary to them. Thus, commercial arbitrators cannot decide based on their notions of equity and fairness, unless the contract permits it. Lastly, the Hon'ble Court set aside the Rs 4814 crore arbitral award passed by the Arbitral Tribunal, as the Respondent i.e., Deccan Chronicle Holdings Ltd. was in "unquestionable breach of its contractual obligations".

**Subject Matter :** Arbitration agreement

**Relevant Section :** Section 7

**Key Issue :** Whether an arbitration clause that allows the arbitration proceeding to be abandoned at the will of one party would be valid in law?

**Citation Details :** Tata Capital Housing Finance Ltd. vs. Shri Chand Construction and Apartment Private Limited and Ors. (24.11.2021 - DELHC) : [MANU/DE/3216/2021](#)

**Summary Judgment :**

**Facts:** Shri Chand Construction and Apartment Pvt. Ltd. ("Respondent") entered into two separate loan agreements with the Appellant in 2017 for INR 23 million and INR 0.8 million loans, respectively. As security, the Respondent deposited original title deeds to an immovable property with the Appellant. In 2018, the Respondent paid off the loan amounts owed under both loan agreements and asked the Appellant to return the property's original title deeds. The Appellant failed to return the Respondent's original title deeds. The Respondent filed a civil suit in court, seeking INR 34 million in damages. However, since the loan agreements included an arbitration clause, the Appellant filed an application under Section 8 of the Act in order to direct the Respondent to pursue its claim through arbitration.

**Held:** The High Court of Delhi ruled that an arbitration agreement that gives one party unequal power to unilaterally terminate the arbitration proceedings is illegal because it lacks 'mutuality,' which is an essential feature of an arbitration agreement. The court also held that an arbitration agreement that provides for arbitration of one party's claims while also providing for a remedy of court or any other for the other party's claim would be invalid in law because it would result not only in the splitting of the claims and cause of action, but also in a multiplicity of proceedings and conflicting decisions on the same cause of action.

**Subject Matter :** Power to refer parties to arbitration where there is an arbitration agreement.

**Relevant Section :** Section 8

**Key Issue :** Whether a party can file a writ petition against an order referring the parties to arbitration under Section 8 of the Act?

**Citation Details :** Arun Srivastava vs. Larsen and Toubro Ltd. (09.11.2021 - DELHC) : [MANU/DE/2959/2021](#)

**Summary Judgment :**

**Facts:** The respondent issued a Letter of Intent to the petitioner on October 20, 2019, for the supply, installation, and commissioning of electric works. The parties executed and signed a letter of intent. The petitioner claimed that the respondent wrongfully withheld Rs.12,24,181/- in respect of bills raised by the petitioner against the respondent, which resulted in the filing of a recovery suit for Rs.17,26,000/- before the ADJ court on September 22, 2017. In the aforementioned suit, the respondent filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 requesting that the parties be referred to arbitration in accordance with the arbitration clause contained in the Letter of Intent. On December 22, 2017, the petitioner filed an application under Order 12 Rule 6 of the Code of Civil Procedure (CPC), 1908, seeking a decree based on the respondent's admissions. The impugned order granted the respondent's application filed under Section 8 of the Act. Because the respondent's Section 8 application was granted, the petitioner's application under Order 12 Rule 6 of the CPC was dismissed.

**Held:** The Delhi High Court ruled that a petition under Article 227 could not be filed in response to an order referring the parties to arbitration under Section 8. The court observed that there is no provision in the act for appealing an order allowing a Section 8 application; thus, the legislative intent is clear in terms of the court referring the parties to arbitration and raising all issues related to the existence and validity of the arbitration agreement before the tribunal.

**Subject Matter :** Arbitral Awards

**Relevant Section :** Section 34: It provides for setting aside of an arbitral award by making an application to the Court, on the grounds stated therein.

**Key Issue :** Issue to be decided in this case was of jurisdiction?

**Citation Details :** Emkay Global Financial Services Ltd. vs. Girdhar Sondhi (20.08.2018- SC): [MANU/SC/0875/2018](#)

**Summary Judgment :**

**Facts:** In this case a dispute arose between a registered broker with the National Stock Exchange and its client involving certain transactions. The client had initiated arbitration proceeding against the broker wherein the claim was rejected by an award given by the nominated sole arbitrator. The Respondent then filed an application under Section 34 of the Act, before the District Court, Delhi. By a judgment, the Additional District Judge referred to the exclusive jurisdiction clause contained in the agreement, and stated that he would have no jurisdiction to proceed further in the matter and, therefore, rejected the Section 34 application filed in Delhi. However, on appeal, the Delhi High Court held that the issue of jurisdiction in the present case was a question of fact and parties were not allowed to lead evidence on it. Accordingly, the High Court directed District Court to decide this question (in relation to existence of territorial jurisdiction of Delhi Courts) after framing a specific issue and permitting parties to lead evidence on it.

**Held:** The court held the moment a seat is determined it would vest the 'seat' courts with exclusive jurisdiction i.e. if the seat is Mumbai, it would vest in Mumbai Courts with jurisdiction owing to the agreement. Secondly, it was held that the Section 34 proceedings are

summary proceedings and framing of issues was not an integral process of the proceeding under Section 34.

**Subject Matter :** Arbitral Awards

**Relevant Section :** Section 34: It provides for setting aside of an arbitral award by making an application to the Court, on the grounds stated therein.

**Key Issue :** Whether under Section 34(3) of Arbitration Act which states that an application for setting aside arbitral award may not be made after three months have elapsed from the date on which the party making the application had received the arbitral award?

**Citation Details :** Anilkumar Jinabhai Patel (D) thr. L.Rs. vs. Pravinchandra Jinabhai Patel and Ors. (27.03.2018 - SC): [MANU/SC/0295/2018](#)

**Summary Judgment :**

**Facts:** The subject matter of arbitration in the case involved division of property between appellant and respondent and accordingly arbitration award was passed whereby certain properties were given to the Appellant and Respondent whereas some other assets were kept undivided with equal rights and interest thereon of both groups. Appellant had filed an arbitration petition under Section 34 of the Act challenging the award and contended that they learnt about the arbitral award only on certain date when they were served with the notice of execution petition filed by Respondent.

Hence, the issue in the case pertained to Section 34(3) of Arbitration Act which states that an application for setting aside arbitral award may not be made after three months have elapsed from the date on which the party making the application had received the arbitral award.

**Held:** It was held that with respect to the issue of limitation for filing application under Section 34 of the Act for setting aside the arbitral award, the period of limitation would commence only after a valid delivery of an arbitral award takes place under Section 31(5) of the Act. The Court dismissed the appeal on the ground that Anilkumar Patel, accepted the copy of the award on behalf of the entire family in his capacity as the Head of the family and hence the validity of such an award cannot be challenged by the family members on the ground of not having received a copy of the award.

**Subject Matter :** International Arbitration

**Relevant Section :** No Relevant Section

**Key Issue :** Whether there is a bar to a foreign lawyer for conducting arbitration in India?

**Citation Details :** Bar Council of India vs. A.K. Balaji and Ors. (13.03.2018 - SC): [MANU/SC/0239/2018](#)

**Summary Judgment :**

**Facts:** This appeal was filed against the order wherein the directions were issued to restrict foreign law firms/lawyers to practice in India.

**Held:** There is absolutely no bar to a foreign lawyer for conducting arbitrations in India. If the matter is governed by an international commercial arbitration agreement, conduct of proceedings may fall with the provisions of the Arbitration Act. Even in such cases, Code of Conduct, if any, applicable to the legal profession in India had to be followed.

**Subject Matter :** Interim measures by court

**Relevant Section :** Section 9: Interim measures etc. by Court

**Key Issue :** Whether the Indian Court can provide interim measures where the seat of arbitration is outside India?

**Citation Details :** Bharat Aluminium Company vs. Kaiser Aluminium Technical Services Inc. (28.01.2016 - SC): [MANU/SC/0090/2016](#)

**Summary Judgment :**

**Facts:** The appellant and respondent executed an agreement in relation to supply of equipment , modernisation and up-gradation of the production facilities of the appellant. Certain dispute arose between the parties leading to arbitration proceedings. The question arose in this case was whether the Indian Court can provide interim measures where the seat of arbitration is outside India.

**Held:** Section 9 is limited in its application to arbitration which takes place in India, however after the amendment of 2015, the provisions apply to International Commercial Arbitration even if the place of arbitration is outside India.

**Subject Matter :** Enforcement of foreign awards

**Relevant Section :** Section 48: This section provides for conditions for enforcement of foreign awards.

**Key Issue :** Enforceability of Foreign Awards was under consideration?

**Citation Details :** Shri Lal Mahal Ltd. vs. Progetto Grano Spa (03.07.2013 - SC):

[MANU/SC/0655/2013](#)

**Summary Judgment :**

**Facts:** Enforceability of Foreign Awards was under consideration.

**Held:** Supreme Court held and made a distinction between public policy when used in the context of enforcement of domestic awards & foreign awards, by holding that in the latter a more restricted meaning was applicable. The enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the Appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated Under Section 48(2)(b).

**Subject Matter :** Appointment of an Arbitrator

**Relevant Section :** Section 11(6): This section deals with failure to perform any function entrusted or any procedure agreed upon by the parties

**Key Issue :** Nature of power under Section 11(6)?

**Citation Details :** S.B.P. and Co. vs. Patel Engineering Ltd. and Ors. (26.10.2005 - SC):

[MANU/SC/1787/2005](#)

**Summary Judgment :**

**Facts:** Section 12(2) of the act provides full freedom to the parties to agree upon a procedure for the appointment of the arbitrator. Usually, the parties provide for the appointment of a named arbitrator, or in the case of an institutional arbitration, a designee institution. If few of such procedure for appointment of the arbitrators, it is left for future agreement between the parties. In situations, where the parties are not able to agree on the procedure, or the arbitrators are unable to agree upon the third arbitrator, or the designee institution is unable to perform its functions related to the procedure of appointment of the arbitral tribunal, Section 11(6) of the Act provides for such appointment by giving a default power to Chief Justice to decide. The issue in this case was regarding the nature of such power.

**Held:** The Supreme Court clarified and explained that the function of Supreme Court or High Court is judicial, quasi-judicial & not purely administrative.

**Subject Matter :** Arbitral Awards

**Relevant Section :** Section 34: It provides for setting aside of an arbitral award by making an application to the Court, on the grounds stated therein.

**Key Issue :** The scope and ambit of court's jurisdiction where award passed by arbitral award is challenged under Section 34 of the Act?

**Citation Details :** Oil & Natural Gas Corporation Ltd. vs. SAW Pipes Ltd. (17.04.2003- SC) : [MANU/SC/0314/2003](#)

**Summary Judgment :**

**Facts:** The point of controversy in this case was the scope and ambit of court's jurisdiction where award passed by arbitral award is challenged under Section 34 of the Act.

**Held:** Supreme Court held that the award could be set aside when the applying party provided proof that it was under some incapacity; or the arbitration agreement was not valid; or the award dealt with a dispute contemplated by the terms of the arbitration clause; or the applying party was not properly notified of the appointment of the arbitrator. Additionally, the composition of the Tribunal has to be in accordance with the agreement of the parties for a court to set aside the award.

Further it was held that the expression public policy as found under Section 48 would not bring within its fold the grounds of patent illegality. Hence, the enforcement of the award could not be refused on the grounds of it being against the substantive laws & terms of contract

**Subject Matter :** Appointment of an Arbitrator

**Relevant Section :** Section 11(6): This section deals with failure to perform any function entrusted or any procedure agreed upon by the parties

**Key Issue :** Whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after expiry of 30 days from the date of demand?

**Citation Details :** Datar Switchgears Ltd. vs. Tata Finance Ltd. and Ors. (18.10.2000 - SC): [MANU/SC/0651/2000](#)

**Summary Judgment :**

**Facts:** The appellant had entered into a lease agreement with the respondent in respect of certain machineries. A dispute arose between the parties and the respondent sent a notice to the appellant invoking the arbitration clause. The respondent appointed a sole Arbitrator as per the arbitration clause of the Lease Agreement and the Arbitrator in turn issued a notice to the appellant asking them to make their appearance before him. Thereafter, the appellant filed application before Hon'ble the Chief Justice of Bombay and prayed for appointment of another Arbitrator and the respondent opposed this application. This petition was rejected by the Chief Justice holding that as the Arbitrator had already been appointed by the first respondent, the Lessor, the petition was not maintainable. The question was whether in a case falling under Section 11(6), the opposite party cannot appoint an arbitrator after expiry of 30 days from the date of demand.

**Held:** Appointment of arbitrator after expiry of 30 days was held to be valid and the court stated that in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.

**Subject Matter :** Referring parties to arbitration where an arbitration agreement is there

**Relevant Section :** Section 8: Power to refer parties to arbitration where there is an arbitration agreement

**Key Issue :** Whether during pendency of an appeal a court can refer the parties to arbitration or whether the court can stay the Judicial Proceedings and refer the parties to arbitration?

**Citation Details :** P. Anand Gajapathi Raju and Ors. vs. P.V.G. Raju (Died) and Ors.

(28.03.2000 - SC): [MANU/SC/0281/2000](#)

**Summary Judgment :**

**Facts:** Issue in this case was whether during pendency of an appeal a court can refer the parties to arbitration or whether the court can stay the Judicial Proceedings and refer the parties to arbitration.

**Held:** The arbitration agreement is valid under Section 7 of the new act and reference under Section 8 during the pendency of an appeal can be made to arbitration.

**Subject Matter :** Referring parties to arbitration where an arbitration agreement is there

**Relevant Section :** Section 8: Power to refer parties to arbitration where there is an arbitration agreement

**Key Issue :** Whether an arbitrator would have jurisdiction to winding up company?

**Citation Details :** Haryana Telecom Ltd. vs. Sterlite Industries (India) Ltd. (13.07.1999 - SC): [MANU/SC/0401/1999](#)

**Summary Judgment :**

**Facts:** In this case party A filed a winding up petition before High Court and Party B moved an application to refer the matter to arbitration as there was an arbitration agreement. Issue in this case whether an arbitrator would have jurisdiction to winding up company.

**Held:** An arbitrator notwithstanding any agreements between the parties would have no jurisdiction to entertain a matter which is non-arbitrable

**Subject Matter :** Arbitration agreements

**Relevant Section :** Section 7: Arbitration agreement

**Key Issue :** Whether the mentioned clause was an arbitration clause or not?

**Citation Details :** K.K. Modi vs. K.N. Modi and Ors. (04.02.1998 - SC) :

[MANU/SC/0092/1998](#)

**Summary Judgment :**

**Facts:** Modi Family owned various public limited companies. They also owned various assets. Differences arose between the parties and respondent invoked the arbitration clause. The issue in this case was whether this clause was an arbitration clause or not.

**Held:** It was held that it was not an arbitration clause. Supreme Court observed that while there are no conclusive tests, one can follow a set of guidelines in deciding the terms of the agreement i.e. whether they have agreed to solve disputes through arbitration or whether the agreement is to refer an issue to an expert.

**Subject Matter :** Appointment of Certain Number of Arbitrators

**Relevant Section :** Section 10: Parties can appoint as many number of arbitrators, but the selection should be in odd numbers. Even a sole arbitrator can be appointed

**Section 11: Appointment of Arbitrators**

**Key Issue :** Whether an agreement is invalidated due to appointment of even number of arbitrators?

**Citation Details :** M.M.T.C. Limited vs. Sterlite Industries (India) Ltd. (18.11.1996 - SC):  
[MANU/SC/1298/1996](#)

**Summary Judgment :**

**Facts:** The respondent in this case claimed that it has not received certain due amount from the appellant and hence the arbitration clause was invoked. As per the agreement the respondent appointed their arbitrator but the appellant claimed that arbitration cannot be resorted. While the proceeding commenced, New Act came into force. The first issue which arose was whether the case will proceed according to old act or new act. and second issue was whether an agreement is invalidated due to appointment of even number of arbitrators.

**Held:** It was held that the proceeding will commence according to new act. For the second issue the court held that If the parties provide for appointment of even number arbitrators that does not mean that the agreement becomes invalid. Under Section 11(3), the two arbitrators should then appoint the third arbitrator who shall act as a presiding arbitrator.

**Subject Matter :** Interpretation of arbitral award

**Relevant Section :** Section 33: This section provides that within 30 days or time on which parties agree, from the time award was given- Parties can request for correction or error to the arbitral tribunal

**Key Issue :** Whether an arbitrator can unilaterally enlarge his own power to arbitrate any of disputes?

**Citation Details :** Union of India (UOI) vs. G.S. Atwal and Co. (Asansole) (22.02.1996 - SC) : [MANU/SC/1130/1996](#)

**Summary Judgment :**

**Facts:** The respondent and the appellant had entered into an agreement for excavation of feeder canal. A dispute arose between them and arbitration clause was invoked. The question which arose in this case was whether an arbitrator can unilaterally enlarge his own power to arbitrate any of disputes?

**Held:** It was held that the arbitrator cannot enlarge the scope of the arbitrability and it is for the court to decide the claim in dispute or any clause or any things related therof. Further the court held "mere acceptance or acquiescence to the jurisdiction of the arbitrator for adjudication of the dispute as to the extent of the arbitration agreement or arbitrability of the dispute does not disentitle the appellant to have the remedy under Section 33 through the court."

## CODE OF CIVIL PROCEDURE, 1908

**Subject Matter :** Decree

**Relevant Section :** Section 2: Decree may be either preliminary or final or sometimes partly preliminary and partly final. For any adjudication to be termed as decree the above mentioned conditions has to be satisfied, but in case when courts determines the right of the parties but does not finally dispose the matters completely, it is called preliminary decree. When the

court completely dispose of the suit and finally settles all questions in controversy between the parties and nothing further remains to be decided thereafter, it is called final decree.

**Key Issue :** Whether the decree was a final decree or a preliminary decree?

**Citation Details :** Rachakonda Venkat Rao and Ors. vs. R. Satya Bai (D) by Lr. and Ors. (11.09.2003 - SC): [MANU/SC/0702/2003](#)

**Summary Judgment :**

**Facts:** Appellants and the respondents filed for a suit for partition. A decree was passed on the basis of compromise arrived at between the parties. A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed off . Through the compromise there was complete partition of the suit properties which was acceptable to both the parties and decree was passed in this regard. The Plaintiff applied for final decree after 13 years as an after thought as there was a change in values of the properties. The entire controversy in the present case revolved around the question which was whether the decree was a final decree or a preliminary decree.

**Held:** Supreme Court held that the definition of decree includes both preliminary and final decree. Preliminary decrees declares the rights of the parties and final decess fulfills the preliminary decree

**Subject Matter :** Decree, Order & Judgement

**Relevant Section :** Sections 2(2): Decree Means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties.

Section 2(14): Order means the formal expression of any decision of a civil Court which is not a decree.

Section 2(9): 'Judgment' means the statement given by a judge of the grounds of a decree or order.

**Key Issue :** Difference between Decree, Order and Judgement?

**Citation Details :** Boards and Boards Pvt. Ltd., Jaipur vs. Himalaya Paper (Machinery) Pvt. Ltd., New Delhi (09.11.1989 - RAJHC): [MANU/RH/0031/1990](#)

**Summary Judgment :**

**Facts:** This suit was instituted for the recovery of the advances made by the plaintiff against the defendant. The main contention of the petitioner was the suit has not been dismissed but the Court had only held that it is liable to be dismissed. As such, according to the petitioners, this is not a decree but is an interlocutory order and the revision is maintainable. He further submits that the Court has not directed that the suit to be dismissed and, for this reason formal decree has not been drawn.

**Held:** Court observed difference between decree,order and judgement and held that judgement stands on different footing than the decree and order. The expression of the words 'liable to be dismissed' by implication means that the suit is dismissed and it may tantamount the formal expression of the dismissal of the suit, though not said in specific words.

**Subject Matter :** Courts to try civil suits

**Relevant Section :** Section 9 : This section states that courts have jurisdiction to try all the suits unless barred

**Key Issue :** Jurisdiction of court?

**Citation Details :** Hakam Sing vs. Gammon (India) Ltd. (08.01.1971 - SC): [MANU/SC/0001/1971](#)

**Summary Judgment :**

**Facts:** The appellant in this case agreed to do certain construction work for the respondent company registered under the Indian Companies Act and having its principal place of business at Bombay on the terms and conditions of a written tender. Clause 13 provided that despite of the place, where the work under the contract was to be executed the contract shall be deemed to have been entered into by the parties at Bombay and the court in Bombay alone shall have jurisdiction to adjudicate thereon. On disputes arising between the parties the appellant submitted a petition to the Court at Varanasi for an order under Section 20 of the Arbitration Act, 1940 that the agreement be filed and an order of reference be made to an arbitrator or arbitrators appointed by the court. The respondent contended that in view of clause 13 of the arbitration agreement, only the courts at Bombay had jurisdiction.

**Held:** The Court in this case held that it is not open to the parties to confer jurisdiction on any court which it does not otherwise possess under the code by agreement. However, where two courts have jurisdiction under the code, an agreement between the parties that the dispute should be tried in one such court is not contrary to the public policy.

**Subject Matter :** Courts to try civil suits

**Relevant Section :** Section 9: This section states that courts have jurisdiction to try all the suits unless barred

**Key Issue :** Whether the plaintiff is an agriculturist and secondly, whether this court has jurisdiction to try this suit?

**Citation Details :** Gundaji Satwaji Shinde vs. Ramchandra Bhikaji Joshi (05.12.1978 - SC): MANU/SC/0307/1978

**Summary Judgment :**

**Facts:** The plaintiff and defendant came to an agreement for sale of an agricultural land. The defendant later does not sell the land to the plaintiff. Hence, the plaintiff filed a suit for specific performance of contract for sale of an agricultural land. The defendant contended that the land being an agricultural land is covered under Bombay tenancy and agricultural land act and plaintiff is not an agriculturist. The issue in this case was first, whether the plaintiff is an agriculturist and secondly, if yes then whether this court has jurisdiction to try this suit.

**Held:** Supreme Court held that in a suit properly constituted and cognizable by the Civil Court, if there arises an issue which requires to be settled by the competent authority, the jurisdiction of the Civil Court is not only ousted but the same is under a statutory obligation to refer the issue to a competent authority and upon the reference being answered by, to dispose of the suit in accordance with the decision of the competent authority.

**Subject Matter :** Res Judicata

**Relevant Section :** Section 11: The principle of Res Judicata in a nutshell means that once a matter is finally decided by a competent court, no party can be permitted to reopen it in subsequent litigation

**Key Issue :** Whether petition is barred by Res Judicata?

**Citation Details :** Daryao and Ors. vs. The State of U.P. and Ors. (27.03.1961 - SC): MANU/SC/0012/1961

**Summary Judgment :**

**Facts:** The petitioners and their ancestors had been the tenants of the land and respondents were proprietors of the suit property for past 50 years. Due to communal violence in western district of UP, the respondents took unlawful possession of the said land and on return of the petitioners, denied to deliver the possession back to the true owners. The

petitioners filed suit for ejectment under U.P. Tenancy Act, 1939. In the trial court the petitioners succeeded and a decree was passed in their favor. The said decree was confirmed in appeal which was taken by respondents. Respondents then preferred a second appeal before the Board of Revenue under Section 267 of the U.P. Tenancy Act, 1939. The board allowed the appeal preferred by respondents and dismissed the petitioner's suit with respect to the land. Aggrieved by this decision the petitioners moved the High Court at Allahabad under Article 226 of the Constitution for the issue of a writ of certiorari to quash the said judgment the said petition was dismissed. It was under these circumstances that the petitioners filed the petition under Article 32. The grounds against the decision of the Board which the petitioners seek to raise by their present petition are exactly the same as the grounds which they had raised before the Allahabad High Court; and so it is urged by the respondents that the present petition is barred by Res Judicata.

**Held:** Supreme court held that if the order is pronounced in a writ petition , in limine, it would be a bar but where order is without a speaking order, such dismissal cannot be treated as creating a bar or res-judicata.

**Subject Matter :** Foreign Judgement not conclusive

**Relevant Section :** Section 13 : This section states that the indian court will not enforce a foreign judgment if the judgment is not that of a competent court.

**Key Issue :** Whether Indian courts enforce a foreign judgment if the judgment is not that of a competent court?

**Citation Details :** Y. Narasimha Rao and Ors. vs. Y. Venkata Lakshmi and Ors. (09.07.1991 - SC): MANU/SC/0603/1991

**Summary Judgment :**

**Facts:** The first appellant and the first respondent were married at Tirupati on February 27, 1975. They separated in July 1978. The first appellant filed a petition for dissolution of marriage in the Circuit Court of St. Louis County Missouri, USA. The first respondent sent her reply from here under protest. The Circuit Court passed a decree for dissolution of marriage on February 19, 1980 in the absence of the first respondent. The first appellant had earlier filed a petition for dissolution of marriage in the sub-court of Tirupati. In that petition, the first appellant filed an application for dismissing the same as not pressed in view of the decree passed by the Missouri Court. On August 14, 1991 the learned sub-Judge of Tirupati dismissed the petition. The first appellant married the second appellant in Yadgirignita. Hence, first respondent filed a criminal complaint against the appellants for the offence of bigamy. The appellants filed an application for their discharge in view of the decree for dissolution of marriage passed by the Missouri Court. By his judgment of October 21, 1986, the learned Magistrate discharged the appellants holding that the complainant, i.e., the first respondent had failed to make out prima facie case against the appellants. Against the said decision, the first respondent preferred a Criminal Revision Petition to the High Court and the High Court by the impugned decision , set aside the order of the Magistrate holding that a photostat copy of the judgment of the Missouri Court was not admissible in evidence to prove the dissolution of marriage. The Court further held that since the learned Magistrate acted on the photostat copy, he was in error in discharging the accused and directed the Magistrate to dispose of the petition filed by the accused, i.e., appellants herein for their discharge, afresh in accordance with law. It is aggrieved by this describe that the present appeal was filed.

**Held:** Supreme Court held that if a foreign judgement is not passed merits of the case, the courts in India will not recognise such judgment.

**Subject Matter :** Place of institution of suits where local limits of jurisdiction is uncertain

**Relevant Section :** Section 18 : This section states the place of institution of suit where local limits of jurisdiction of Courts are uncertain

**Key Issue :** Whether Ghaziabad court had territorial jurisdiction to try the suit?

**Citation Details :** Dhodha House and Ors. vs. S.K. Maingi and Ors. (15.12.2005 - SC):

[MANU/SC/2524/2005](#)

**Summary Judgment :**

**Facts:** Appellant filed a suit against the Respondent to protect his copyright, trade marks and common law rights as regard his art work/ trade mark. Appellant filed a suit before the District Judge, Ghaziabad. The Addl. District Judge passed an order of injunction.

Respondent filed an appeal before the High Court of Allahabad. High Court held that the Ghaziabad Court had no territorial jurisdiction to try the suit. Against the said order, the Appellant approached the Supreme Court.

**Held:** Supreme Court held that where it is uncertain as within whose jurisdiction of two or more courts the immovable property is situated, any of those courts may try the suit relating to that suit property and disposed of the matter and its decree shall have the same effect as if the property is situated within the local limits of its jurisdiction

**Subject Matter :** Suits to be instituted where defendants reside or cause of action arises

**Relevant Section :** Section 20 : This section provides the rights to the plaintiff to institute suit proceedings at a place where the defendant(s) are actually and voluntarily residing or carry on the business for gain.

**Key Issue :** Whether a suit is maintainable against the Government anywhere in the State because the State is deemed to carry on business everywhere in the country?

**Citation Details :** Bakhtawar Singh Bal Kishan vs. Union of India (UOI) and Ors. (10.02.1988 - SC): [MANU/SC/0298/1988](#)

**Summary Judgment :**

**Facts:** The appellant, a contractor entered into a construction contract with the Military Engineering Service for making some additional construction in the factory in the State of Uttar Pradesh. The contract was entered into at Bareilly in Uttar Pradesh. A dispute arose in regard to the execution of the contract between the contractor and the respondent, Union of India. An Arbitrator was appointed who in due course rendered an award in favour of the contractor. The contractor instead of instituting an appropriate proceeding in Uttar Pradesh where the contract was executed and the work was carried out, instituted a proceeding on the original side of the Delhi High Court. By this proceeding the contractor prayed for making the award a rule of the Court under Sections 14 and 17 of the Indian Arbitration Act, 1940. The respondent raised a plea to the effect that the Delhi High Court had no Jurisdiction inasmuch as the cause of action had arisen at a place in Uttar Pradesh and that the contract was also executed at Bareilly in Uttar Pradesh.

**Held:** In order to end the controversy on the issue whether a suit is maintainable against the Government anywhere in the State because the State is deemed to carry on business everywhere in the country , the Supreme Court said that if the activity of the state is sovereign in nature the suit against the government can be filed only at the place where the cause of action has arisen in full or in part. As against this, if the activities of State are commercial in nature, then the suit can be filed at the place where the cause of action has arisen in full or part and also at the principal place of business or principal office or the branch office, if the dealings have been there.

**Subject Matter :** Res Judicata

**Relevant Section :** Section 11 : The principle of Res Judicata in a nutshell means that once a matter is finally decided by a competent court, no party can be permitted to reopen it in subsequent litigation

**Key Issue :** Interpretation of Explanation VIII to Section 11 of the CPC was under appeal?

**Citation Details :** Sulochana Amma vs. Narayanan Nair (24.09.1993 - SC):

[MANU/SC/0047/1994](#)

**Summary Judgment :**

**Facts:** The conflict of judicial opinion among the High Courts in interpretation of Explanation VIII to Section 11 of the CPC, as introduced by the CPC (Amendment) Act, 1976, is to be resolved in this appeal. Kutty Amma executed a settlement deed in favour of her husband giving life-estate to him, and vested remainder in favour of the respondent. She died in the year 1971. Her husband alienated the property in 1972 by a registered sale deed in favour of Narayanan Nair and Chennan. The respondent filed a suit to restrain the appellant from alienating the properties and committing acts of waste. Pending the suit, the appellant purchased the suit property from Narayanan Nair and Chennan. The trial court, by its judgment and decree , decreed the suit holding that 'the husband' had no right to alienate the lands and permanent injunction was issued restraining him from committing acts of waste. The appeal by 'the husband' was dismissed. The appellant, being not a party to the earlier suit, when he was committing acts of waste the respondent filed another suit against 'the husband' and the appellant for perpetual injunction restraining them from committing the acts of waste. The suit was decreed. Therein the validity of the appellant's title was left open. The respondent filed another suit in Court of Subordinate Judge for declaration of his title and possession against the appellant. The trial court by judgment and decree, decreed the suit and granted mesne profits. On appeal, it was confirmed. The second appeal was dismissed. Thus the conflict of judicial opinion among the High Courts in interpretation of Explanation VIII to Section 11 of the CPC was under appeal.

**Held:** The court held that Section 11 should be read in harmony with explanation VIII. An order or an issue arising directly and substantially between the parties and decided finally by the competent courts or tribunal even though of limited jurisdiction , will operate as res judicata in a subsequent suit or proceeding.

## COMPETITION ACT, 2002

**Subject Matter :** Prohibition of abuse of dominant position.

**Relevant Section :** Section 4 : The unfair or discriminatory condition and price in purchase or sale of goods or service shall not include such discriminatory condition or price which may be adopted to meet the competition.

**Key Issue :** Is this process legal under the Competition Act, 2002?

**Citation Details :** UPSE Securities Limited vs. National Stock Exchange of India Limited (19.02.2013 - CCI): [MANU/CO/0016/2013](#)

**Summary Judgment :**

**Facts:** The informant is a body corporate and a wholly owned subsidiary of UP Stock Exchange Limited (UPSE), a Regional Stock Exchange (RSE). The opposite party is a national level stock exchange. As per informant since the operationalisation of the opposite party in 1994, the turnover of the RSEs (including UPSE) started eroding which adversely affected their operations. In 1999, the Securities and Exchange Board of India (SEBI) envisaged a route to rescue the RSEs. The suggested route required the RSEs to form a subsidiary company. This subsidiary was permitted to acquire membership of stock exchanges such as NSE (the opposite party), BSE (Bombay Stock Exchange) etc. and the members of the RSEs could obtain sub-brokery of the subsidiary company and could trade there. UPSE accordingly formed a subsidiary (the informant) in the year 2000 and obtained membership of BSE. In response to the constant demand from its members, the informant obtained membership of NSE in 2009 by paying a high deposit (Rs. 2.71 crores) to enable the members of UPSE to trade at the opposite party stock exchange as sub brokers.

**Held:** The definition of relevant market proposed by the informant viz 'securities market in India' seems to be correct. Unlike the Monopolies and Restrictive Trade Practices Act, 1969, dominance in itself is not prohibited by the Competition Act, 2002. It is only abuse of dominance which the Act intends to proscribe. Undoubtedly, the opposite party treated the RSE members (including informant) differently from other corporate members. However, differential treatment in itself cannot always be discriminatory. The notion of equality enshrined under the Indian Constitution recognizes reasonable classification and conceives different treatment may be accorded to different classes. In view of the foregoing, it appears that the conditions imposed by opposite party on RSE members (including informant) were necessary for investors' protection. Transactions between opposite party and ordinary corporate members on one hand, and between opposite party and RSE Members on the other were therefore not comparable. The opposite party's conduct therefore does not seem to be in contravention of the provisions of the Act.

**Subject Matter :** Abuse of dominant position; Anti-competitive agreement; Relevant market.

**Relevant Section :**

Section 4(2) : The unfair or discriminatory condition and price in purchase or sale of goods or service shall not include such discriminatory condition or price which may be adopted to meet the competition.

Section 3 : No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

Section 2(r): "relevant market" means the market as determined by the Commission with reference to the relevant product or the relevant geographic market or with reference to both the markets.

Section 2(s): "relevant geographic market" means a market comprising the area in which the conditions of competition are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

Section 2(t): "relevant product market" means a market comprising all those products or services which are regarded as interchangeable.

**Key Issue :**

Whether there is any abuse of dominant position in relevant market by Opposite Parties?

Whether Opposite Parties have violated provisions of Section 3 of Act as has been alleged?

Whether relevant market has been rightly determined in instant case?

**Citation Details :** Shamsher Kataria Informant vs. Honda Siel Cars India Ltd. (25.08.2014 - CCI): [MANU/CO/0066/2014](#)

**Summary Judgment :**

**Facts:** The present information has been filed alleging anti-competitive practices on part of the OPs whereby the genuine spare parts of automobiles manufactured by OP-1, OP-2 and OP-3, respectively, are not made freely available in the open market. It has also been alleged that even the technological information, diagnostic tools and software programs required to maintain, service and repair the technologically advanced automobiles manufactured by each of the aforesaid OPs were not freely available to the independent repair workshops. The OPs and their respective dealers, as a matter of policy, refuse to supply genuine spare parts and technological equipment for providing maintenance and repair services in the open market and in the hands of the independent repairers. By restricting the sale and supply of the genuine spare parts, diagnostic tools/equipment, technical information required to maintain, service and repair the automobiles manufactured by the respective OPs, have effectively created a monopoly over the supply of such genuine spare parts and repair/maintenance services and, consequently, have indirectly determined the prices of the spare parts and the repair and maintenance services. Additionally, such restrictive practice carried out by the OPs in conjunction with their respective authorized dealers, amounts to denial of market access to independent repair workshops.

**Held:** (a) Independent service providers were customers of OEMs in aftermarket and further competed with OEMs in repairs and maintenance service aftermarket. Such practices amount to denial of market access by OEMs under Section 4(2)(c) of Act. Further, such denial of market access was specifically aimed at adopting a course of conduct with a view to exclude a competitor from market by means other than legitimate competition and such exclusionary abusive conduct allowed OEMs to further strengthen their dominant position and abuse it.

(b) Consequently since exception under Section 3(5)(i) of Act was not applicable to agreements between OEMs and OESs, contravention found by Commission under Sections 3(4)(c) & (d) read with Section 3(1) of Act stood established. Further more as Commission noted that both in mature and developing competition law regimes of world, refusal to access branded or alternate spare parts and technical manuals/repair tools, necessary to repair sophisticated consumer durable products, such as automobiles, was frowned upon, since such practices restricted consumer choice besides foreclosing market for repairs/maintenance contracts by independent repairers. Practices of OEMs were found to restrict consumer choice and foreclose after markets and were held to be anti-competitive in nature.

(c) An owner of any brand of automobile, manufactured by an OEM, can get his car serviced or repaired from repair shops across territory of India. Whether such repair shops are authorized dealer outlets or those run by independent repairers conditions of competition for sale of spare parts and after-sale repair and maintenance services are homogeneous across

territory of India and therefore relevant geographic market for present case consists of entire territory of India. Therefore, this Commission was of view that relevant geographic market, as defined under Section 2(s) of Act, consisted of entire territory of India. Therefore Commission was of opinion that there existed two separate relevant markets; one for manufacture and sale of cars and other for sale of spare parts and repair services in respect of automobile market in entire territory of India.

**Subject Matter :** Determination of dominance in the relevant market.

**Relevant Section :** Section 4 : The unfair or discriminatory condition and price in purchase or sale of goods or service shall not include such discriminatory condition or price which may be adopted to meet the competition.

**Key Issue :** Whether CIL and its subsidiaries are dominant in said relevant market?

**Citation Details :** Maharashtra State Power Generation Company Ltd. and Ors. vs. Mahanadi Coalfields Ltd. and Ors. (24.03.2017 - CCI): [MANU/CO/0028/2017](#)

**Summary Judgment :**

**Facts:** MCL instead of signing/executing coal supply agreements/fuel supply agreements as required under the new Coal Distribution Policy, 2007 (NCDP) executed/signed MoUs which did not cover all aspects of supply and issues. Aspects like quality control, grade failure, short supply, joint sampling etc., had not been detailed/enumerated in clear terms and conditions. Further, the Informant received a model Coal Supply Agreement (CSA) proposed to be executed between it and MCL. The clauses of CSA demonstrated that the conditions of supply as proposed were onerous and, as such, negated the purpose of securing firm supply of coal on the basis of a contractual arrangement in terms of NCDP. The proposed CSA contained clauses which were burdensome and capable of causing implementation issues imposing additional cost on MAHAGENCO leading to higher cost of electricity which would be eventually passed on to consumers. While the draft CSA was under negotiation, MCL sent a draft MoU to MAHAGENCO which had to be executed simultaneously at the time of execution of CSA. The draft MoU attempted to further dilute the obligations of MCL to supply coal under the proposed CSA.

**Held:** In view of statutory and policy scheme, coal companies have acquired a dominant position in relation to production and supply of coal. Dominant position of CIL is acquired as a result of policy of Government of India by creating a public sector undertaking in name of CIL and vesting ownership of private mines in it. Merely being a Public Sector Undertaking and mention of social objectives in memorandum cannot negate the market power exercised by CIL in view of commercial freedom enjoyed by it. Commission is of considered opinion that, CIL through its subsidiaries operates independently of market forces and enjoys dominance in relevant market.

**Subject Matter :** Price Fixing/ Bid-rigging.

**Relevant Section :** Section 3(3)d: Any agreement entered into between enterprises engaged in identical or similar trade of goods or provision of services, which directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

**Key Issue :** Did the opposite parties enter into any agreement or indulge in any cartel like conduct that was in contravention of Section 3 of the Act?

**Citation Details :** FICCI Multiplex Association of India vs. United Producers/Distributors Forum and Ors. (25.05.2011 - CCI): [MANU/CO/0018/2011](#)

**Summary Judgment :**

**Facts:** UPDF is an association of film producers and distributors which includes both corporate houses and individuals independent film producers and distributors. The AMPTPP and FTPGI are the members of UPDF. Further, UPDF, AMPTPP and FTPGI produce and distribute almost 100% of the Hindi Films produced/ supplied/ distributed in India and thereby exercise almost complete control over the Indian Film Industry. UPDF had instructed all producers and distributors including those who are not the members of UPDF, not to release any new film to the members of the informant for the purposes of exhibition at the multiplexes operated by the members of the informant. because of the conflict between the producers/distributors and the members of the informant on revenue sharing ratio.

**Held:** The contravention of the provisions of Section 3(3) of the Act has been established in as much as the producers and distributors behaved in a cartel-like manner. They came together on a common platform, by raising the bogey of survival and indulged in concerted action after talking to each other openly under media glare and took joint decision not to supply films to the multiplex owners with a view to garner higher revenue for themselves. However, after the notification of the relevant provisions of the Act, there cannot be any doubt that it is the bound duty of the persons/enterprises to ensure that knowingly or unknowingly they do not infringe the provisions of the Act and to take necessary and concrete steps in order to maintain a competition compliance programme. The opposite parties are directed to refrain from indulging in such anti-competitive practices in future and are further directed to file an undertaking to this effect within one month from the date of receipt of the order. A penalty of rupees one lakh is also imposed on each of the 27 opposite parties. This penalty shall be paid by the opposite parties within one month from the date of receipt of the copy of this order.

**Subject Matter :** Regulation on combination.

**Relevant Section :** Section 6(1): No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

**Key Issue :** Whether Tribunal was right in setting aside order passed by Competition Commission whereby penalty of Rupees One Crore was imposed on Respondents on ground of non-compliance of provisions contained in Section 6(2) of Act?

**Citation Details :** Competition Commission of India vs. Thomas Cook (India) Ltd. and Ors. (17.04.2018 - SC): [MANU/SC/0405/2018](#)

**Summary Judgment :**

**Facts:** The TCIL is engaged in travel and travel related services. The TCISIL is also engaged in travel and travel related services and is a subsidiary of the TCIL and is also a registered corporate agent of Bajaj Allianz General Insurance Company Limited, which is engaged in the business of selling insurance to outbound travelers, as well as health insurance, motor insurance, personal accident insurance etc. SHRIL is engaged in the business of providing premium hotel services, vacation ownership services, normal hotel services like renting of rooms, restaurants, holiday activities etc. It also arranges meetings, incentives, conference and events for its corporate clients. The Board of Directors of the aforesaid three companies approved a Scheme for demerger/amalgamation. The said Scheme contemplated the following:

- (a) Demerger: Resorts and timeshare business of SHRIL were to be transferred by way of demerger from SHRIL to TCISIL in lieu of which equity shares of TCIL would be issued to shareholders of SHRIL as per the ratio in the 'Scheme'; and
- (b) Amalgamation: SHRIL with its residual business would be amalgamated into TCIL in

lieu of equity shares to be issued to the shareholders of SHRIL as per the ratio in the Scheme. For the purpose of implementing the above transactions, the Respondents entered into a Merger Cooperation Agreement ) on the same day. On the very same day, by another resolution of the Board of Directors of the Respondents, the following transactions were approved and executed -

- (i) Share Subscription Agreement (SSA): TCISIL was to subscribe 2,06,50,000 shares of SHRIL pursuant to a preferential allotment (amounting to 22.86% of SHRIL of equity share capital of SHRIL on fully diluted basis);
- (ii) Share Purchase Agreement (SPA): TCISIL was to acquire 19.94% of equity share capital of SHRIL on the fully diluted basis from certain existing shareholders and promoters of SHRIL.
- (iii) Open Offer by TCIL and TCISIL to purchase 26% of the equity share capital from public shareholders of SHRIL, in terms of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Held: Once a particular transaction or a series of transactions falls within purview of combination, it was obligatory to report same to Commission under Section 6 of Act. Section 6(1) prohibited combinations which cause or likely to cause an adverse effect on competition and such a combination shall be void. Section 6(2) of Act required that, advance notice had to be given of proposal to enter into a combination and that had to be given within 30 days of approval of proposal relating to merger or amalgamation, execution of any agreement or other document or acquisition referred to in Section 5(a) of Act. Section 6(2) made it clear that, no combination shall come into effect until 210 days had elapsed from the date on which notice had been given to Commission under Section 6(2) and Commission had passed orders under Section 30(1), whichever was earlier. We find that in the facts and circumstances of the case, the order passed by the Commission was just and proper and in accordance with law, which the Tribunal set aside on wrong premises. Thus, the order of the Tribunal cannot be said to be legally sustainable. The nominal penalty has been imposed by the Commission of Rupees One crore only considering the facts and circumstances of the case and that there was a violation of the provision. Thus, we find no ground to interfere with the nominal penalty that has been imposed in the instant case.

#### Appreciable Adverse Effect on Competition

Section 3(3)(b) read with Section 3(1): No enterprise shall enter into any agreement which causes or is likely to cause an appreciable adverse effect on competition within India. Any agreement entered into between enterprises engaged in identical or similar trade of goods or provision of services, which limits or controls production, supply, markets, technical development, investment or provision of services, shall be presumed to have appreciable adverse effect on competition.

Section 19(3): The Commission shall determine the appreciable adverse effect on competition based on the factors that if there is creation of barriers to new entrants in the market, driving existing competitors out of the market, foreclosure of competition by hindering entry into the market, accrual of benefits to consumers, improvements in production or distribution of goods or provision of services, promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

Whether the action of KFCC and other associations caused Appreciable Adverse Effect on Competition in the market?

Eros International Media Limited vs. Central Circuit Cine Association, Indore, Film Distributors Association, Kerala, Northern India Motion Pictures Association and Motion Pictures Association (16.02.2012 - CCI): MANU/CO/0019/2012

Facts: The said film bodies/associations have indulged in various anticompetitive activities in

violation of the provisions of sections 3 and 4 of the Act viz; asking the producers-distributors to compulsorily register their films before release, with them in territories under their control, forcing them to abide by their unfair and discriminatory rules, directing the members not to deal with the non-members, prescribing undue long holdback period for satellite, DTH and other rights in respect of exhibition of films and imposing bans, penalties and giving a call of boycott against those who violate the rules and regulations of the associations.

**Held:** It was felt that the acts and conduct of the associations established that they have caused restrictions on free and fair competition in the market. There was a foreclosure of competition in the areas under the control of KFCC, since non-Kannada films could not be released in all the cinemas but only in restricted theatres. Further, hold back of films from exhibition of films on other media for a period prescribed as on date, ensures that films could not be exploited on other media competing with the theatres leading to the loss to the producers-distributors. restrictions on non-Kannada films in areas under the control of KFCC also did not benefit the consumers since the consumers are deprived of watching movies of their choice. The aforesaid analysis of factors as mentioned in Section 19(3) established that the acts and conduct of the associations instead of bringing in pro-competitive effects caused AAEC in the market. In light of the foregoing, it was held that Karnataka Film Chamber of Commerce (KFCC), Northern India Motion Picture Association (NIMPA), Motion Picture Association (MPA), Central Circuit Cine Association (CCCA), Film Distributors Association, Kerala (FDA) and Telangana Telugu Film Distributors Association (TTFDA) had contravened the provisions of Section 3(3)(b) read with Section 3(1) of the Act and had also caused appreciable adverse effect on competition in India in terms of Section 19(3) of the Act. However, it was felt that in absence of existence of such a joint agreement among all these associations, the findings of DG did not hold good. The associations named were individually held in contravention of the provisions of Section 3(3)(b) read with Section 3(1) of the Act.

## CONSTITUTION OF INDIA

**Subject Matter :** Freedom of speech and expression

**Relevant Article :** Article 19(1)(a)

**Key Issue :** A delicate question of balancing the powers of two constitutional authorities in this appeal has raised larger issues of the freedom of speech and expression of the media, the right to information of citizens and the accountability of the judiciary to the nation.

**Citation Details :** The Chief Election Commissioner of India vs. M.R. Vijayabhaskar and Ors. (06.05.2021 - SC) : [MANU/SC/0341/2021](#)

**Summary Judgment :**

**Facts :** The present Petition arose from order of a Division Bench of Madras High Court was entertaining petition under Article 226 of the Constitution to ensure that COVID-related protocols are followed concerned polling booths. During the hearings, the Division Bench alleged to have made certain remarks, attributing responsibility to the Election Commission (EC) for the present surge in the number of cases of COVID-19, due to their failure to implement appropriate COVID-19 safety measures and protocol during the elections. EC has

alleges the remarks to be baseless, and tarnishing its image, it being also an independent constitutional authority.

**Held :** The Court ruled that freedom of speech and expression includes reporting on court proceedings, including oral observations made by judges. The court finds no substance in the prayer of the EC for restraining the media from reporting on court proceedings. This Court stands as a staunch proponent of the freedom of the media to report court proceedings. This we believe is integral to the freedom of speech and expression of those who speak, of those who wish to hear and to be heard and above all, in holding the judiciary accountable to the values which justify its existence as a constitutional institution. Appeal stands disposed of.

**Subject Matter :** Publication of pending criminal cases of candidates contesting the election.

**Relevant Article :**

**Article 129** - The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

**Article 142 - (1)** The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it and that shall be enforceable throughout the territory of India.

**Key Issue :** Whether it is mandatory for the candidates contesting in the election to disclose any and all criminal proceedings pending against them?

**Citation Details :** Rambabu Singh Thakur vs. Sunil Arora and Ors. (13.02.2020 - SC) :

[MANU/SC/0172/2020](#)

**Summary Judgment :**

**Facts :** Due to the increased involvement of politicians and a spike in the criminal activities in politics, the concern was raised as to why such candidates were allowed to contest in the elections in the first place.

**Held :** Demanding the explanation for allowing such candidates against whom criminal proceedings were pending, the Apex Court issued the following directions as to the code of conduct on the part of the Political Parties:

- a. It is mandatory for political parties to upload in their website the detailed information of candidates along with pending criminal cases against them.
- b. The political parties must mention the reasons for selecting candidates and also as to why other individuals, who did not have any criminal antecedents could not be selected.
- c. The reasons as to selection shall be with reference to the qualifications and merits of the candidate, and not merely winning-ability.
- d. The information shall be published on a local and national newspaper and on the official social media platforms of the political party.
- e. The political party shall submit a report of with the Election Commission within 72 hours of the selection of the said candidate.

**Subject Matter :** Internet is a fundamental right.

**Relevant Article :**

**Article 19(1)(g)** - All citizens shall have the right to practise any profession, or to carry on any occupation, trade or business.

**Article 19(6)** - Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular pertaining to technical and professional qualifications.

**Key Issue :** Whether freedom of speech and expression and freedom to practise any profession, or to carry on any occupation, trade or business over Internet was part of fundamental rights and imposition of restrictions under Section 144 of Code of Criminal Procedure were valid?

**Citation Details :** Anuradha Bhasin and Ors. vs. Union of India (UOI) and Ors. (10.01.2020 - SC) : [MANU/SC/0022/2020](#)

**Summary Judgment :**

**Facts :** The Constitutional Order was issued by the President, applying all provisions of the Constitution of India to the State of Jammu and Kashmir. In light of the prevailing circumstances, on the same day, the District Magistrates, apprehending breach of peace and tranquillity, imposed restrictions on movement and public gatherings by virtue of powers vested under Section 144, Code of Criminal Procedure. Due to the said restrictions, the Petitioner claims that the movement of journalists was severely restricted. Aggrieved by the same, the Petitioners filed petition seeking issuance of an appropriate writ for setting aside or quashing any and all order(s), notification(s), direction(s) and/or circular(s) issued by the Respondents under which any/all modes of communication including internet, mobile and fixed line telecommunication services have been shut down or suspended or in any way made inaccessible or unavailable in any locality. Further, the Petitioners sought the issuance of an appropriate writ or direction directing Respondents to immediately restore all modes of communication including mobile, internet and landline services throughout Jammu and Kashmir in order to provide an enabling environment for the media to practice its profession.

**Held :** The internet is also a very important tool for trade and commerce. The globalization of the Indian economy and the rapid advances in information and technology have opened up vast business avenues and transformed India as a global IT hub. There was no doubt that there are certain trades which are completely dependent on the internet. Such a right of trade through internet also fosters consumerism and availability of choice. Therefore, the freedom of trade and commerce through the medium of the internet is also constitutionally protected under Article 19(1)(g), subject to the restrictions provided under Article 19(6).

**Subject Matter :** Right to marry - Consent of family not needed once two adults decide to marry.

**Relevant Article : Article 21 - Protection of life and personal liberty:** No person shall be deprived of his life or personal liberty except according to procedure established by law.

**Key Issue :** Whether directions need to be issued for the protection of Petitioners?

**Citation Details :** Laxmibai Chandaragi B. and Ors. vs. The State of Karnataka and Ors. (08.02.2021 - SC) : [MANU/SC/0068/2021](#)

**Summary Judgment :**

**Facts:** A father lodged a complaint stating that his daughter was missing. In pursuance to the complaint, FIR of a missing person was registered and the investigation officer recorded the statement of the missing person's parents and her relatives and took call details. In the course of investigation it was found that the said daughter married Petitioner 2. She sent her marriage certificate to her parents through whatsapp revealing the factum of marriage to Petitioner 2. It was the case of the Petitioners that the uncle of the said daughter was threatening them. Both the parties were well educated. They developed liking for each other during their employment. However, there was resistance from the parents of Petitioner 1. Both Petitioners are majors and Hindu by religion.

**Held:** It was held that the consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into a wedlock and that their consent has to be piously given primacy. It was in that context it was further observed that the choice of an individual was an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice. Such a right or choice was not expected to succumb to the concept of class honour or group thinking. The Petitioners having filed the present petition, no further statement was really required to be recorded and thus, the proceedings in pursuance to the FIR were quashed.

**Subject Matter :** Freedom of Press relating to Court proceedings.

**Relevant Article : Article 19(1)(a):** All citizens shall have the right - to freedom of speech and expression.

**Key Issue :** Whether a restrain can be put on media from reporting court proceedings?

**Citation Details :** The Chief Election Commissioner of India vs. M.R. Vijayabhaskar and Ors. (06.05.2021 - SC) : [MANU/SC/0341/2021](#)

**Summary Judgment :**

**Facts:** During the hearings regarding Covid Protocols to be followed at polling booths, the Division Bench of Madras High Court alleged to have made certain remarks, attributing responsibility to the Election Commission (EC) for the present surge in the number of cases of COVID-19, due to their failure to implement appropriate COVID-19 safety measures and protocol during the elections. EC has alleged the remarks to be baseless, and tarnishing of its image, it being also an independent constitutional authority. Hence, the present appeal.

**Held:** Freedom of speech and expression extends to reporting the proceedings of judicial institutions as well. Courts are entrusted to perform crucial functions under the law. Their work has a direct impact, not only on the rights of citizens, but also the extent to which the citizens can exact accountability from the executive whose duty it is to enforce the law. The power of judges must not be unbridled and judicial restraint must be exercised, before using strong and scathing language to criticize any individual or institution. However, these oral remarks are not a part of the official judicial record, and therefore, the question of expunging them does not arise. It is right to say that a formal opinion of a judicial institution is reflected through its judgments and orders, and not its oral observations during the hearing. Hence, in view of the above discussion, no substance found in the prayer of the EC for restraining the media from reporting on court proceedings. This Court stands as a staunch proponent of the freedom of the media to report court proceedings.

**Subject Matter :** Deportation of Rohingya refugees.

**Relevant Article :**

**Article 14:** Equality before law -The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

**Article 19(1)(e):** All citizens shall have the right - to reside and settle in any part of the territory of India.

**Article 21:** Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.

**Key Issue :** Whether Respondent should be directed to release Rohingya refugees and not to deport them?

**Citation Details :** Mohammad Salimullah and Ors. vs. Union of India (UOI) and Ors. (08.04.2021 - SC) : [MANU/SC/0246/2021](#)

**Summary Judgment :**

**Facts:** Pending disposal of the main writ petition praying for the issue of an appropriate writ directing the Respondents to provide basic human amenities to the members of the Rohingya Community, who have taken refuge in India, the Petitioners who claim to have registered themselves as refugees with the United Nations High Commission for refugees, had filed present interlocutory application seeking the release of the detained Rohingya refugees and a direction to the Respondents not to deport the Rohingya refugees who have been detained in the sub-jail in Jammu.

**Held:** There was no denial of the fact that India was not a signatory to the Refugee Convention. There was no doubt that the National Courts can draw inspiration from International Conventions/Treaties, so long as they were not in conflict with the municipal law. It was also true that the rights guaranteed under Articles 14 and 21 are available to all persons who may or may not be citizens. But the right not to be deported, is ancillary or concomitant to the right to reside or settle in any part of the territory of India guaranteed

under Article 19(1)(e). The Rohingyas in Jammu, on whose behalf the present application was filed, shall not be deported unless the procedure prescribed for such deportation was followed.

**Subject Matter :** Constitutionality of Maratha Quota

**Relevant Article : Article 15:** Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth - No state shall discriminate among the citizens based on the above mentioned grounds. Article 16: There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

**Key Issue :** Whether Act in question ultravires Articles 15(4) and 16(4) of the Constitution of India, 1950 and also against the precedent laid down in the case of Indira Sawhney?

**Citation Details :** Jaishri Laxmanrao Patil vs. The Chief Minister and Ors. (09.09.2020 - SC) : MANU/SC/0686/2020; Jaishri Laxmanrao Patil and Ors. vs. The Chief Minister and Ors. (05.05.2021 - SC) : [MANU/SC/0340/2021](#)

**Summary Judgment :**

**Facts:** The Maharashtra State Reservation (SEBC) Act, 2018 declared Marathas to be a "Socially and Educationally Backward Class", and provided reservations to the extent of 16 per cent of the total seats in educational institutions including private educational institutions and 16 per cent of the total appointments in direct recruitment for public services and posts under the State. Constitutional validity as challenged by way of PILs was upheld by the High Court, though it reduced the quantum of reservations from 16% to 12% in respect of the educational institutions and from 16% to 13% in respect of public employment. Hence, the present appeal.

**Held:** The State of Maharashtra has not shown any extraordinary situation for providing reservations to Marathas in excess of 50 per cent. Maratha community which comprises of 30 per cent of the population in the State of Maharashtra cannot be compared to marginalized Sections of the society living in far flung and remote areas. The State has failed to make out a special case for providing reservation in excess of 50 per cent. These matters shall be placed before Hon'ble The Chief Justice of India for suitable orders. Admissions to educational institutions for the academic year 2020-21 shall be made without reference to the reservations provided in the Act. Admissions made to Post-Graduate Medical Courses shall not be altered. Appointments to public services and posts under the Government shall be made without implementing the reservation as provided in the Act.

**Subject Matter :** Habeas Corpus Petitions

**Relevant Article :** Article 32: Remedies for enforcement of rights conferred by this Part - The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

**Key Issue :** Whether the accused is entitled to be released for medical assistance?

**Citation Details :** Kerala Union of Working Journalists vs. Union of India (UOI) and Ors. (28.04.2021 - SC) : [MANU/SC/0332/2021](#)

**Summary Judgment :**

**Facts:** The present petition sought for release of alleged detenu, who was allegedly taken into illegal custody without serving any notice or order. The petition was contested on the ground of maintainability. However release on bail was sought through an interim application owing to his deteriorating health condition.

**Held:** Alleged detenu has alternative remedies including the right to approach the competent court for the grant of bail and/or the High Court under Article 226 of the Constitution of India and/or under Section 482 Code of Criminal Procedure for redressal of his grievances. Owing

to the apparent precarious health condition of the arrestee, it is necessary to provide adequate and effective medical assistance to him. As soon as arrestee recovers, and the Doctors certify him fit to be discharged, he would be shifted back to concerned Jail. Arrestee in the meanwhile at liberty to avail appropriate remedy in accordance with law.

**Subject Matter :** Vaccination Policy - Pandemic Management

**Relevant Article :**

**Article 14: Equality before law** - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

**Article 21: Protection of life and personal liberty** - No person shall be deprived of his life or personal liberty except according to procedure established by law.

**Key Issue :** Whether government has prepared road map on vaccination policy further?

**Citation Details :** In Re: Distribution of Essential Supplies and Services During Pandemic (31.05.2021 - SC) : [MANU/SC/0365/2021](#)

**Summary Judgment :**

**Facts:** The present suomotu proceedings were in reference to management of second wave of COVID-19 pandemic on the issues of vaccination policy, supply of essential drugs, supply of medical oxygen, medical infrastructure, augmentation of healthcare workforce and the issues faced by them, and issues of freedom of speech and expression during the COVID-19 pandemic. There were observations and directions issued.

**Held:** Union of India directed to file an affidavit, which shall address the issues and questions raised, wherein it shall ensure that each issue is responded to individually and no issue is missed out. Affidavit should provide all the information pertaining to population that has been vaccinated; purchase history of vaccines, etc. and an outline for how and when the Central Government seeks to vaccinate the remaining population in phases 1, 2 and 3 as well as the steps being taken by the Central Government to ensure drug availability for mucormycosis.

**Subject Matter :** Equality of opportunity in matter of public employment

**Relevant Article : Article 16:** It guarantees equality of opportunity for all citizens in matters employment under state services

**Key Issue :** Discrimination on the basis of caste?

**Citation Details :** Champakam Dorairajan and Ors. vs. The State of Madras (27.07.1950 - MADHC): [MANU/TN/0014/1951](#)

**Summary Judgment :**

**Facts:** Champakam Dorairajan, a brahmin girl from State of Madras was denied admission in medical college even after qualifying the eligibility criteria, due to some Government Order. She moved the Supreme Court and claimed that she had been discriminated on the basis of her birth(caste).

**Held:** The Supreme court struck down the entire government order and held that caste based reservations was against Article 16(2) of the Constitution. Government as forced to amend the constitution for the first time and add 'clause 4 to Article 15'

**Subject Matter :** Laws inconsistent with fundamental rights

**Relevant Article :**

**Articles 13:** This article states that the State shall not make any law which takes away or abridges the fundamental rights of the citizens.

**Article 368:** This article states the Power of Parliament to amend the Constitution and procedure therefore

**Key Issue :** Whether First, Fourth and Seventeenth Amendment are unconstitutional and inoperative as they are violating Article 14 and Article 19(1)(f) & (g)?

**Citation Details :** I.C. Golak Nath and Ors. vs. State of Punjab and Ors. (27.02.1967 - SC): [MANU/SC/0029/1967](#)

**Summary Judgment :**

**Facts:** The legal representaitves of the petitioner were claiming against an order that an area of 418 standard acres and 9-1/4 units was surplus in the hands of the petitioners under the provision of Punjab securityy of Land Tenure Act. The petitions alleged against the provisions of the said act where under the said area ws declared surplius were void on the gound that it infringed their rights under Article 19 & 14 of the constitution and filed a writ under Article 32 challenging that Constitutional First, Fourth and Seventeenth Amendment are unconstitutional and inoperative as they are violating Article 14 and Article 19(1)(f) & (g).

**Held:** The court held that 1st, 4th and 17th amendments though abridged Fundamental rights were valid in the past and are valid for the future. Further the court also held that the powers of the Parliament are limited. The law made by the Parliament shall not be such that infringes and takes away the fundamental rights of the citizen provided by the Constitution.

**Subject Matter :** Abolition of titles and awards

**Relevant Article : Article 18:** Abolition of Titles

**Key Issue :** Validity of titles and privileges was challenged?

**Citation Details :** Madhav Rao Jivaji Rao Scindia Bahadur and Ors. vs. Union of India (UOI) and Ors. (15.12.1970 - SC): MANU/SC/0050/1970

**Summary Judgment :**

**Facts:** After independence rulers of various States were integrated with guarantee of payment of some amount known as privy purse along with 'gaddi' of State after some time order of 'derecognising' such rulers was passed by President. Validity of said Order challenged in Supreme Court.

**Held:** The Court abolished titles and privileges of India's erstwhile princely rule. Also abolished privy purses of India's erstwhile princely states

**Subject Matter :** Equality before law and Right to life

**Relevant Article :**

**Articles 14:** Guarantees equality before law or equal protection of law. Article 39A- Provides for free legal aid.

**Article 21:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Key Issue :** 24th, 25th ad 29th amendment were challenged?

**Citation Details :** Kesavananda Bharati Sripadagalvaru vs. State of Kerala (24.04.1973 - SC): MANU/SC/0445/1973

**Summary Judgment :**

**Facts:** The petitioner was the head of a Hindu Matt in a village in state of Kerala. He challenged the Kerala governement's attempts under two states land reforms acts, to impose restrictions on the management of its property without government interference. During that time major amendments to the constitution i.e. 24th, 25th and 29th, had been enacted by Indira Gandhi's government. All these amendments were challenged under this case.

**Held:** The Supreme Court gave power to Parliament to amend any part of the Constitution. The Court further added that such amendment shall not take away the fundamental rights of the citizen which are provided by the Constitution of India.

**Subject Matter :** Special Provisions as to elections to Parliament (Repealed)

**Relevant Article : Article 329A:** Provides for Special provision as to elections to Parliament in the case of Prime Minister and Speaker [Repealed]

**Key Issue :** Constitutional Validity of 39th Amendment to Constitution was challenged?

**Citation Details :** Indira Nehru Gandhi vs. Raj Narain and Ors. (24.06.1975 - SC): MANU/SC/0025/1975

**Summary Judgment :**

**Facts:** Raj Narain was a political contender against Indira Gandhi for Rae Bareilly and Mrs. Gandhi won the election. After polling results Raj Narain filed a case against her contending that she performed election malpractices. The Allahabad High Court found her guilty. On appeal to Supreme Court , the Supreme Court was going on vacation so they granted a conditional stay. Thereafter emergency was declared in the country due to internal disturbances. In the meantime Indira Gandhi passed 39th Amendment which introduced Article 329A which stated that election of Prime Minister and Speaker cannot be questioned in any court of law, and it can only be challenged before a committee framed by Parliament itself. Thus barring the Supreme Court to decide the pending Indira Gandhi's Case. Therefore, Constitutional Validity of 39th Amendment was challenged.

**Held:** The Supreme Court relied on landmark judgement of Kesvananda Bharti's case and held clause (4) of 329-A as unconstitutional and further held that Rule of Law, Democracy and Judicial Review are part of the basic structure and no amendment can do away with them.

**Subject Matter :** Laws inconsistent with fundamental rights

**Relevant Article : Article 13:** This article states that the State shall not make any law which takes away or abridges the fundamental rights of the citizens.

**Key Issue :** Whether the Tribunals constituted under Part XIV-A of the Constitution of India can be effective substitutes for the High Court in discharging the power of Judicial Review?

**Citation Details :** L. Chandra Kumar vs. Union of India (UOI) and Ors. (18.03.1997 - SC):

[MANU/SC/0261/1997](#)

**Summary Judgment :**

**Facts:** A number of Special Leave Petitions were filed forming a batch of matter brought before the Supreme Court in his case owing to their origin to separate decisions of different High Court's and several different provisions and enactments. These matters were basically pertaining to the constitutional validity of sub-clause(d) of clause (2) of Article 323A and sub-clause (d) of clause (3) of Article 323B of the Constitution of India and also regarding the constitutional validity of Administrative Tribunals Act 1985. Question to decide in this case was whether the Tribunals constituted under Part XIV-A of the Constitution of India can be effective substitutes for the High Court in discharging the power of Judicial Review.

**Held:** Supreme Court held that sub-clause(d) of clause (2) of Article 323A and sub-clause (d) of clause (3) of Article 323B of the Constitution of India are unconstitutional and further through Article 32 and the High Court through Article 226 have the power to Judicial Review and no amendment can curtail this power.

**Subject Matter :** Laws inconsistent with fundamental rights and Right to Life

**Relevant Article :**

**Article 13:** This article states that the State shall not make any law which takes away or abridges the fundamental rights of the citizens.

**Article 21:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Key Issue :** Validity of Preventive Detention Law?

**Citation Details :** A.K. Gopalan vs. The State of Madras (19.05.1950 - SC):

[MANU/SC/0012/1950](#)

**Summary Judgment :**

**Facts:** Gopalan was detained under a preventive detention law . He moved the court saying that his detention was unlawful as it violated his right to personal liberty.

**Held:** The words 'personal liberty' used under Article 21 just meant procedural due process' and preventive detention law under which Gopalan was detained was valid even if it violated his right to movement. This doctrine was commonly known as 'procedural due process'

**Subject Matter :** Laws inconsistent with fundamental rights

**Relevant Article : Article 13:** This article states that the State shall not make any law which takes away or abridges the fundamental rights of the citizens.

**Key Issue :**

**Citation Details :** Basheshar Nath vs. The Commissioner of Income Tax, Delhi and Rajasthan and Ors. (19.11.1958 - SC): MANU/SC/0064/1958

**Summary Judgment :**

**Facts:** In this case the petitioner concealed a huge amount of his income and his case was referred to investigating commission under Section 5A. In order to avoid heavier penalty he agreed for settlement under Section 8A. Meanwhile the Supreme Court in another case held Section 5A as unconstitutional and violative of Article 14 of the Indian Constitution. The petitioner challenged the enforceability of the settlement on this basis.

**Held:** This case established Doctrine of Waiver and Supreme Court held that in Indian Constitution fundamental rights cannot be waived off.

**Subject Matter :** Equality before law

**Relevant Article : Article 14:** Guarantees equality before law or equal protection of law

**Key Issue :** Validity of transfer of post was challenged?

**Citation Details :** E.P. Royappa vs. State of Tamil Nadu and Ors. (23.11.1973 - SC):  
MANU/SC/0380/1973

**Summary Judgment :**

**Facts:** The petitioner was a member of the Indian Administrative Service in the Cadre of the State of Tamil Nadu. When the post of Chief Secretary of the state fell vacant the petitioner was selected for the post. But then State government gave permission to the creation of a temporary post of Deputy Chairman in the State Planning Commission in the grade of Chief Secretary. After that he was transferred and appointed to the post of Officer on Special Duty. While the post of Chief Secretary was given to a junior cadre officer to the petitioner. The petitioner filed a writ petition under Article 32 asking a mandamus or any other appropriate writ challenging the validity of the transfer and alleged that such act was violative of Article 14 & 16 and was done in malafide exercise of power.

**Held:** The Supreme Court however dismissed the petition but held that if any action is arbitrary, we shall assume that it is opposed to equality.

**Subject Matter :** Equality before law

**Relevant Article : Article 14:** Guarantees equality before law or equal protection of law

**Key Issue :** Whether the pay scale of the petitioner who was a driver in the Delhi Police Force be same to that of the drivers of Delhi Administration?

**Citation Details :** Randhir Singh vs. Union of India (UOI) and Ors. (22.02.1982 - SC):  
[MANU/SC/0234/1982](#)

**Summary Judgment :**

**Facts:** In this case the issue to be decided was whether the pay scale of the petitioner who was a driver in the Delhi Police Force be same to that of the drivers of Delhi Administration. It was held that the functions performed by both, the petitioner and other drivers is the same. however it was contended that the duties of the petitioner are onerous.

**Held:** The court directed to fix a pay-scale atleast on a par for the petitioner and Delhi Police Force driver constables.

**Subject Matter :** Right to Life

**Relevant Article : Article 21:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Key Issue :** Whether the petitions are maintainable even if the right to move to court for the enforcement of fundamental right under Article 21 is suspended?

**Citation Details :** Additional District Magistrate, Jabalpur vs. Shivakant Shukla (28.04.1976 - SC): [MANU/SC/0062/1976](#)

**Summary Judgment :**

**Facts:** During emergency in India, Fundamental rights were suspended i.e. nobody can go to court for invoking the infringement of their fundamental rights. Emergency made such proclamations due to which many people were detained under various laws. Few of them moved to High Courts seeking a writ of Habeas Corpus. The Government said that since the right to move to court for the enforcement of fundamental right under Article 21 is suspended, the petitions are not maintainable. These cases went to appeal to Supreme Court.

**Held:** Supreme Court refused to recognise fundamental rights that citizens acquire since birth. In this case, court held that during emergency, fundamental rights cannot be enforced.

**Subject Matter :** Right to Life

**Relevant Article : Article 21:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Key Issue :** Whether non disclosure of reason to impound the passport breached the fundamental rights of the petitioner?

**Citation Details :** Maneka Gandhi vs. Union of India (UOI) and Ors. (25.01.1978 - SC): [MANU/SC/0133/1978](#)

**Summary Judgment :**

In this case Maneka Gandhi's passport was impounded. When she wrote to the Regional Passport Officer asking for reasons to do so, the officer declined to state reasons citing public interest. She filed a writ petition in Supreme Court stating that this act breached her fundamental rights.

**Held:** Supreme Court said that Article 14, 19 and 21 are interlinked and any such procedure which deprives life or personal liberty under Article 21 then that procedure/law shall satisfy the test of Article 14 & Article 19 as well. This led to era of 'substantive due process'

**Subject Matter :** Right to Education

**Relevant Article :**

**Article 14:** Guarantees equality before law or equal protection of law.

**Article 15:** No discrimination on grounds of religion, race, caste, sex or place of birth.

**Article 21:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Key Issue :** Whether the state was duty bound to provide education, and that the private institutions that discharge the state's duties were equally bound not to charge a higher fee than the government institutions?

**Citation Details :** Miss. Mohini Jain vs. State of Karnataka and Ors. (30.07.1992 - SC):

[MANU/SC/0357/1992](#)

**Summary Judgment :**

**Facts:** The challenge in this case was to a notification of June 1989, which provided for a fee structure, whereby for government seats, the tuition fee was Rs. 2, 000 per annum, and for students from Karnataka, the fee was Rs. 25,000 per annum, while the fee for Indian students from outside Karnataka, under the payment category, was Rs. 60,000 per annum. It had been contended that charging such a discriminatory and high fee violated constitutional guarantees and rights. This attack was sustained, and it was held that there was a fundamental right to education in every citizen, and that the state was duty bound to provide the education, and that the private institutions that discharge the state's duties were equally bound not to charge a higher fee than the government institutions.

**Held:** The Court then held that any prescription of fee in excess of what was payable in government colleges was a capitation fee and would, therefore, be illegal.

**Subject Matter :** Right to Legal Aid

**Relevant Article :**

**Articles 14:** Guarantees equality before law or equal protection of law. Article 39A: Provides for free legal aid.

**Article 21:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Key Issue :** Legal Aid to under trial prisoners on habeas corpus petitions?

**Citation Details :** Hussainara Khatoon and Ors. vs. Home Secretary, State of Bihar, Patna (09.03.1979 - SC): [MANU/SC/0121/1979](#)

**Summary Judgment :**

**Facts:** The case dealt, inter alia, with the rights of the under trial prisoners on habeas corpus petitions which disclosed a state of affairs in regard to administration of justice in the State of Bihar. An alarmingly large number of men and women, children including, were behind prison bars for years awaiting trial in courts of law. The offences with which some of them were charged were trivial, which even if proved, would not warrant punishment for more than a few months, perhaps a year or two, and yet they remained in jail, deprived of their freedom, for periods ranging from three to ten years without even as much as their trial having commenced.

**Held:** The Court ordered immediate release of these under trials many of whom were kept in jail without trial or even without a charge. The Court in this case observed that State cannot avoid its constitutional duty to provide for speedy trial and directed for enforcement of right to speedy trial as a fundamental right.

**Subject Matter :** Right to Privacy

**Relevant Article :**

**Articles 19:** Freedom of Speech and Expressions

**Article 21:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Key Issue :** Whether telephone tapping is an invasion to one's privacy?

**Citation Details :** People's Union of Civil Liberties (PUCL) vs. Union of India (UOI) and Ors. (18.12.1996 - SC): [MANU/SC/0149/1997](#)

**Summary Judgment :**

**Facts:** The Petitioner highlighted the incident of telephone tapping which was permissible under section 5(2) of Telegraph Act and contended unless such tapping comes under reasonable restrictions put up by Article 19 of the Indian constitution it is infringing right to privacy of people.

**Held:** The court directed the authorities to maintain records of the intercepted messages and limited the terms of usage of such records to Section 5(2) of the Act and provided for a review committee

**Subject Matter :** Right to Livelihood

**Relevant Article :**

**Articles 14:** Guarantees equality before law or equal protection of law.

**Articles 19:** Freedom of Speech and Expressions Article 21: No person shall be deprived of his life or personal liberty except according to procedure established by law.

**Key Issue :** Whether court is under a duty to provide alternative for eviction of slum dwellers?

**Citation Details :** Olga Tellis and Ors. vs. Bombay Municipal Corporation and Ors. (10.07.1985 - SC): [MANU/SC/0039/1985](#)

**Summary Judgment :**

**Facts:** In this case the Municipal Corporation decided to evict the pavement dwellers and those who were residing in slums in Bombay. To this the inhabitants claimed that such act deprived their right to life. The question which arose in this case was whether right to life

includes right to livelihood? Constitution does not provide for an absolute embargo on the deprivation of life or personal liberty. Under Article 21, such deprivation must be in accordance with the procedure established by law. No one has right to encroach on trails, pavements or sidewalks which is reserved for public use.

**Held:** The court refused alternative site for expelled inhabitants however the State Government assured Court that alternative would be provided to slum dwellers who were caused to be evicted.

**Subject Matter :** Right to Privacy

**Relevant Article : Article 21:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Key Issue :** Constitutional Validity of Aadhaar Card?

**Citation Details :** Justice K.S. Puttaswamy and Ors. vs. Union of India (UOI) and Ors.

(26.09.2018 - SC): [MANU/SC/1054/2018](#)

**Summary Judgment :**

**Facts:** Supreme Court upheld the constitutional validity of Aadhaar and struck down provisions which rendered it mandatory to link Aadhaar number with Bank Accounts, cell phone connections and school admissions. Additionally, held that all matters relating to an individual cannot be classified as inherent part of right to privacy and only those matters over which there would be a reasonable expectation of privacy are protected by Article 21.

**Subject Matter :** Right to life includes Right to Die

**Relevant Article : Article 21:** No person shall be deprived of his life or personal liberty except according to procedure established by law

**Key Issue :** Whether Right to die is a fundamental right?

**Citation Details :** Common Cause (A Regd. Society) vs. Union of India (UOI) and Ors.

(09.03.2018 - SC): [MANU/SC/0232/2018](#)

**Summary Judgment :**

**Facts:** In this case people who were suffering from chronic diseases were at the end of their natural life span and were deprived of their rights to refuse cruel and unwanted medical treatment, like feeding through hydration tubes, being kept on ventilator and other life supporting machines in order to artificially prolong their natural life span. It was further pleaded that it was a common law right of the people, of any civilized country, to refuse unwanted medical treatment and no person could force him/her to take any medical treatment which the person did not desire to continue with.

**Held:** The Court in this case recognized right to die with dignity as a fundamental right

**Subject Matter :** Triple Talaq

**Relevant Article : Article 14, 15(1), 21, 21(a), 25, Section 125 CrPC**

**Key Issue :**

1. Whether or not the practise of talaq-e-biddat (particularly, instantaneous triple talaq / a key Islamic ritual) is permissible?

2. Whether triple talaq is a violation of any basic rights?

**Citation Details :** Shayara Bano v. Union of India, [MANU/SC/1031/2017](#)

**Summary Judgment :**

**Facts:** In this instance, Shayara Bano was married to Rizwan Ahmed for 15 years. Her spouse filed for talaq-e-bidat divorce from her in 2016. (triple talaq). Ms. Bano argued that three customs were unlawful, citing Articles 14, 15, 21, and 25 of the Constitution: triple talaq, polygamy, and nikah halala (the practice of forcing women to marry and divorce another man so that their previous spouse may remarry her after triple talaq).

**Held:** The Apex Court has held the practice of triple talaq (talaq-e-biddat), unconstitutional by a 3:2 majority. The court directed the Parliament to take legislative measures against the practice of triple talaq and declared that the practice of triple talaq as illegal, unconstitutional.

**Subject Matter :** Constitutional validity of the 42nd Amendment Act 1976

**Relevant Article : Article 31C, Article 368**

**Key Issue :**

1. Whether insertion made under Article 31C and Article 368 through sections 4 and 55 of the 42nd Amendment Act, 1976 does hamper the basic structure doctrine?

2. Whether the Directive Principle of the State policy has primacy over Fundamental right to the Indian Constitution?

**Citation Details :** Minerva Mills v. Union of India [MANU/SC/0075/1980](#)

**Summary Judgment :**

**Facts:** In the state of Karnataka, Minerva Mills was a manufacturing facility for large-scale silk clothing production that also provided a market for the local populace. The Central government was sceptical that the company matched the requirements to be classified as a crippled industry, though. A committee was established by the Central Government in 1970 in accordance with Section 15 of the Industries (Development and Regulation) Act, 1951, to examine the enterprises of Minerva Mills. As a result, on October 19, 1971, the Central Government contracted a National Textile Corporation Limited (a body created under the 1951 Act) to take over the management of Minerva Mills in accordance with Section 18A of the 1951 Act based on the Committee's evaluation. The Nationalization Act of 1974 was previously incorporated into the Ninth Schedule, which implies that any test on the said act was outside the purview of legal audit. However, the applicant was unable to challenge the part of the 39th Constitutional (Amendment) Act, 1975 because this remedy was abolished by the 42nd Amendment. The 42nd Constitutional (Amendment) Act of 1976's validity was therefore the key question in this circumstance.

**Held:** The 5 judge bench in a decision of 4:1 Majority struck down section 4 and 55 of the 42nd Constitutional amendment on the grounds that they went against the fundamental principles of our Constitution. The judges reiterated the basic structural theory and supported the ruling made in the Kesavananda Bharati case.

**Subject Matter :** Proclamation of emergency

**Relevant Article : Article 352**

**Key Issue :** 1. Whether a writ petition can be filed or not under Article 226 of the Constitution before the High Court in order to enforce the Fundamental Rights during the period of proclamation of emergency.

**Citation Details :** ADM Jabalpur v. Shivakant Shukla [MANU/SC/0062/1976](#)

**Summary Judgment :**

**Facts:** On 25th June, 1975, the President in exercise of his powers, declared that there was a grave emergency whereby security of India is threatened by the internal disturbances. Subsequently, it was declared that the right of any person including the foreigners to move any court in order to enforce their rights which have been granted to them under Article 14, 21 and 22 of the Constitution and also all the proceedings that are pending in the court will remain suspended during the period of proclamation of emergency which was made under Article 352 of Indian Constitution. On 8th January, 1976, the President passed a notification declaring that right of any person to move to any court in order to enforce the right which have been granted to them under Article 19 of the Constitution and also all the proceedings that are pending in the court will remain suspended during the period of proclamation of emergency. Thereupon, several illegal detentions were made and as a result, numerous writ petitions were submitted around the nation. Nine High Courts ruled in favour of the defendants by stating that even if Article 21 could not be applied, the detention order may still be challenged because it did not follow the Act or was not made in good faith.

Additionally, numerous appeals to the Supreme Court were filed in opposition to these orders.

**Held:** A Constitution Bench by a majority of 4:1, ruled that the state of emergency is in effect, the right to petition the High Courts for Habeas Corpus to challenge State-authorized illegal imprisonment shall be suspended. The Supreme Court declared, "If extraordinary powers are granted, they are granted because the Emergency is extraordinary, and they are limited to the term of the Emergency."

**Subject Matter :** Challenge to first amendment act, 1951

**Relevant Article : Article 368, Article 31A, Article 31B**

**Key Issue :**

1. Whether the 1st Constitutional Amendment, 1951 passed by the Parliament is valid.
2. Whether the word "law" used under Article 13(2) also includes the "law of the amendment of the Constitution of India.

**Citation Details :** Shankari Prasad v. Union of India, 1952, [MANU/SC/0013/1951](#)

**Summary Judgment :**

**Facts:** The Zamindari Abolition Act, also known as the agricultural land reforms when India gained its independence, was passed into law in the states of Bihar, Uttar Pradesh, and Madhya Pradesh. The zamindars were angry because they had lost their separate landholdings as a result. As this statute violates their fundamental rights, the zamindars filed a suit in the High Courts of Bihar, Uttar Pradesh, and Madhya Pradesh to regain control of their properties. The Bihar Land Reforms Act of 1950 was declared unconstitutional by the Patna High Court, however the high courts in Allahabad and Nagpur affirmed the legality of the legislation in Uttar Pradesh and Madhya Pradesh. To end the numerous legal disputes surrounding the same issue, the government proposed a remedy in the shape of the Constitution (First Amendment) Act, 1951. In response, the zamindars filed a petition under Article 32 of the Constitution asking if the Constitutional (First Amendment) Act, 1951, passed by the Parliament and including articles 31A and 31B, is invalid and unconstitutional.

**Held:** The apex court states that in articles 13(4) and 368(3), the parliament is empowered to alter part 3 of the fundamental rights, and because an amendment to 368 is not an ordinary legislation as defined in article 13(3), it cannot be declared void under article 13(2). The SC ruled that the power to amend the Constitution under Article 368 did not include the power to amend fundamental rights and that the term "law" in Article 13(8) only refers to a regular law passed under the authority of the legislative branch and excludes constitutional amendments passed under the authority of the constituent branch. Therefore, even if a constitutional amendment limits or eliminates abridges some essential rights, it will still be enforceable.

## CONSUMER PROTECTION ACT, 2019

**Subject Matter :** Maintainability of Writ Petition against Order Passed by National Commission

**Relevant Article :**

**Article 227 of Constitution :** Every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction.

(2) Without prejudice to the generality of the foregoing provisions, the High Court may-

- (a) call for returns from such courts;
- (b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising therein; Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision or any law for the time being in force, and shall require the previous approval of the Governor.

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces.

**Section 58(1)(a)(iii) of CPA, 2019 :** Subject to the other provisions of this Act, the National Commission shall have jurisdiction to entertain appeals against the orders of any State Commission

**Key Issue :** Whether writ petition under Article 227 of the Constitution of India against the order passed by the National Commission which has been passed in an appeal under Section 58(1)(a) (iii) of the Consumer Protection Act, 2019 is Maintainable

**Citation Details :** Ibrat Faizan Versus Omaxe Buildhome Private Limited (13.05.2022-  
[MANU/SC/0642/2022](#)

**Summary Judgment :**

**Facts :** The original Respondent before the High Court has preferred the present appeal against impugned interim order passed by the High Court, by which the learned Single Judge of the High Court has stayed order passed by the National Consumer Disputes Redressal Commission, New Delhi (National Commission), while hearing a writ petition filed under Article 227 of the Constitution of India, 1950. The jurisdiction of the High Court under Article 227 of the Constitution of India, against the order passed by the National Commission, in an appeal under Section 58(1)(a)(iii) of the Consumer Protection Act, 2019, is the moot question for consideration before this Court.

**Held :** It cannot be said that, a writ petition under Article 227 of the Constitution of India before the concerned High Court against the order passed by the National Commission in an appeal under Section 58(1)(a)(iii) of the 2019 Act was not maintainable. Appeal dismissed.

**Subject Matter :** Delay in handing over possession and compensation

**Relevant Article :**

**Section 2:** This section explains 'Deficiency' as **any fault inadequacy in the quality of performance which is required to be maintained by any law for the time being** in force to be performed by a person in pursuance of a service.

**Key Issue :** Whether the purchasers were not entitled to compensation in excess of what was stipulated in the Apartment Buyers Agreement?

**Citation Details :** Arifur Rahman Khan and Ors. vs. DLF Southern Homes Pvt. Ltd. and Ors. (24.08.2020 - SC): [MANU/SC/0607/2020](#)

**Summary Judgment :**

**Facts:** A complaint filed by flat buyers was dismissed by the National Consumer Disputes Redressal Commission, accepting the defence of respondent that there was no deficiency of service on their part in complying with their contractual obligations and, that despite a delay in handing over the possession of the residential flats, the purchasers were not entitled to compensation in excess of what was stipulated in the Apartment Buyers Agreement and thus appellant's submitted some primary grounds for compensation to consider.

**Held:** The flat buyers are entitled to compensation for delayed handing over of possession and for the failure of the developer to fulfill the representations made to flat buyers in regard to the provision of amenities.

**Subject Matter :** Invalidate proceedings of Central Authority

**Relevant Article :**

**Section 12:** On receipt of a complaint made, the District Forum may allow the complaint to be proceeded with or rejected and that a complaint shall not be rejected under this sub-section unless an opportunity of being heard has been given to the complainant and further that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint was received.

**Key Issue :** Whether National Commission rightly rejected revision petition on ground that Appellant filed his claim after a delay of 8 days from occurrence of theft?

**Citation Details :** Om Prakash vs. Reliance General Insurance and Ors. (04.10.2017 - SC):  
[MANU/SC/1259/2017](#)

**Summary Judgment :**

**Facts:** The insured truck of Appellant was stolen. Thereafter the Appellant lodged the insurance claim with the Respondent company and an investigator, appointed by the company, confirmed the factum of theft. Consequently, the Corporate Claims Manager approved an amount for the said claim of the Appellant. Thereafter, the Appellant made several requests and demands to the Respondent-company, inter alia, seeking speedy processing and disposal of his insurance claim and the Respondent-company repudiated the insurance claim of the Appellant citing breach of Condition of immediate information about the loss/theft of the vehicle. Thereafter the Appellant filed complaint before the District Forum, State Commission and National Commission. Still petition was dismissed by the National Commission and so the present appeal.

**Held:** The Respondents are directed to pay to the Appellant the amount with interest from the date of filing of the claim petition till the date of payment. The payment, as above, shall be made within a period of 8 weeks from the date of this order.

**Subject Matter :** Complaints to authorities

**Relevant Article :**

**Section 17:** The State Commission shall have jurisdiction to entertain the complaints where the value of the goods or services and compensation is claimed exceeds rupees twenty lakhs but does not exceed rupees one crore and appeals against the orders of any District Forum within the State and to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State.

**Key Issue :** Whether the Respondent is entitled for processing charges debited by Bank?

**Citation Details :** Bank of India vs. Brindavan Agro Industries Pvt. Ltd. (28.02.2020 - SC):  
[MANU/SC/0238/2020](#)

**Summary Judgment :**

**Facts:** M/S Brindavan Agro Industries Pvt. Ltd. was maintaining an account with the Appellant Bank. The Consumer applied for a loan. The Bank debited the account of the Consumer by the applicable processing fees, thereafter it was found that the Consumer admittedly is old customer of Bank who applied to avail credit facilities of more than Rs. 40 crores, It is doubtful that it was unaware of procedure and Circulars of Bank and Ignorance of procedure and Circular of Bank cannot be accepted. Consumer was aware of processing charges and sought a waiver of processing charges, therefore, processing charges debited by Bank in terms of authority given by Consumer, Therefore, order to refund processing fees is set aside.

**Held:** The Consumer is entitled to refund in terms of the decision of the Bank communicated to the Consumer rather than waiver of TEV charges in its entirety and the court found that the orders of SCDRC and NCDRC suffer from patent illegality and set aside and held that the Bank is directed to refund within two months from the date of this order.

**Subject Matter :** Time Limitation for the opposite party for filing Response To The Complaint

**Relevant Article :**

**Section 13:** The District Forum shall on admission of a complaint, if it relates to any goods or refer a copy of the admitted complaint, within twenty-one days from the date of its admission to the opposite party mentioned in the complaint directing him to give his version of the case within a given mentioned period in act, where the opposite party omits or fails to take any action to represent his case within the time given by the District Forum, the District Forum shall proceed to settle the consumer dispute.

**Section 20:** Where the Central Authority is satisfied on the basis of investigation that there is sufficient evidence to show violation of consumer rights or unfair trade practice by a person, it may pass such order of recalling of goods or withdrawal of services which are dangerous, hazardous or unsafe.

**Key Issue :** Whether Section 13(2) (a) of Act, which provides for Respondent to file its response to complaint within thirty days or period mentioned in Act should be read as mandatory or directory?

**Citation Details :** New India Assurance Co. Ltd. vs. Hilli Multipurpose Cold Storage Pvt. Ltd. (04.03.2020 - SC): [MANU/SC/0272/2020](#)

**Summary Judgment :**

**Facts:** The present reference made to this matter relates to the grant of time for filing response to a complaint under the provisions of the under section 13 of the Consumer Protection Act.

**Held:** The position of law for filing response by the Respondents under various statutes and due consideration to various judicial precedents, has concluded that, the District Forum has no power to extend the time for filing the response to the complaint beyond the period of 15 days in addition to 30 days as is envisaged under Section 13 of the Consumer Protection Act; and that the commencing point of limitation of 30 days under Section 13 of the Consumer Protection Act would be from the date of receipt of the notice accompanied with the complaint by the opposite party.

**Subject Matter :** Power of Central Authority to issue directions and penalties

**Relevant Article :**

**Section 2:** This section explains 'Deficiency' as any fault inadequacy in the quality of performance which is required to be maintained by any law for the time being in force to be performed by a person in pursuance of a service.

**Section 21:** The Central Authority is satisfied after investigation that any advertisement is false to the interest of any consumer, it may issue directions to the concerned trader to discontinue such advertisement or to modify the same in such manner and within specific time.

**Section 25:** The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Central Authority grants of such sums of money as that Government may think fit for being utilised for the purposes of this Act.

**Key Issue :** Whether a Revision Petition was maintainable?

**Citation Details :** Karnataka Housing Board vs. K.A. Nagamani (06.05.2019 - SC): [MANU/SC/0674/2019](#)

**Summary Judgment :**

**Facts:** The State Commission Order allowed the Appeal filed by the Respondent, and set aside the Order passed by the District Forum. It was directed that, amount already paid by the Board, would be appropriated first towards the Interest component and then towards the principal amount. Aggrieved by the Order of the State Commission, the Appellant-Board preferred a Revision Petition under Section 21(b) before the National Commission. Revision Petition filed by the Board was allowed vide Order. The stand taken by the Respondent was rejected as being devoid of merit. Being aggrieved by the Orders passed by National

Commission, the Respondent filed Petition before Delhi High Court. and held that the Order passed in an Execution Petition was not amenable to a challenge before the National Commission in exercise of its Revisional Jurisdiction. Appellant submitted that, a Revision Petition is maintainable before the National Commission under Section 21(b) of the 1986 Act.

**Held:** The National Commission has awarded Interest on the amount twice, by first including it in the principal amount and after awarding on the same amount, which would amount to a double payment and thus a Revision Petition was not maintainable under section 21(b) against the Order passed by the State Commission in an appeal arising out of execution proceedings.

## CONSUMER PROTECTION ACT, 2019

**Subject Matter :** Maintainability of Writ Petition against Order Passed by National Commission

**Relevant Article :**

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Article 227 of the Constitution of India, 1950. The jurisdiction of the High Court under Article 227 of the Constitution of India, against the order passed by the National Commission, in an appeal under Section 58(1)(a)(iii) of the Consumer Protection Act, 2019, is the moot question for consideration before this Court.

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**Summary Judgment :**

**Facts:** A complaint filed by flat buyers was dismissed by the National Consumer Disputes Redressal Commission, accepting the defence of respondent that there was no deficiency of service on their part in complying with their contractual obligations and, that despite a delay in handing over the possession of the residential flats, the purchasers were not entitled to compensation in excess of what was stipulated in the Apartment Buyers Agreement and thus appellant's submitted some primary grounds for compensation to consider.

**Held:** The flat buyers are entitled to compensation for delayed handing over of possession and for the failure of the developer to fulfill the representations made to flat buyers in regard to the provision of amenities.

**Subject Matter :** Invalidate proceedings of Central Authority

**Relevant Article :**

**Section 12:** On receipt of a complaint made, the District Forum may allow the complaint to be proceeded with or rejected and that a complaint shall not be rejected under this sub-section unless an opportunity of being heard has been given to the complainant and further that the admissibility of the complaint shall ordinarily be decided within twenty-one days from the date on which the complaint was received.

**Key Issue :** Whether National Commission rightly rejected revision petition on ground that Appellant filed his claim after a delay of 8 days from occurrence of theft?

**Citation Details :** Om Prakash vs. Reliance General Insurance and Ors. (04.10.2017 - SC): [MANU/SC/1259/2017](#)

**Summary Judgment :**

**Facts:** The insured truck of Appellant was stolen. Thereafter the Appellant lodged the insurance claim with the Respondent company and an investigator, appointed by the company, confirmed the factum of theft. Consequently, the Corporate Claims Manager approved an amount for the said claim of the Appellant. Thereafter, the Appellant made several requests and demands to the Respondent-company, inter alia, seeking speedy processing and disposal of his insurance claim and the Respondent-company repudiated the insurance claim of the Appellant citing breach of Condition of immediate information about the loss/theft of the vehicle. Thereafter the Appellant filed complaint before the District Forum, State Commission and National Commission. Still petition was dismissed by the National Commission and so the present appeal.

**Held:** The Respondents are directed to pay to the Appellant the amount with interest from the

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**Subject Matter :** Complaints to authorities

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**Citation Details :** Bank of India vs. Brindavan Agro Industries Pvt. Ltd. (28.02.2020 - SC):

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**Held:** The Consumer is entitled to refund in terms of the decision of the Bank communicated to the Consumer rather than waiver of TEV charges in its entirety and the court found that the orders of SCDRC and NCDRC suffer from patent illegality and set aside and held that the Bank is directed to refund within two months from the date of this order.

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**Section 20:** Where the Central Authority is satisfied on the basis of investigation that there is sufficient evidence to show violation of consumer rights or unfair trade practice by a person, it may pass such order of recalling of goods or withdrawal of services which are dangerous, hazardous or unsafe.

**Key Issue :** Whether Section 13(2) (a) of Act, which provides for Respondent to file its response to complaint within thirty days or period mentioned in Act should be read as mandatory or directory?

**Citation Details :** New India Assurance Co. Ltd. vs. Hilli Multipurpose Cold Storage Pvt. Ltd. (04.03.2020 - SC): [MANU/SC/0272/2020](#)

**Summary Judgment :**

**Facts:** The present reference made to this matter relates to the grant of time for filing response to a complaint under the provisions of the under section 13 of the Consumer Protection Act.

**Held:** The position of law for filing response by the Respondents under various statutes and due consideration to various judicial precedents, has concluded that, the District Forum has

no power to extend the time for filing the response to the complaint beyond the period of 15 days in addition to 30 days as is envisaged under Section 13 of the Consumer Protection Act; and that the commencing point of limitation of 30 days under Section 13 of the Consumer Protection Act would be from the date of receipt of the notice accompanied with the complaint by the opposite party.

**Subject Matter :** Power of Central Authority to issue directions and penalties

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**Section 25:** The Central Government may, after due appropriation made by Parliament by law in this behalf, make to the Central Authority grants of such sums of money as that Government may think fit for being utilised for the purposes of this Act.

**Key Issue :** Whether a Revision Petition was maintainable?

**Citation Details :** Karnataka Housing Board vs. K.A. Nagamani (06.05.2019 - SC):

[MANU/SC/0674/2019](#)

**Summary Judgment :**

**Facts:** The State Commission Order allowed the Appeal filed by the Respondent, and set aside the Order passed by the District Forum. It was directed that, amount already paid by the Board, would be appropriated first towards the Interest component and then towards the principal amount. Aggrieved by the Order of the State Commission, the Appellant-Board preferred a Revision Petition under Section 21(b) before the National Commission. Revision Petition filed by the Board was allowed vide Order. The stand taken by the Respondent was rejected as being devoid of merit. Being aggrieved by the Orders passed by National Commission, the Respondent filed Petition before Delhi High Court. and held that the Order passed in an Execution Petition was not amenable to a challenge before the National Commission in exercise of its Revisional Jurisdiction. Appellant submitted that, a Revision Petition is maintainable before the National Commission under Section 21(b) of the 1986 Act.

**Held:** The National Commission has awarded Interest on the amount twice, by first including it in the principal amount and after awarding on the same amount, which would amount to a double payment and thus a Revision Petition was not maintainable under section 21(b) against the Order passed by the State Commission in an appeal arising out of execution proceedings.

## **NEGOTIABLE INSTRUMENTS ACT, 1881**

**Subject Matter :** Liability of maker of note and acceptor of bill.

**Relevant Section :** Section 32: This section requires the maker or acceptor of promissory note or a Bill Of Exchange to make payment in accordance with the terms of the instrument, or compensate in case of default, to the holder.

**Key Issue :** Whether the CSC, first respondent, is liable in the capacity of the drawer-acceptor when addressed as MMTC A/c CSC Calcutta as extracted earlier?

**Citation Details :** American Express Bank Ltd. vs. Calcutta Steel Co. and Ors. (18.12.1992 - SC): [MANU/SC/0667/1992](#)

**Summary Judgment :**

**Facts:** The admitted facts are that the appellant/first defendant is the banker. The CSC, obtained licence to import steel billets. The Govt. of India's import policy for 1985-88 was that iron and steel etc. should be imported through canalised agency i.e. M/s. Minerals and Metals Trading Corp. of India Ltd. for short "MMTC", the 3rd defendant/3rd respondent. CSC approached MMTC for letter of authority to import the goods. M/s. Harlow and Jones Ltd., London is the supplier. The latter permitted CSC to draw draft on "MMTC A/c. Calcutta Steel Co. Ltd., 20, Hemanta Basu Sarani, Calcutta 700001" for a sum not exceeding US \$ 1,456,000, payable to the beneficiary on presentation of a separate draft within 180 days from the date of bill of lading drawn for 100% of the invoice value. The cargo sent under bill of lading reached at Calcutta port in the month of February, 1987 and were presented to CSC, who received the documents, executed a trust receipt in favour of the appellant and endorsed its acceptance on the said three usance Bills of Exchange.

**Held:** CSC accepted to be the Principal importer of the steel billets; took irrevocable letters of credit and thereby had undertaken the liability to the foreign suppliers; on receipt of the cargo on bill of lading and the bills of exchange of drawer. M/s. Harlow Jones Ltd. had accepted the bills of exchange as drawee and had endorsement from MMTC on the bill of lading in its favour; and thereafter had and appropriated the goods. These admitted **facts unmistakably show that CSC accepted the bills of exchange as drawee and hence is liable to default.**

**Subject Matter :** Liability of banker for negligently dealing with bill presented for payment.

**Relevant Section :** Section 77: When a bill of exchange, accepted payable at a specified bank, has been duly presented there for payment and dishonoured, if the banker so negligently or improperly keeps, deals with or delivers back such bill as to cause loss to the holder, he must compensate the holder for such loss.

**Key Issue :** Whether the Bank is liable for negligence for the loss of the cheque in transit?

**Citation Details :** Syndicate Bank and Ors. vs. K.K. Parthasarathy (06.09.1994 - SCDRC Kerala): [MANU/SC/0073/1994](#)

**Summary Judgment :**

**Facts:** The Complainant had Savings Bank Account with Kottayam Branch of the 1st Opposite Party's Bank. A cheque issued to complainant was deposited with the Kottayam Branch of the Syndicate Bank for sending the same for collection and for crediting the amount into the complainant's account. The complainant issued a cheque for Rs. 75,000/- with a letter to the 2nd opposite party, the Branch Manager of the Syndicate Bank requesting to transfer the sum of Rs. 75,000/- to the complainant's Account presumably thinking that the cheque deposited by the complainant with the opposite parties was already encashed and the amount was credited in his account with the opposite parties. The cheque was dishonoured. The complainant alleged that due to negligence and deficiency on the part of the opposite parties the complainant lost Rs. 75,000/- and is undergoing mental agony and anguish and the reputation of the complainant was also affected. He therefore claimed Rs. 75,000/- together

with interest and also compensation of Rs. 10,000/- for his mental agony and loss of reputation besides Rs. 200/- towards the cost of notice sent to the opposite parties.

**Held:** In our view even in a case to which **Section 77** has application, the parties may contract against the liability created by the section for payment of compensation. It is not disputed that the evidence specifically gives immunity to the 1st opposite party against any claim for non intimation of dishonour or loss of instrument in the transit. As per the provisions of rules of collection of instruments the bank was not liable for any delay/loss of instrument in transit and is entitled to charge overdue interest on the account advanced to them/discounted to them from the date of discount to the date of discharge of liability. Appeal allowed.

**Subject Matter :** The burden of proof of the amount due shall be on the accused.

**Relevant Section : Section 320, Code of Criminal Procedure, 1973: Procedure where parties refer dispute to arbitrators.**-A criminal case is not a matter between the parties as a civil case is. A Magistrate is not bound to recognise a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait, he will not be doing anything illegal. But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question, and if it is an offence compoundable under this section, effect will be given to such compounding.

**Section 138:** A cheque will be dishonoured due to insufficiency of funds in the drawer's account, or when the cheque amount is in excess of credit limit that the drawer can avail. The five ingredients required for the dishonor of cheque are:

- a. Drawing of the cheque,
- b. Presentation of the cheque to the bank,
- c. Returning the cheque unpaid by the drawee bank,
- d. Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,
- e. Failure of the drawer to make payment within 15 days of the receipt of the notice; **only then** penalty can be levied on him.

**Note:** When the proviso implies, main section will not.

**Section 142:** Empowers a Metropolitan/ Judicial Magistrate to take cognizance of an offence of dishonour if the complaint is made within one month in writing by the payee.

**Key Issue :** Whether the onus to prove the due amount shifts to the accused?

**Citation Details :** Uttam Ram vs. Devinder Singh Hudan and Ors. (17.10.2019 - SC):

[MANU/SC/1435/2019](#)

**Summary Judgment :**

**Facts:** The Trial Court dismissed the complaint filed against Respondent for offence of dishonor of cheque under Section 138 of Act for the reason that cheque amount was more than the amount alleged on the due date when cheque was presented. Therefore, the cheque could not be said to be drawn towards discharge of whole or in part of any debt. On appeal, the High Court held that Appellant had failed to prove guilt of Respondent beyond reasonable doubt. Hence, the present appeal.

**Held:** The Accused had failed to lead any evidence to rebut the statutory presumption, a finding returned by both the Trial Court and the High Court. Both Courts not only erred in law but also committed perversity when the due amount was said to be disputed only on account of discrepancy in the cartons, packing material or the rate to determine the total liability as if the Appellant was proving his debt before the Civil Court. Therefore, it was presumed that the cheques in question were drawn for consideration and the holder of the

cheques i.e., the Appellant received the same in discharge of an existing debt. **The onus, thereafter, shifts on the Accused-Appellant to establish a probable defence so as to rebut such a presumption, which onus had not been discharged by the Respondent.** The conclusion drawn by the Trial Court and the High Court to acquit the Respondent was not only illegal but being perverse was totally unsustainable in law.

**Subject Matter :** Criminal compoundable case u/s.138 can be referred to mediation.

**Relevant Section : Section 320, Code of Criminal Procedure, 1973: Procedure where parties refer dispute to arbitrators.**-A criminal case is not a matter between the parties as a civil case is. A Magistrate is not bound to recognise a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait, he will not be doing anything illegal. But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question, and if it is an offence compoundable under this section, effect will be given to such compounding.

**Section 138:** A cheque will be dishonoured due to insufficiency of funds in the drawer's account, or when the cheque amount is in excess of credit limit that the drawer can avail. The five ingredients required for the dishonor of cheque are:

- a. Drawing of the cheque,
- b. Presentation of the cheque to the bank,
- c. Returning the cheque unpaid by the drawee bank,
- d. Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,
- e. Failure of the drawer to make payment within 15 days of the receipt of the notice; **only then** penalty can be levied on him.

**Note:** When the proviso implies, main section will not.

**Section 142:** Empowers a Metropolitan/ Judicial Magistrate to take cognizance of an offence of dishonour if the complaint is made within one month in writing by the payee.

**Key Issue :** a. What is the legality of referral of a criminal compoundable case u/s. 138 of the NI Act to mediation?

b. If the Mediated Settlement Agreement, by itself, is taken to be tantamount to a decree, then, how the same is to be executed? Is the complainant to be relegated to file an application for execution in a civil court?

**Citation Details :** Dayawati vs. Yogesh Kumar Gosain (17.10.2017 - DELHC):

[MANU/DE/3173/2017](#)

**Summary Judgment :**

**Facts:** The appellant Smt. Dayawati/complainant filed a complaint under Section 138 of the NI Act, complaining that the respondent Shri Yogesh Kumar Gosain/respondent had a liability of 55,99,600/- towards her for supply of fire-fighting goods and equipment to the respondent on different dates and different quantities. In part discharge of this liability, the respondent was stated to have issued two account payee cheques in favour of the complainants. Unfortunately, these two cheques were dishonoured by the respondent's bank on presentation on account of "insufficiency of funds". As a result, the complainant was compelled to serve a legal notice of demand on the respondent which, when went unheeded, led to the filing of two complaint cases under Section 138 of the NI Act. In these proceedings, both parties had expressed the intention to amicably settle their disputes. Consequently, by a common order dated 1st April, 2015 recorded in both the complaint cases, the matter was referred for mediation to the Delhi High Court Mediation and Conciliation Centre.

**Held:** **a.** It is legal to refer a criminal compoundable case as one under Section 138 of the NI Act to mediation.

**b.** The settlement reached in mediation arising out of a criminal case does not tantamount to a decree by a civil court and cannot be executed in a civil court. However, a settlement in mediation arising out of referral in a civil case by a civil court, can result in a decree upon compliance with the procedure under Order XXIII of the C.P.C. This can never be so in a mediation settlement arising out of a criminal case.

**Subject Matter :** Dishonour of cheque for insufficiency, etc., of funds in the account.

**Relevant Section : Section 320, Code of Criminal Procedure, 1973: Procedure where parties refer dispute to arbitrators.**-A criminal case is not a matter between the parties as a civil case is. A Magistrate is not bound to recognise a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait, he will not be doing anything illegal. But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question, and if it is an offence compoundable under this section, effect will be given to such compounding.

**Section 138:** A cheque will be dishonoured due to insufficiency of funds in the drawer's account, or when the cheque amount is in excess of credit limit that the drawer can avail. The five ingredients required for the dishonor of cheque are:

- a.** Drawing of the cheque,
- b.** Presentation of the cheque to the bank,
- c.** Returning the cheque unpaid by the drawee bank,
- d.** Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,
- e.** Failure of the drawer to make payment within 15 days of the receipt of the notice; **only then** penalty can be levied on him.

**Note:** When the proviso implies, main section will not.

**Section 142:** Empowers a Metropolitan/ Judicial Magistrate to take cognizance of an offence of dishonour if the complaint is made within one month in writing by the payee.

**Key Issue :** **a.** Whether 15 days' notice required to be given?

**b.** Whether the amount payable is the outstanding sum or the pending bills only?

**Citation Details :** Rahul Builders vs. Arihant Fertilizers and Chemical and Ors. (02.11.2007 - SC): [MANU/SC/4139/2007](#)

**Summary Judgment :**

**Facts:** Appellant is a partnership firm. Respondent No. 1 entered into a contract with it for construction of a building and factory premises. Appellant executed the said contract. It submitted bills for execution of contractual work for a sum of Rs. 26,46,647/- . Respondent No. 1 had made payments of Rs. 17,74,238/- and a balance of Rs. 8,72,409/- was said to be outstanding. A cheque for a sum of Rs. 1,00,000/- drawn on Federal Bank Limited, Indore was issued by Respondent No. 1 in favour of the appellant. Upon presentation of the said cheque, it was not honoured on the ground that Respondent No. 1 had closed its account with the bank. A notice dated 31.10.2000 was sent by it to Respondent No. 1. As despite receipt of the said notice, Respondent No. 1 did not make any payment, a complaint petition was filed on 11.12.2000. An application was filed by Respondent No. 1 for rejection of the said complaint inter alia on the ground that the notice issued by the appellant was not a valid one. The said application was rejected. A revision application filed there against before the District and Sessions Judge, Neemuch was also dismissed. High court, however, allowed the appeal stating that 15 days' notice was not given and the pending amount mentioned was also wrong which made the notice vague.

**Held:** a. Section 138 does not speak of a 15 days' notice. It contemplates service of notice and payment of the amount of cheque within 15 days from the date of receipt thereof. When the statute prescribes for service of notice specifying a particular period, it should be expressly stated. In absence of any such stipulation, it is difficult to hold that 15 days' notice was thereby contemplated. The High Court, therefore, was not correct in arriving at the aforementioned finding.

b. We have noticed hereinbefore the notice dated 31.10.2000 issued by the appellant to Respondent No. 1. An information thereby was only given that the cheque when presented was returned "unpassed" by the bank authorities on the plea that the account had been closed. By the operative portion of the said notice, the respondent was called upon to remit the payment of his pending bills, otherwise suitable action shall be taken. An omnibus notice without specifying as to what was the amount due under the dishonoured cheque would not subserve the requirement of law. Respondent No. 1 was not called upon to pay the amount which was payable under the cheque issued by it. The amount which it was called upon to pay was the outstanding amounts of bills, i.e., Rs. 8,72,409/- . The notice was to respond to the said demand. Pursuant thereto, it was to offer the entire sum of Rs. 8,72,409/- . No demand was made upon it to pay the said sum of Rs. 1,00,000/- which was tendered to the complainant by cheque dated 30.04.2000. What was, therefore, demanded was the entire sum and not a part of it.

**Subject Matter :** Vicarious Liability; Consenting party is equally liable.

**Relevant Section : Section 320, Code of Criminal Procedure, 1973: Procedure where parties refer dispute to arbitrators.**-A criminal case is not a matter between the parties as a civil case is. A Magistrate is not bound to recognise a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait, he will not be doing anything illegal. But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question, and if it is an offence compoundable under this section, effect will be given to such compounding.

**Section 138:** A cheque will be dishonoured due to insufficiency of funds in the drawer's account, or when the cheque amount is in excess of credit limit that the drawer can avail. The five ingredients required for the dishonor of cheque are:

- a. Drawing of the cheque,
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- c. Returning the cheque unpaid by the drawee bank,
- d. Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount,
- e. Failure of the drawer to make payment within 15 days of the receipt of the notice; **only then** penalty can be levied on him.

**Note:** When the proviso implies, main section will not.

**Section 142:** Empowers a Metropolitan/ Judicial Magistrate to take cognizance of an offence of dishonour if the complaint is made within one month in writing by the payee.

**Key Issue :** a. Whether the second accused, being the managing director of the first accused company, is liable u/s. 138?

b. Whether the complainant is competent to file the complaint u/s. 142?

**Citation Details :** Jayalakshmi Nataraj vs. Jeena and Co. (06.10.1994 - MADHC):

MANU/TN/0075/1994

**Summary Judgment :**

**Facts:** The petitioner is the second accused in the proceedings before the learned Magistrate. She is challenging that proceedings on two grounds, viz., that there is no overt act alleged against her in the complaint except merely describing her as a director and the person who

has signed the complaint, Unnikrishnan, has not produced any authorisation or power of attorney to accept that he is competent to file the complaint on behalf of the complainant and, therefore, on these two grounds, the complaint against here is not sustainable and is liable to be quashed.

**Held:** a. The petitioner, who is the **second accused**, is the managing director of the first accused company. When the allegation is that she is the managing director, **it cannot be taken that she is not participating in the day-to-day administration of the company** or that she is a sleeping partner knowing nothing about the affairs of the company. Therefore, **the allegation that she is the managing director of the company is sufficient overt act against the petitioner herein with regard to the offence alleged under section 138 of the Negotiable Instruments Act, 1881.**

b. Under section 142(a) of the Negotiable Instruments Act, 1881, the complaint shall be filed by the payee or, as the case may be, the holder in due course of the cheque. As mentioned above, Jeena and Company, which is the partnership firm, has launched the complaint and, therefore, when the payee has launched the complaint, there cannot be any objection that the complaint has not been properly initiated. **The signatory to the complaint has described himself in the cause title itself that he is the senior assistant.** Whether he is the senior assistant or not, is a matter to be considered in the evidence at the time of trial and to satisfy this court now, the power of attorney also is produced. Therefore, I find that there is no merit in this petition to quash the proceedings.

**Subject Matter :** Ingredients necessary for an act to be an offence u/s. 138 and territorial jurisdiction for the judicial proceedings.

**Relevant Section : Section 320, Code of Criminal Procedure, 1973: Procedure where parties refer dispute to arbitrators.**-A criminal case is not a matter between the parties as a civil case is. A Magistrate is not bound to recognise a reference to arbitration and wait for the arbitrators to make the award though it will be reasonable to do so. If he does not choose to wait, he will not be doing anything illegal. But if he chooses to wait and then there is an award, that award may amount to a compounding of the offence in question, and if it is an offence compoundable under this section, effect will be given to such compounding.

**Section 138:** A cheque will be dishonoured due to insufficiency of funds in the drawer's account, or when the cheque amount is in excess of credit limit that the drawer can avail. The five ingredients required for the dishonor of cheque are:

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- e. Failure of the drawer to make payment within 15 days of the receipt of the notice; **only then** penalty can be levied on him.

**Note:** When the proviso implies, main section will not.

**Section 142:** Empowers a Metropolitan/ Judicial Magistrate to take cognizance of an offence of dishonour if the complaint is made within one month in writing by the payee.

**Key Issue :** Whether liable to be dismissed for want of territorial jurisdiction of Magistrate Court?

**Citation Details :** K. Bhaskaran vs. Sankaran Vaidhyan Balan and Ors. (29.09.1999 - SC): [MANU/SC/0625/1999](#)

**Note:** Overruled by Dashrath Rupsingh Rathore case.

**Summary Judgment :**

**Facts:** The complainant presented a cheque which bears the signature of the accused before the Syndicate Bank's branch office at Kayamkulam (Kerala) on 29.1.1993 for encashment. The cheque was for an amount of rupees one lakh. The bank bounced the cheque due to insufficiency of funds in the account of the accused. Complainant issued a notice by registered post in the address of the accused on 2.2.1993. The notice was returned to the complainant on 15.2.1993. As the postal article remained unclaimed till 15. 2.1993 it was returned to the sender with a further endorsement 'unclaimed.' A complaint was filed by the complainant against the accused under Section 138 of the Act. The accused raised the contention regarding the territorial jurisdiction of the said magistrate Court to try the case as the cheque was dishonoured at the Syndicate Bank's Branch office at Kayamkulam situated in another district in Kerala. Accused denied having issued the cheque although he owned his signature therein. The accused said that the complainant had snatched away some signed blank cheque leaves from his possession and utilised one such cheque leaf for the present case. He also contended that he did not receive any notice from the complainant regarding dishonour of the cheque and hence no cause of action would have arisen in this case. Trial Court favoured the accused but the High Court favoured the complainant. Hence, the present appeal.

**Held:** The offence under Section 138 of the Act can be completed only with the concatenation of a number of acts. It is not necessary that all the five acts should have been perpetrated at the same locality. It is not necessary that all the five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But concatenation of all the above five is a sine qua non for the completion of the offence under **Section 138** of the Act. If five different acts were done in five different localities, any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under Section 138 of the Act. In other words, **the complainant can choose any one of those courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done.** As the amplitude stands so widened and so expansive **it is an idle exercise to raise jurisdictional question regarding the offence under Section 138 of the Act.**

**Subject Matter :** Jurisdiction: Venue of judicial inquiry.

**Relevant Section : Section 72:** A cheque must be presented at the bank upon which it is drawn in order to charge the drawer.

**Key Issue :** Whether the case has to be initiated at the place where the branch of the bank on which the cheque was drawn is located?

**Citation Details :** Dashrath Rupsingh Rathod vs. State of Maharashtra (01.08.2014 - SC):

[MANU/SC/0655/2014](#)

**Summary Judgment :**

**Facts:** Cheque was drawn by the accused on State Bank of Travancore, Delhi. It was presented at Aurangabad. A Complaint was filed Aurangabad. Application, seeking dismissal of the Complaint. Registered Office of the Complainant was at Chitegaon, Aurangabad. Accused was transacting business from Delhi. Complainant-company also had its branch office at Delhi. Statutory notice had emanated from Aurangabad. Subject transaction took place at Delhi. Civil Suit in respect of the recovery of the cheque amount has already been filed in Delhi. Principles pertaining to the cause of action as perceived in civil law are not relevant in criminal prosecution.

**Held:** The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue; If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque; If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice. The facts constituting cause of action do not constitute the ingredients of the offence Under Section 138 of the Act. **Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonoured. JMFC, Aurangabad has no jurisdiction over the offence.** Appeal is dismissed.

**Subject Matter :** Clayton's Rule

**Relevant Section :** The rule is based upon the deceptively simple notion of **first-in, first-out to determine the effect of payments from an account**, and normally applies in English Law in the absence of evidence of any other intention. **Payments are presumed to be appropriated to debts in the order in which the debts are incurred.**

**Key Issue :** Whether the estate of the deceased was liable to Clayton to pay him?

**Citation Details :** HIGH COURT OF CHANCERY Devaynes Vs. Noble ([1816](#)) 35 ER 781

**Summary Judgment :**

**Facts:** Mr. Clayton had an account with a banking firm, Devaynes Dawes Noble and Co., that was a partnership rather than a joint stock company. The bank's partners were therefore personally liable for the debts of the bank. One of the partners, William Devaynes, died in 1809. The amount then due to Clayton was £1,717. After Mr. Devaynes' death, Clayton made further deposits with the bank and the surviving partners paid out to Mr. Clayton more than the £1,717 on deposit at the time of Mr. Devaynes' death. The firm went bankrupt in 1810.

**Held:** The estate of the deceased partner was not liable to Clayton, as the payments made by the surviving partners to Clayton must be regarded as completely discharging the liability of the firm to Clayton at the time of the particular partner's death. It appears to me that this transaction stands quite detached from any other, and may be decided by itself. The exchequer bills having been sold in Mr. Devaynes's lifetime, contrary to the duty reposed in the partnership, and the money having been received by the partnership, the amount became a partnership debt, whether the individual partners were, or were not, privy to the sale.

## RESERVE BANK OF INDIA ACT, 1934

**Subject Matter :** Right to issue bank notes.

**Relevant Section : Section 3(1):** A bank to be called the Reserve Bank of India shall be constituted for the purposes of taking over the management of the currency and of carrying on the business of banking.

**Section 8(4):** A Director nominated shall hold office for a period of four years and shall be eligible for reappointment

**Provided** that any such Director shall not be appointed for more than two terms, that is, for a maximum period of eight years either continuously or intermittently.

**Section 22(1):** The Bank shall have the sole right to issue bank notes in India, and may, for a

period which shall be fixed by the Central Government on the recommendation of the Central Board, issue currency notes of the Government of India supplied to it by the Central Government.

**Key Issue :** Whether impugned Circular, directing entities regulated by RBI not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies, liable to be set aside on ground of proportionality?

**Citation Details :** Internet and Mobile Association of India vs. Reserve Bank of India (04.03.2020 - SC): [MANU/SC/0264/2020](#)

**Summary Judgment :**

**Facts:** Respondent Bank issued Statement on Developmental and Regulatory Policies which directed entities regulated by RBI not to deal with or provide services to any individual or business entities dealing with or settling virtual currencies and to exit relationship, if they already had one, with such individuals/business entities. Following said Statement, RBI also issued circular directing entities regulated by RBI not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies and to exit relationship with such persons or entities, if they were already providing such services to them. Hence, present petition.

**Held:** There could be no quarrel with the proposition that RBI had sufficient power to issue directions to its regulated entities in the interest of depositors, in the interest of banking policy or in the interest of the banking company or in public interest. **If the exercise of power by RBI with a view to achieve one of these objectives incidentally causes a collateral damage to one of the several activities of an entity which did not come within the purview of the statutory authority, the same could not be assailed as a colourable exercise of power or being vitiated by malice in law.** To constitute colourable exercise of power, the act must have been done in bad faith and the power must have been exercised not with the object of protecting the regulated entities or the public in general, but with the object of hitting those who form the target. To constitute malice in law, the act must have been done wrongfully and wilfully without reasonable or probable cause. The impugned Circular did not fall under the category of either of them.

**Subject Matter :** Obligation to supply different forms of currency.

**Relevant Section : Section 39:** The Bank shall issue rupee coin on demand in exchange for bank notes and currency notes of the Government of India and shall issue currency notes or bank notes on demand in exchange for coin which is legal tender under the Coinage Act, 2011.

**Key Issue :** Whether the RTI filed by complainant as to supply of coins with inscriptions of god holds validity?

**Citation Details :** Roshan Alag vs. Reserve Bank of India (06.05.2015 - CIC): [MANU/CI/0052/2015](#)

**Summary Judgment :**

**Facts:** The complainant Shri Roshan Alag submitted RTI application before the Central Public Information Officer (CPIO), Reserve Bank of India, Mumbai seeking information relating ban on coins of Rs. 5 and 10 having the picture of 'Mata Vaishno Devi'; who ordered for minting these coins, method of distribution of these coins in the market and requested for immediate withdrawal of these coins from the market in order to avoid any religious controversy among the people etc.

**Held:** The matter was heard by the Commission. The complainant did not attend the hearing in spite of a notice of hearing having been sent to him. The respondents stated that the CPIO sent a point-wise reply to the complainant. In response to complainant's another representation, the RBI informed the complainant that all matters relating to design etc. of coins are the exclusive ambit of Government of India under the provisions of the Coinage Act, 2011. **The role of RBI is restricted to putting the coins into circulation as and when made available by the India Government Mints, in terms of Section 39 of RBI Act 1934.**

**Subject Matter :** Publication of consolidated statement by the Bank.

**Relevant Section : Section 43:** The Bank shall cause to be published each fortnight a consolidated statement showing the aggregate liabilities and assets of all the scheduled banks together, based on the returns and information received under this Act or any other law for the time being in force.

**Section 43(5):** It defines 'Speculative transaction' means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips.

**Section 143 of IT Act, 1961:** Once the income tax department has processed your income tax return (ITR), it sends you an intimation notice under section 143(1) of the Income Tax Act

**Key Issue :** Whether transactions in futures and options must be treated as business income as distinct from trading in shares?

**Citation Details :** Snowtex Investment Limited vs. Principal Commissioner of Income Tax, Central-2, Kolkata (30.04.2019 - SC): MANU/SC/0804/201

**Summary Judgment :**

**Facts:** The Appellant filed its return which was processed under Section 143(1) of the IT Act. On the case being selected for scrutiny, a notice was issued. It was held that the principal business activity of the Assessee is trading in shares and securities. The loss from share trading was held to be a speculation loss. The assessing officer held that activities pertaining to futures and options could not be treated as speculative transactions. The loss from speculation was held not to be capable of being set off against the profits from business. Against the order of the assessing officer for assessment year 2008-2009, an appeal was filed before the CIT(A). The CIT(A) held that, the Assessee derived income from trading in derivatives and share business along with dividend and interest and was an NBFC. The CIT(A) held that, the provisions of Section 43(5) came into existence with effect from 1 April 2006 and hence, transactions in futures and options must be treated as business income as distinct from trading in shares. Consequently, the CIT(A) rejected the contention of the Assessee is that the assessing officer had erred in not allowing the speculation loss to be set off against profits of trading in futures and options. The Revenue appealed against the decision of the CIT(A).

**Held:** The court held that The provisions of Section 43(5) were amended by the Finance Act, 2005. The impact of the amendment by the Finance Act, 2005 was that an eligible transaction on a recognised stock exchange in respect of trading in derivatives was deemed not to be a speculative transaction. With effect from 1 April 2006, trading in derivatives was by a deeming fiction not regarded as a speculative transaction when it was carried out on a recognized stock exchange. The consequence is that, in A.Y. 2008-2009, the loss which occurred to the Assessee as a result of its activity of trading in shares (a loss arising from the business of speculation) was not capable of being set off against the profits which it had earned against the business of futures and options since the latter did not constitute profits and gains of a speculative business.

**Subject Matter :** Appointment of agents and acceptance of deposits.

**Relevant Section : Section 45:** The Bank may, having regard to public interest, convenience of banking, banking development and such other factors which in its opinion are relevant in this regard, appoint the National Bank, or the State Bank, or a corresponding new bank as its agent at all places, or at any place in India for such purposes as the Bank may specify.

**Section 45S:** No person, being an individual or a firm or an unincorporated association of individuals shall, accept any deposit- **(i)** if his or its business wholly or partly includes any of the activities specified in clause (c) of section 45-1

**(ii)**if his or its principal business is that of receiving of deposits under any scheme or arrangement or in any other manner or lending

**Key Issue :** Whether the amendment made to Section 9 holds validity?

**Citation Details :** Bhavesh D. Parish and Ors. vs. Union of India (UOI) and Ors. (12.05.2000 - SC): [MANU/SC/0392/2000](#)

**Summary Judgment :**

**Facts:** The appellants are shroffs engaged in the business of providing credit to the members of the public. The traditional mode of organising the business of shroffs over the past several decades had been by way of partner ship firms. The nature of the services practised by the appellants generally involved maintaining a mutual current account where the customer may either place deposit on call or withdraw money on call with out security. The financing activity of the shroff firms was through capital contributions of the partners/proprietor and deposits made by members of the public.

**Held:** The impugned Section 45-S does not in any way prohibit or restrict any unincorporated body or individual from carrying on the business that it likes. It is open to unincorporated bodies to carry on their financial business either from their own funds or the funds borrowed from their relatives or from financial institutions. The restriction, which is placed by Section 45-S, is on the carrying on of such business by utilising public deposits.. Examining the validity of the amended Section 45-S of the Act by applying the principles enunciated over the years by this Court, and as encapsulated in the passage quoted in the earlier part of this judgment from this Court's decision in Papnasan Labour Unions Case (supra) we find that the said Section is in no way illegal or bad in law. Section 45-S no doubt prohibits the conduct of banking business by an unincorporated non-banking entity like a shroff, but this prohibition has come about, inter alia , in the interest of unwary depositors and borrowers (from shroffs) and with a view to prevent them from committing financial suicide.

**Subject Matter :** Power of Bank to collect credit information.

**Relevant Section : Section 45B:** The Bank may collect, in such manner as it may think fit, credit information from banking companies.

**Key Issue :** Whether RBI was correct in taking up jurisdiction when company withdrew NBFC registration?

**Citation Details :** Rockland Leasing Ltd. vs. Reserve Bank of India and Ors. (21.09.2002 - DELHC): [MANU/DE/2094/2002](#)

**Summary Judgment :**

**Facts:** The appellant has its registered office in Delhi. Its objects amongst other included "undertaking business of finance, hire-purchase, leasing and to finance lease operations of all kinds". The case of RBI is that the appellant was carrying on business of NBFC as defined under Section 45-I(f) of Chapter III-B of the Act. Thus the appellant came to be governed by the existing directions of RBI relating to such companies and these directions include NBFC (Reserve Bank) directions, 1997 as amended. The appellant applied to RBI for certificate of registration under the provisions of Section 45-IA(2) of the Act as NBFC. The RBI in order

to satisfy itself whether the appellant fulfills the condition for such a registration could inspect the books and inspection was undertaken under the provision of Section 45B of the RBI Act. The appellant contended before the RBI it had decided in favor of retaining the fee based activities of merchant banking and discontinue financing operations and it stopped all fund based operations as NBFC. To which RBI replied that it will continue to be guided by RBI regulations as long as it does not return the public deposits.

**Held:** The court held that the Company has been under the jurisdiction of RBI ever since its inception and it voluntarily applied for registration after amendment of the RBI Act. On such a plea that it had withdrawn the application it cannot avoid the rigorous of law.

**Subject Matter :** Transactions in derivatives.

**Relevant Section : Section 45V:** Notwithstanding anything contained in the Securities Contracts (Regulation) Act, 1956 or any other law for the time being in force, transactions in such derivatives, as may be specified by the Bank from time to time, shall be valid, if at least one of the parties to the transaction is the Bank, a scheduled bank, or such other agency falling under the regulatory purview of the Bank

**Key Issue :** Whether non banking entity can do transactions in derivatives?

**Citation Details :** Assistant Commissioner of Income Tax vs. AU Financiers (India) Ltd. (07.01.2019 - ITAT Jaipur): [MANU/IJ/0248/2019](#)

**Summary Judgment :**

**Facts:** During the course of assessment proceedings, the AO received certain information that the assessee-company has carried out trading through certain registered brokers on NSEL and for various reasons, the trading on the NSEL exchange platform had stopped and in respect of many traders, their outstanding receivable amounts had remained unsettled. The Hon'ble Bombay High Court had subsequently set up a committee which has started recovery proceedings and certain amounts have been recovered. However, like other brokers/traders, the assessee-company has claimed the outstanding amount as bad debts. The AO further held that as per section 45V of RBI Act, NBFC companies are restricted from trading in any derivative contracts, unless the counter party is a bank. In the instance case, the counter party was not a bank and therefore the activity carried out by NBFC is illegal, restricted and contrary to public policy. Accordingly, the claim is also not eligible under section 37(1).

**Held:** It was held that the transactions undertaken by the assessee-company are in the nature of derivative transactions and loss arising therefrom is in the nature of speculative loss which cannot be allowed set off against normal business income. Secondly, the speculative transactions are not in compliance with section 45V of the RBI Act and hence, in view of Explanation to section 37(1), the same cannot be allowed as an allowable deduction in the hands of the assessee-company.

## RESERVE BANK OF INDIA ACT, 1934

**Subject Matter :** Right to issue bank notes.

**Relevant Section : Section 3(1):** A bank to be called the Reserve Bank of India shall be constituted for the purposes of taking over the management of the currency and of carrying

on the business of banking.

**Section 8(4):** A Director nominated shall hold office for a period of four years and shall be eligible for reappointment

**Provided** that any such Director shall not be appointed for more than two terms, that is, for a maximum period of eight years either continuously or intermittently.

**Section 22(1):** The Bank shall have the sole right to issue bank notes in India, and may, for a period which shall be fixed by the Central Government on the recommendation of the Central Board, issue currency notes of the Government of India supplied to it by the Central Government.

**Key Issue :** Whether impugned Circular, directing entities regulated by RBI not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies, liable to be set aside on ground of proportionality?

**Citation Details :** Internet and Mobile Association of India vs. Reserve Bank of India (04.03.2020 - SC): [MANU/SC/0264/2020](#)

**Summary Judgment :**

**Facts:** Respondent Bank issued Statement on Developmental and Regulatory Policies which directed entities regulated by RBI not to deal with or provide services to any individual or business entities dealing with or settling virtual currencies and to exit relationship, if they already had one, with such individuals/business entities. Following said Statement, RBI also issued circular directing entities regulated by RBI not to deal in virtual currencies nor to provide services for facilitating any person or entity in dealing with or settling virtual currencies and to exit relationship with such persons or entities, if they were already providing such services to them. Hence, present petition.

**Held:** There could be no quarrel with the proposition that RBI had sufficient power to issue directions to its regulated entities in the interest of depositors, in the interest of banking policy or in the interest of the banking company or in public interest. **If the exercise of power by RBI with a view to achieve one of these objectives incidentally causes a collateral damage to one of the several activities of an entity which did not come within the purview of the statutory authority, the same could not be assailed as a colourable exercise of power or being vitiated by malice in law.** To constitute colourable exercise of power, the act must have been done in bad faith and the power must have been exercised not with the object of protecting the regulated entities or the public in general, but with the object of hitting those who form the target. To constitute malice in law, the act must have been done wrongfully and wilfully without reasonable or probable cause. The impugned Circular did not fall under the category of either of them.

**Subject Matter :** Obligation to supply different forms of currency.

**Relevant Section : Section 39:** The Bank shall issue rupee coin on demand in exchange for bank notes and currency notes of the Government of India and shall issue currency notes or bank notes on demand in exchange for coin which is legal tender under the Coinage Act, 2011.

**Key Issue :** Whether the RTI filed by complainant as to supply of coins with inscriptions of god holds validity?

**Citation Details :** Roshan Alag vs. Reserve Bank of India (06.05.2015 - CIC): [MANU/CI/0052/2015](#)

**Summary Judgment :**

**Facts:** The complainant Shri Roshan Alag submitted RTI application before the Central Public Information Officer (CPIO), Reserve Bank of India, Mumbai seeking information

relating ban on coins of Rs. 5 and 10 having the picture of 'Mata Vaishno Devi'; who ordered for minting these coins, method of distribution of these coins in the market and requested for immediate withdrawal of these coins from the market in order to avoid any religious controversy among the people etc.

**Held:** The matter was heard by the Commission. The complainant did not attend the hearing in spite of a notice of hearing having been sent to him. The respondents stated that the CPIO sent a point-wise reply to the complainant. In response to complainant's another representation, the RBI informed the complainant that all matters relating to design etc. of coins are the exclusive ambit of Government of India under the provisions of the Coinage Act, 2011. **The role of RBI is restricted to putting the coins into circulation as and when made available by the India Government Mints, in terms of Section 39 of RBI Act 1934.**

**Subject Matter :** Publication of consolidated statement by the Bank.

**Relevant Section : Section 43:** The Bank shall cause to be published each fortnight a consolidated statement showing the aggregate liabilities and assets of all the scheduled banks together, based on the returns and information received under this Act or any other law for the time being in force.

**Section 43(5):** It defines 'Speculative transaction' means a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips.

**Section 143 of IT Act, 1961:** Once the income tax department has processed your income tax return (ITR), it sends you an intimation notice under section 143(1) of the Income Tax Act

**Key Issue :** Whether transactions in futures and options must be treated as business income as distinct from trading in shares?

**Citation Details :** Snowtex Investment Limited vs. Principal Commissioner of Income Tax, Central-2, Kolkata (30.04.2019 - SC): MANU/SC/0804/201

**Summary Judgment :**

**Facts:** The Appellant filed its return which was processed under Section 143(1) of the IT Act. On the case being selected for scrutiny, a notice was issued. It was held that the principal business activity of the Assessee is trading in shares and securities. The loss from share trading was held to be a speculation loss. The assessing officer held that activities pertaining to futures and options could not be treated as speculative transactions. The loss from speculation was held not to be capable of being set off against the profits from business. Against the order of the assessing officer for assessment year 2008-2009, an appeal was filed before the CIT(A). The CIT(A) held that, the Assessee derived income from trading in derivatives and share business along with dividend and interest and was an NBFC. The CIT(A) held that, the provisions of Section 43(5) came into existence with effect from 1 April 2006 and hence, transactions in futures and options must be treated as business income as distinct from trading in shares. Consequently, the CIT(A) rejected the contention of the Assessee is that the assessing officer had erred in not allowing the speculation loss to be set off against profits of trading in futures and options. The Revenue appealed against the decision of the CIT(A).

**Held:** The court held that The provisions of Section 43(5) were amended by the Finance Act, 2005. The impact of the amendment by the Finance Act, 2005 was that an eligible transaction on a recognised stock exchange in respect of trading in derivatives was deemed not to be a speculative transaction. With effect from 1 April 2006, trading in derivatives was by a deeming fiction not regarded as a speculative transaction when it was carried out on a recognized stock exchange. The consequence is that, in A.Y. 2008-

**2009, the loss which occurred to the Assessee as a result of its activity of trading in shares (a loss arising from the business of speculation) was not capable of being set off against the profits which it had earned against the business of futures and options since the latter did not constitute profits and gains of a speculative business.**

**Subject Matter :** Appointment of agents and acceptance of deposits.

**Relevant Section : Section 45:** The Bank may, having regard to public interest, convenience of banking, banking development and such other factors which in its opinion are relevant in this regard, appoint the National Bank, or the State Bank, or a corresponding new bank as its agent at all places, or at any place in India for such purposes as the Bank may specify.

**Section 45S:** No person, being an individual or a firm or an unincorporated association of individuals shall, accept any deposit- **(i)** if his or its business wholly or partly includes any of the activities specified in clause (c) of section 45-1

**(ii)** if his or its principal business is that of receiving of deposits under any scheme or arrangement or in any other manner or lending

**Key Issue :** Whether the amendment made to Section 9 holds validity?

**Citation Details :** Bhavesh D. Parish and Ors. vs. Union of India (UOI) and Ors. (12.05.2000 - SC): [MANU/SC/0392/2000](#)

**Summary Judgment :**

**Facts:** The appellants are shroffs engaged in the business of providing credit to the members of the public. The traditional mode of organising the business of shroffs over the past several decades had been by way of partnership firms. The nature of the services practised by the appellants generally involved maintaining a mutual current account where the customer may either place deposit on call or withdraw money on call without security. The financing activity of the shroff firms was through capital contributions of the partners/proprietor and deposits made by members of the public.

**Held:** The impugned Section 45-S does not in any way prohibit or restrict any unincorporated body or individual from carrying on the business that it likes. It is open to unincorporated bodies to carry on their financial business either from their own funds or the funds borrowed from their relatives or from financial institutions. The restriction, which is placed by Section 45-S, is on the carrying on of such business by utilising public deposits.. Examining the validity of the amended Section 45-S of the Act by applying the principles enunciated over the years by this Court, and as encapsulated in the passage quoted in the earlier part of this judgment from this Court's decision in Papnasan Labour Unions Case (supra) we find that the said Section is in no way illegal or bad in law. Section 45-S no doubt prohibits the conduct of banking business by an unincorporated non-banking entity like a shroff, but this prohibition has come about, inter alia , in the interest of unwary depositors and borrowers (from shroffs) and with a view to prevent them from committing financial suicide.

**Subject Matter :** Power of Bank to collect credit information.

**Relevant Section : Section 45B:** The Bank may collect, in such manner as it may think fit, credit information from banking companies.

**Key Issue :** Whether RBI was correct in taking up jurisdiction when company withdrew NBFC registration?

**Citation Details :** Rockland Leasing Ltd. vs. Reserve Bank of India and Ors. (21.09.2002 - DELHC): [MANU/DE/2094/2002](#)

**Summary Judgment :**

**Facts:** The appellant has its registered office in Delhi. Its objects amongst other included "undertaking business of finance, hire-purchase, leasing and to finance lease operations of all

kinds". The case of RBI is that the appellant was carrying on business of NBFC as defined under Section 45-I(f) of Chapter III-B of the Act. Thus the appellant came to be governed by the existing directions of RBI relating to such companies and these directions include NBFC (Reserve Bank) directions, 1997 as amended. The appellant applied to RBI for certificate of registration under the provisions of Section 45-IA(2) of the Act as NBFC. The RBI in order to satisfy itself whether the appellant fulfills the condition for such a registration could inspect the books and inspection was undertaken under the provision of Section 45B of the RBI Act. The appellant contended before the RBI it had decided in favor of retaining the fee based activities of merchant banking and discontinue financing operations and it stopped all fund based operations as NBFC. To which RBI replied that it will continue to be guided by RBI regulations as long as it does not return the public deposits.

**Held:** The court held that the Company has been under the jurisdiction of RBI ever since its inception and it voluntarily applied for registration after amendment of the RBI Act. On such a plea that it had withdrawn the application it cannot avoid the rigorous of law.

**Subject Matter :** Transactions in derivatives.

**Relevant Section : Section 45V:** Notwithstanding anything contained in the Securities Contracts (Regulation) Act, 1956 or any other law for the time being in force, transactions in such derivatives, as may be specified by the Bank from time to time, shall be valid, if at least one of the parties to the transaction is the Bank, a scheduled bank, or such other agency falling under the regulatory purview of the Bank

**Key Issue :** Whether non banking entity can do transactions in derivatives?

**Citation Details :** Assistant Commissioner of Income Tax vs. AU Financiers (India) Ltd. (07.01.2019 - ITAT Jaipur): [MANU/IJ/0248/2019](#)

**Summary Judgment :**

**Facts:** During the course of assessment proceedings, the AO received certain information that the assessee-company has carried out trading through certain registered brokers on NSEL and for various reasons, the trading on the NSEL exchange platform had stopped and in respect of many traders, their outstanding receivable amounts had remained unsettled. The Hon'ble Bombay High Court had subsequently set up a committee which has started recovery proceedings and certain amounts have been recovered. However, like other brokers/traders, the assessee-company has claimed the outstanding amount as bad debts. The AO further held that as per section 45V of RBI Act, NBFC companies are restricted from trading in any derivative contracts, unless the counter party is a bank. In the instance case, the counter party was not a bank and therefore the activity carried out by NBFC is illegal, restricted and contrary to public policy. Accordingly, the claim is also not eligible under section 37(1).

**Held:** It was held that the transactions undertaken by the assessee-company are in the nature of deriveate transactions and loss arising therefrom is in the nature of speculative loss which cannot be allowed set off against normal business income. Secondly, the speculative transactions are not in compliance with section 45V of the RBI Act and hence, in view of Explanation to section 37(1), the same cannot be allowed as an allowable deduction in the hands of the assessee-company.

# **SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002**

**Subject Matter :** Registration of the company; Cancellation of such registration; Non-performing assets.

**Relevant Section :** **Section 2(1)(o):** "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset.

**Section 3:** No securitisation company or reconstruction company shall commence or carry on the business of securitisation or asset reconstruction without- (a) obtaining a certificate of registration;

(b) having net owned fund of not less than two crore rupees as prescribed by RBI.

**Section 4: (1)** The Reserve Bank may cancel a certificate of registration granted under Section 3, if such company-

(a) ceases to carry on the business;

(b) ceases to receive or hold any investment from a qualified institutional buyer;

(c) has failed to comply with any conditions;

(d) fails to comply with any directions given by the RBI.

**Key Issue :** Whether amended definition of expression Non-Performing Asset (NPA) under Section 2(1)(o) of Act was constitutionally valid?

**Citation Details :** Keshavlal Khemchand and Sons Pvt. Ltd. vs. Union of India (UOI)  
(28.01.2015 - SC): [MANU/SC/0073/2015](#)

**Summary Judgment :**

**Facts:** Present appeals filed by various aggrieved parties, either borrowers or Secured Creditors for challenging constitutional validity of Section 2(1)(o) of Act pertaining to Non-Performing Assets.

**Held:** Submission that amendment of definition of expression 'NPA' under **Section 2(1)(o)** of Act was bad on account of excessive delegation of essential legislative function, was untenable and was required to be rejected. Another submission that by authorizing different Regulators to prescribe different norms for identification of NPA with reference to different Creditors amount to unreasonable classification was also required to be rejected for reason that all Creditors did not form uniform/homogenous class. Section 13 of Act obligated Secured Creditor to communicate reasons for non-acceptance of representation or objections to borrowers. Amended definition of expression "NPA" Under **Section 2(1)(o)** of Act was **constitutionally valid**. Another important aspect of the Act is that the activity of the Securitisation Companies (SC) and Reconstruction Companies (RC) are given a statutory recognition. Their activity is regulated Under **Sections 3 and 4** of the Act. **Under Section 3 such companies are required to be registered with the RBI. Such registration is liable for cancellation Under Section 4 on the happening of any one of the events specified therein. Section 5** confers statutory authority upon SCs and RCs to acquire the "financial assets" of any CREDITOR. Section 5(2)12 further provides that upon such acquisition of

an asset, the SC or RC, as the case may be, steps into the shoes of the original SECURED CREDITOR from whom the asset is acquired.

**Subject Matter :** Acquisition of rights or interest in financial assets.

**Relevant Section : Section 5:** Emphasises on mode of transfer as permitted by this law should prevail over any other law. In addition, there is no bar on either a securitisation company or reconstruction company buying assets other than financial assets of banks or financial institutions-

- (a) by issuance of debenture, bond or other security; or
- (b) by entering into an agreement.

**Section 13(2):** If any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower, by notice in writing, to discharge in full, his liabilities to the secured creditor within **sixty days** from the date of notice, failing which the secured creditor shall be entitled to exercise all or any of the rights under Section 13(4).

**Key Issue :** Whether the action taken by the bank under Section 13(2) of the Act is justified?

**Citation Details :** Allahabad Bank vs. Rajinder Mehra & Ors. (25.02.2011 - DRAT Delhi):

MANU/DD/0119/2011

**Summary Judgment :**

**Facts:** The present appeal has been preferred against the order rendered by DRT-II wherein an application moved by Allahabad Bank for deletion of its name from the array of the parties was dismissed. According to Allahabad Bank it had assigned the debt in favour of the assignee M/s. IARC Pvt. Ltd. under the deed of assignment and the assignee company has already been impleaded as respondent. Counsel for the appellant argued that succinctly stated the debt stands transferred to M/s. IARC Pvt. Ltd. and it has ceased to be a necessary party.

**Held:** The bank assigned the loan to a ARC, but the borrower continued paying rent to the bank, also the action taken by the bank u/s **13(2) & 13(4)** was questionable and the DRT (trial court) was yet to adjudicate. So, the DRAT dismissed the appeal of the Bank seeking deletion of its name from array of parties, which had cited **Section 5(4)** in seeking so. The same could not be done till the alternate remedy asked for by the borrower u/s **17(1)** has been adjudicated upon. Thus, until then, both the assignor as well as the assignee were held to be necessary parties to this case.

**Subject Matter :** Offences and Penalties.

**Relevant Section : Section 27:** If a default is made--

- (a) in filing the particulars of every transaction of any securitisation or asset reconstruction or security interest created;
- (b) in sending the particulars of the modification; or
- (c) in giving intimation to the Central Registrar of the payment in full by every company or the secured creditor, shall be punishable upto five thousand rupees per day during which the default continues.

**Section 29:** If any person contravenes or attempts or abets the contravention of the provisions or of any rules, he shall be punishable with imprisonment for a term upto one year, or with fine, or with both.

**Section 30:** No court shall take cognizance of any offence punishable under section 27 except upon a complaint in writing made by an officer of the Central Registry or an officer of the Reserve Bank authorised as such.

**Key Issue :** Whether the sale effected should be in consonance of Section 29?

**Citation Details :** Canara Bank vs. M. Amarender Reddy and Ors. (02.03.2017 - SC):

[MANU/SC/0271/2017](#)

**Summary Judgment :**

**Facts:** The Appellant bank had provided financial assistance to one company/principal borrower. The Respondent 1(R1) was one of the two guarantors for the said loan transaction. The R1 had offered his immovable property as security. As the principal borrower committed default, the Appellant issued a demand notice u/s. 13(2) of the SARFAESI Act, 2002. The Appellant then issued possession notice Under Section 13 (4) of 2002 Act. After taking symbolic possession of the secured asset, the upset price at Rs. 69,75,000/- thereof was determined and was accepted by the Appellant. A notice of sale was issued and was also given to the principal borrower and both the guarantors, to give them one last and final opportunity to discharge the debt within 30 days from the date of the said notice. A copy of e-auction notice was also enclosed indicating that the sale date was fixed as 21.11.2015. As per the e-auction notice, the auction was held on 21.11.2015. The property was sold to the highest bidder, for an amount of Rs. 73,25,000/. The R1 filed petition before the High Court, for a declaration that the e-auction notice was illegal and in contravention of the provisions of the 2002 Act and Rules framed thereunder. The High Court took the view that it was imperative for the secured creditor to put the borrower on a notice of 30 days' duration about the intention to sell the secured asset and the mode of sale. This should precede the issuance of a public notice for sale. Hence, the present appeal.

**Held:** It is, therefore, imperative that for the sale to be effected Under Section 13(8), the procedure prescribed under Rule 8 read along with Rule 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale by referring to Sections 13(1), 13(8) and 37, read along with **Section 29** and Rule 15. In the present case, **as the public auction sale held on 21.11.2015 has not materialized, the Appellant may have to resort to a fresh public notice for sale of the secured asset of the Respondent No. 1, if the outstanding liability is still unpaid and the sale is to be effected either by inviting tenders from the public or by holding public auction.**

**Subject Matter :** Offences and Penalties.

**Relevant Section : Section 30:** No court shall take cognizance of any offence punishable under section 27 except upon a complaint in writing made by an officer of the Central Registry or an officer of the Reserve Bank, generally or specially authorised in writing in this behalf by the Central Registrar or, as the case may be, the Reserve Bank.

**Section 14:** The secured creditor for the purpose of taking possession or control of any secured asset may request in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and they shall, on such request being made

- (a) take possession of such asset and documents relating thereto; **and**
- (b) forward such assets and documents to the secured creditor.

**Key Issue :** Whether the Chief Judicial Magistrate is competent to process the request of the secured creditor to take possession of the secured asset u/s. 14 of the Act of 2002?

**Citation Details :** The Authorised Officer, Indian Bank vs. D. Visalakshi and Ors.

(23.09.2019 - SC): [MANU/SC/1303/2019](#)

**Summary Judgment :**

**Facts:** The seminal question involved in present appeals is whether the Chief Judicial Magistrate is competent to process the request of the secured creditor to take possession of

the secured asset under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 . There are conflicting views of different High Courts on this question. The High Courts of Bombay, Calcutta, Madras, Madhya Pradesh and Uttarakhand have interpreted the said provision to mean that, only the Chief Metropolitan Magistrate in metropolitan areas and the District Magistrate in non - metropolitan areas are competent to deal with such request. On the other hand, the High Courts of Kerala, Karnataka, Allahabad and Andhra Pradesh have taken a contrary view of the same provision, to mean that it does not debar or preclude the CJM in the non metropolitan areas to exercise power under **Section 14** of the 2002 Act.

**Held:** It is urged that taking any other view would require rewriting of **Section 14** of the 2002 Act and in the process doing violence to the legislative intent. That must be eschewed. It is urged that in contradistinction to the expression used in Section 14 "CMM" and "DM", **Section 30** of the same Act (2002 Act) refers to the authority as "Metropolitan Magistrate" or a "Judicial Magistrate", as the case may be for taking cognizance of offences punishable under the Act. The CJM is equally competent to deal with the application moved by the secured creditor under Section 14 of the 2002 Act. Accordingly, view taken by the High Courts of Kerala, Karnataka, Allahabad and Andhra Pradesh is upheld and decisions of the High Courts of Bombay, Calcutta, Madras, Madhya Pradesh and Uttarakhand in that regard is reversed.

**Subject Matter : Jurisdiction**

**Relevant Section : Section 34:** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

**Section 35:** The provisions of this Act shall have overriding effect over other laws in any inconsistence between them.

**Section 17(1):** Any person (including borrower), aggrieved by any of the measures referred to in Section 13(4) taken by the secured creditor or his authorised officer may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within **forty-five days** from the date on which such measure had been taken.

**Key Issue :** Whether the Court had jurisdiction to entertain the suit in view of the provisions of Section 34 r/w. Section 13(2) of the Act?

**Citation Details :** State Bank of Patiala vs. Mukesh Jain and Ors. (08.11.2016 - SC):

[MANU/SC/1436/2016](#)

**Summary Judgment :**

**Facts:** The Appellant is a nationalized bank which had lent Rs. 8,00,000/- to R1 by way of a term loan on certain conditions and so as to secure the said debt, R1 debtor had mortgaged his immovable property forming part of premises. As R1 committed default in re-payment of the said loan, the Appellant initiated proceedings under the provisions of the SARFAESI Act, 2002. When notice u/s.13(2) of the Act had been issued and further proceedings were sought to be initiated by the Appellant against R1, the said proceedings had been challenged by R1 by filing civil suit in the Court of Civil Judge, Delhi, the said suit is rejected by the trial court. Being aggrieved by the rejection of the said application, the Appellant filed Civil Revision Petition in the High Court of Delhi. The said petition was also rejected and being aggrieved by the said judgment, the present appeal has been filed by the Appellant.

**Held:** The application submitted by the Appellant bank Under Order VII Rule 11 of the Code of Civil Procedure should have been granted by the trial Court as, according to **Section 34** of the Act, a **Civil Court has no jurisdiction to entertain any appeal arising under the Act.**

**The Debt Recovery Tribunal constituted under the DRT Act has jurisdiction to entertain an appeal as per Section 17 of the Act even if the amount involved is less than Rs. 10 lakh.** But, the said appellate jurisdiction need not be misunderstood with the original jurisdiction of the Tribunal. For the aforeslated reasons, the impugned judgment as well as the order rejecting the application filed Under Order VII Rule 11 are set aside.

**Subject Matter :** Jurisdiction

**Relevant Section : Section 34:** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

**Section 35:** The provisions of this Act shall have overriding effect over other laws in any inconsistency between them.

**Section 17(1):** Any person (including borrower), aggrieved by any of the measures referred to in Section 13(4) taken by the secured creditor or his authorised officer may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within **forty-five days** from the date on which such measure had been taken.

**Key Issue :** **a.** Whether there is a bar on jurisdiction of the High Court as a Company Court to grant relief in the light of **Sections 34 and 35** of the SARFAESI Act?  
**b.** Whether the Banks could choose to stand outside the winding up, in seeking to enforce the security assets and simultaneously prefer a Company Petition seeking for winding up of the Company in respect of the balance debt not covered by such security?

**Citation Details :** Kingfisher Airlines Limited vs. State Bank of India and Ors. (11.12.2013 - KARHC): [MANU/KA/3387/2013](#)

**Summary Judgment :**

**Facts:** State Bank of India leading a consortium of banks (Repsondent Banks) filed an application under S.14 of SARFAESI Act contending that they were entitled to take physical possession of a building in Mumbai named Kingfisher House, a property which was mortgaged by Kingfisher Airlines Limited in favour of the consortium. Kingfisher Airlines Limited holds that a large number of petitions for winding up of the Company is pending before this court (High Court) and if the earliest of these petitions is admitted, then the assets would come under the jurisdiction of this court. Hence the Company filed the Application to direct the Respondent Bank(s) not to proceed with the Application filed under Section 14 of the SARFAESI Act before the CMM Court and for a direction that physical possession of the secured asset shall not been taken in undue haste. The said Application was filed contending that by invoking the jurisdiction of the this Court for winding up, the Banks are deemed to have relinquished and surrendered all security interest and therefore seeking to invoke Section 14 of the SARFAESI Act after filing the Petition for winding up is wholly illegal and without jurisdiction. Further the proceedings under SARFAESI may jeopardize the interests of a large number of creditors, employees, shareholders and the company as well.

**Held:** A plain reading of **Section 34** of the SARFAESI Act would indicate that the jurisdiction of all civil courts is barred and no injunction can be granted by any Court in respect of any action taken or to be taken pursuant to SARFAESI Act. Such bar would apply to Company Court as well. **Section 35** of the SARFAESI Act declares that the provisions of

the Act would prevail over other laws notwithstanding anything inconsistent therein. Though Section 446 (2) of the Companies Act, 1956 provides that the Company Court shall have absolute jurisdiction to entertain and dispose of any suit or proceedings notwithstanding anything contained in any other law, this provision is applicable to a post winding up order. That apart, the non obstante clause contained in the subsequent enactment would normally prevail. Therefore, it was held that the Karnataka High Court as a Company Court did not have jurisdiction to interfere. A secured creditor can choose to stand outside the winding up and yet simultaneously prefer a company petition and also that the Company Court could not exercise jurisdiction over the property when recourse is sought to be taken against the secured asset by a secured creditor under SARFAESI Act.

**Subject Matter : Jurisdiction**

**Relevant Section : Section 34:** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

**Section 35:** The provisions of this Act shall have overriding effect over other laws in any inconsistency between them.

**Section 17(1):** Any person (including borrower), aggrieved by any of the measures referred to in Section 13(4) taken by the secured creditor or his authorised officer may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within **forty-five days** from the date on which such measure had been taken.

**Key Issue :** a. Whether the lower court's rejection of the plaint was justified?

b. Whether the suit appears to be barred by any law?

**Citation Details :** Atheqa Begum vs. Indian bank and Ors. (22.11.2013 – KARHC):

[MANU/KA/3919/2013](#)

**Summary Judgment :**

**Facts:** X, the plaintiff is the sister of Y. Z is the son of Y. According to X, her mother had gifted her half share in a suit property through an oral gift in 11.3.1982 and since then X has been the absolute owner. X handed over the property to Y under the bona fide intention that Y would look after the property in the best interest of X. Y however claims that their mother executed a trust deed on the property on 5.2.1983 in favour of Z, the beneficiary. Y is the trustee of the property. Y availed loan from Indian Bank on strength of the suit property. Upon default in repayment of loan, the Defendant invoked provisions of SARFAESI Act 2002 and thus took over the possession of the suit property. X claims that the possession by the Bank should be withdrawn and that the trust deed does not bind her. The Bank denies the averment by X regarding the gift. The Bank further claimed that the suit is not maintainable and is expressly barred under s.17 and s.34 of the Act. At this stage, an application was also filed with under Order 7 Rule 11(d) of the CPC by the Plaintiff seeking direction against the Defendant for withdrawal of possession notice (the main relief) along with other reliefs. The civil court rejected the plaint stating jurisdiction of civil court is barred and hence the present appeal.

**Held:** Taking over of the possession of the suit property is one of the coercive steps undertaken by the Defendant under s. 13(4). The fact that such steps were taken by the Bank is evident from the statements and documents provided by the Plaintiff in her plaint. The Plaintiff, who is the aggrieved party in this case, would then have only a specific remedy as provided under **S.17** of the SARFAESI Act. Upon **conjoint reading of S.17 and S.34**, it is

clear that **there is a statutory bar on Civil Court to try cases in which action under SARFAESI Act has already been taken or are to be initiated.** The Civil Court thus cannot impose an injunction. Further, **the High Court upheld that the decision of the Civil Court was right in rejecting the plaint.**

**Subject Matter :** Rights & Liabilities of Borrower

**Relevant Section : Section 13(3A):** On receipt of the notice under Section 13(2), if the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

**Exception:** The reasons so communicated by the secured creditor shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal.

**Section 13(2):** Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and the secured creditor declares it as a non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of his rights under the Act.

**Exception:** (i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in accordance with the terms and conditions of security documents executed in favour of the debenture trustee

**Key Issue :** a. Whether Sub-section (3A) of Section 13 mandatory or directory in nature?  
b. Whether sufficient opportunity and time was granted to the debtor to repay the debt without any avail?

**Citation Details :** ITC Limited vs. Blue Coast Hotels Ltd. and Ors. (19.03.2018 - SC):

[MANU/SC/0263/2018](#)

**Summary Judgment :**

**Facts:** Industrial Financial Corporation of India (IFCI), (the creditor), in the capacity of a financial institution entered into a corporate loan agreement with Blue Coast Hotels (hereinafter 'the debtor') for a sum of Rs. 150 crores. The agreement included a creation of a special mortgage to secure the corporate loan. The mortgaged property comprised of the whole of the debtor's hotel property-including the agricultural land on which the debtor was to develop villas. The debtor defaulted in repayment of the loan and the debtor's account became a Non-Performing Asset (NPA). A notice under Section 13(2) of the Act was sent by the creditor calling upon the debtor to pay the amount overdue. After various rounds of litigation the creditor auctioned the mortgaged property in order to recover the debt amount. An appeal was preferred wherein the High Court held entire proceedings for recovery and sale of the hotel to be illegal being in violation of the Act. Aggrieved by, present appeal was preferred.

**Held:** The language of **Sub-section (3A)** to be clearly impulsive. The word 'shall' invariably raise a presumption that the particular provision is imperative. There is nothing in the legislative scheme of **Section 13(3A)** which requires the Court to consider whether or not, the word 'shall' is to be treated as directory in the provision. Under **Section 13(2)** and after the debtor's letter of representation many opportunities were granted by the creditor to the debtor

to repay the debt which were all met by proposals for extension of time. Eventually, the debtor even executed "A Letter of Undertaking" acknowledging the right of IFCI to sell the assets in the case of default.

Non-compliance of **Sub-section (3A) of Section 13** cannot be of any avail to the debtor whose conduct has been merely to seek time and not repay the loan as promised on several occasions. the judgment of the High Court is set aside and direct the debtor and its agents to handover possession of the mortgaged properties to the auction purchaser within a period of six months from the date of this judgment along with the relevant accounts.

**Subject Matter :** Rights & Liabilities of Creditor

**Relevant Section : Section 13(4):** Provides for the measures that can be taken by the secured creditor to recover his secured debt from the Borrower.

**Section 17(1):** Any person (including borrower), aggrieved by any of the measures referred to in Section 13(4) taken by the secured creditor or his authorised officer may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

**Security Interest (Enforcement) Rules, 2002**

**Rule 8:** Provides for sale of immovable secured asset and

**Rule 9** provides for time of sale, issue of sale certificate and delivery of possession of the immovable secured asset.

**Key Issue :** Whether High Court was justified in holding that remedy of Appellant lied in challenging action of Respondent in forfeiting deposit by filing application under Section 17 of Act before DRT?

**Citation Details :** Agarwal Tracom Pvt. Ltd. vs. Punjab National Bank and Ors. (27.11.2017 - SC): [MANU/SC/1494/2017](#)

**Summary Judgment :**

**Facts:** Respondent-Punjab National Bank had given loan facility to a Company called "M/s. India Iron & Steel Corporation Limited". To secure the loan amount, the Borrower had secured their assets, which consisted of the land, factory building, plant and machinery situated at Dhampur. The Borrower, however, failed to clear their loan amount and became a defaulter in its repayment. The PNB, therefore, invoked their powers Under **Section 13(4)** of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and issued a public sale notice in leading English newspapers for sale of the mortgaged assets of the Borrower in the public auction. The Appellant, herein, was the bidder who failed to pay the regular installments towards sale money in terms of memorandum of understanding to Respondent. Dispute arose between Appellant and Respondent before Debt Recovery Tribunal (DRT) wherein an order was passed directing the Appellant not to remove any material from the factory premises. That led the Respondent to forfeit the Appellant's deposit which was challenged in High Court. High Court dismissed the Appellant's petition on the ground of availability of alternative statutory remedy to the Appellant of filing the application under Section 17 of SARFAESI Act before DRT to challenge the action of Respondent in forfeiting the deposit money of the Appellant. Hence, present appeal was filed by Appellant.

**Held:** An action of Respondent in forfeiting the deposit made by Appellant was part of the measures taken by Respondent under Section 13(4). Measures taken under Section 13 (4) would not be completed unless the entire procedure laid down in Rules 8 and 9 for sale of secured assets was fully complied with by the Respondent. Tribunal had been empowered by Section 17(2),(3) and (4) to examine all the steps taken by Respondent with a view to find out

as to whether the sale of secured assets was made in conformity with the requirements contained in Section 13(4) read with the Rules or not. The expression "any of the measures referred to in Section 13(4) taken by Respondent in Section 17(1) would include all actions taken by Respondent under the Rules which relate to the measures specified in Section 13(4). Appellant was aggrieved by the action of Respondent in forfeiting their money. The Appellant falls within the expression "any person" as specified under Section 17(1) and hence was entitled to challenge the action of Respondent before DRT by filing an application under Section 17(1) of Act. Lower Court was justified in dismissing the Appellant's petition on the ground of availability of alternative statutory remedy of filing an application under Section 17(1) of Act before the concerned Tribunal to challenge the action of Respondent in forfeiting the Appellant's deposit under Rule 9(5). The Appellant is, accordingly, granted liberty to file an application before the concerned Tribunal (DRT) Under Section 17(1) of the SARFAESI Act, which has jurisdiction to entertain such application within 45 days from the date of this order.

## INDIAN TRUSTS ACT, 1882

**Subject Matter :** Who has the right to transfer and to execute the Trusts' property.

**Relevant Section : Section 11:** A, a trustee, is simply authorised to sell certain land by public auction. He cannot sell the land by private contract.

**Key Issue :** Whether the minor is entitled to transfer the trusts property?

**Citation Details :** Raja Baldeodas Birla Santatikosh vs. Commissioner of Income Tax (29.06.1990 - CALHC): MANU/WB/0141/1990

**Summary Judgment :**

**Facts:** Facts: The assessee is a private discretionary trust constituted under a deed of settlement and question is raised by the Commissioner of Income Tax and the questions raised by the assessee-trust substantially involve the same issue, that is to say, the validity of donation of certain shares made by the trustees of the assessee-trust and question of Commissioner of Income Tax involves the issue of assessability of the income and accretions arising out of the said donated shares in the hands of the assessee-trust after the date of donation.

**Held:** In the instant case, judged in the light of the reality of the situation and the conduct of the parties, the income from the said shares after the date of the donation did not, at any time, really accrue to nor was it earned or received by the assessee-trust. If the said donation is assumed to be void which we have already held is not so, the dividend thereon, even when received by the said Birla Jankalyan Trust, would be assessable to Income Tax in the hands of the assessee unless, on the principles of real income such dividend on the said shares having been lawfully earned and received by the donee-trust and not by the assessee-trust is held not to be includable in the hands of the assessee-trust.

**Subject Matter :** Who has the right to transfer and to execute the Trusts' property.

**Relevant Section : Section 23:** A trustee improperly leaves trust property outstanding, and it is consequently lost, he is liable to make good the property lost, but he is not liable to pay interest thereon, The trustee is liable to pay interest thereon for the period of the delay.

**Key Issue :** Whether the minor is entitled to transfer the trusts property?

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**Summary Judgment :**

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**Held:** In the instant case, judged in the light of the reality of the situation and the conduct of the parties, the income from the said shares after the date of the donation did not, at any time, really accrue to nor was it earned or received by the assessee-trust. If the said donation is assumed to be void which we have already held is not so, the dividend thereon, even when received by the said Birla Jankalyan Trust, would be assessable to Income Tax in the hands of the assessee unless, on the principles of real income such dividend on the said shares having been lawfully earned and received by the donee-trust and not by the assessee-trust is held not to be includible in the hands of the assessee-trust.

**Subject Matter :** Who has the right to transfer beneficial interest.

**Relevant Section : Section 58:** The beneficiary, if competent to contract may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest.

**Key Issue :** Whether they had any transferable interest in respect of securities?

**Citation Details :** Canbank Financial Services Ltd. vs. The Custodian and Ors. (03.09.2004 - SC): [MANU/SC/0724/2004](#)

**Summary Judgment :**

**Facts:** The affidavit which has been filed by Ashwin Mehta before the Special Court, it has been stated that M/s Canbank Financial Services Ltd. owes substantial sums and Canbank Financial Services Ltd. does not dispute the balances in the various accounts of Ashwin Mehta as on the date he was notified under the Special Courts Act and in as much as large amounts of money were receivable by Mr Harshad Mehta from Canbank Financial Services Ltd. against which Ashwin Mehta claims a set-off. 4. In the application which was filed before the Special Court by the appellant.

**Held:** It is thus clear that Respondent No. 5 could not have purchased the CANCIGO's nor could the beneficial interest in the CANCIGO's be transferred to them. Respondent No. 5 have got thus no right, title or interest in the CANCIGO's and cannot be allowed to hold on to them. This is particularly so as they have now given up their claim that these were deposited with them, as and by way of security. The claim, if any, of Respondent No. 5, against the 1st Respondent, is a mere money claim. The CANCIGO's remain the property of Respondent No. 1 and stand attached. They must be handed over by Respondent No. 5 to the Custodian. It must be mentioned that even if the 5th Respondent had claimed that the CANCIGO's were deposited with them as security for repayment of debts due by the 1st Respondent, the terms of issue would still have prevented any interest being created in their favour and so for the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. These appeals are allowed.

**Subject Matter :** Who has the right to transfer beneficial interest.

**Relevant Section : Section 82:** Transfer to one for consideration paid by another.

**Key Issue :** Whether they had any transferable interest in respect of securities?

**Citation Details :** Canbank Financial Services Ltd. vs. The Custodian and Ors. (03.09.2004 - SC): [MANU/SC/0724/2004](#)

**Summary Judgment :**

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**Subject Matter :** Who has the right to transfer beneficial interest.

**Relevant Section : Section 88: Advantage gained by fiduciary**

Provides that where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property

**Key Issue :** Whether they had any transferable interest in respect of securities?

**Citation Details :** Canbank Financial Services Ltd. vs. The Custodian and Ors. (03.09.2004 - SC): [MANU/SC/0724/2004](#)

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No. 1 and stand attached. They must be handed over by Respondent No. 5 to the Custodian. It must be mentioned that even if the 5th Respondent had claimed that the CANCIGO's were deposited with them as security for repayment of debts due by the 1st Respondent, the terms of issue would still have prevented any interest being created in their favour and so for the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. These appeals are allowed.

**Subject Matter :** What is Right to Redemption.

**Relevant Section : Section 90:** A, tenant for life of leasehold property, renews the lease in his own name and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.

**Key Issue :** Whether the Respondents are entitled to redeem the mortgage property against mortgagee?

**Citation Details :** Shankar Sakharam Kenjale (Died) through his Legal Heirs vs. Narayan Krishna Gade and Ors. (17.04.2020 - SC): [MANU/SC/0375/2020](#)

**Summary Judgment :**

**Facts:** Some of these offices, under this act, paragana and kulkarni watans were abolished and watan lands were resumed to 2 the government, subject to section 4. it is needless to observe that the suit land, being watan property, was also resumed to the government subject to section 4, which empowered the holder of the watan to seek re-grant of the land upon payment of the requisite occupancy price within prescribed period notably, the original watandar did not seek re-grant of the suit land. however, relying on a government resolution permitting persons in actual possession of the watan lands to seek re-grant, the mortgagee paid the requisite occupancy price and obtained a re-grant of the suit land in.

**Held:** The right of redemption under a mortgage deed can come to an end or be extinguished only by a process known to law, i.e., either by way of a contract between the parties to such effect, by a merger, or by a statutory provision that debars the mortgagor from redeeming the mortgage. A mortgagee who has entered into possession of the mortgaged property will have to give up such possession when a suit for redemption is filed, unless he is able to establish that the right of redemption has come to an end as per law. This emanates from the legal principle applicable to all mortgages, "**Once a mortgage, always a mortgage**". The right of redemption of a mortgagor is not extinguished by virtue of re-grant in favour of the mortgagee. Section 90 of the Indian Trusts Act, 1882 casts a clear obligation on the mortgagee to hold any right acquired by him in the mortgaged property for the benefit of the mortgagor, as he is seen to be acting in a fiduciary capacity in respect of such transactions. Therefore, the advantage derived by the mortgagee by way of the re-grant must be surrendered to the benefit of the mortgagor, subject to the payment of the expenses incurred by them in securing the re-grant.

**Subject Matter :** What is Right to Redemption.

**Relevant Section : Section 4:** A trust may be created for any lawful purpose. The purpose of a trust is lawful unless it is

- (a) forbidden by law, or
- (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or
- (c) is fraudulent, or
- (d) involves or implies injury to the person or property of another, or
- (e) the court regards it as immoral or opposed to public policy.

**Key Issue :** Whether the Respondents are entitled to redeem the mortgage property against mortgagee?

**Citation Details :** Shankar Sakharam Kenjale (Died) through his Legal Heirs vs. Narayan Krishna Gade and Ors. (17.04.2020 - SC): [MANU/SC/0375/2020](#)

**Summary Judgment :**

**Facts:** Some of these offices, under this act, paragana and kulkarni watanas were abolished and watan lands were resumed to the government, subject to section 4. It is needless to observe that the suit land, being watan property, was also resumed to the government subject to section 4, which empowered the holder of the watan to seek re-grant of the land upon payment of the requisite occupancy price within prescribed period notably, the original watanadar did not seek re-grant of the suit land. However, relying on a government resolution permitting persons in actual possession of the watan lands to seek re-grant, the mortgagee paid the requisite occupancy price and obtained a re-grant of the suit land in.

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**Subject Matter :** What are liabilities of Trustee where beneficiary's interest is forfeited to Government.

**Relevant Section : Section 29:** When the beneficiary's interest is forfeited or awarded by legal adjudication, the trustee is bound to hold the trust property to the extent of such interest for the benefit of such person in such manner as the State Government may direct in this behalf.

**Key Issue :** Whether the applicability of the Arbitration Act for deciding the disputes relating to trusts through private arbitration as the remedies provided in the Trusts Act were adequate or not?

**Citation Details :** Vimal Kishor Shah and Ors. vs. Jayesh Dinesh Shah and Ors. (17.08.2016 - SC): [MANU/SC/0913/2016](#)

**Summary Judgment :**

**Facts:** One Shri Dwarkadas Laxmichand Modi executed a family Trust Deed on 06.04.1983 forming a trust in favour of six minors, including Vimal Kishor Shah and Jayesh Dinesh Shah. Clause 20 of the Trust Deed provided that if any dispute arise then it would be resolved in pursuance of the provisions of the Indian Arbitration Act, and the decision of the arbitrators would be binding on the parties to the arbitration. But soon after the formation of the trust, differences cropped up between the beneficiaries and one of the trustees resigned from the trusteeship.

**Held:** Supreme Court opined that there was no valid arbitration agreement. Since the conditions were not met as there was no agreement and the arbitration clause was inserted

unilaterally by the “settlor” so the requirements of Section 2(b) and 2(h) read with Section 7 were not fulfilled. Further, the Trusts Act also conferred jurisdiction on Civil Courts, for adjudication in the matter of trusts. **Though there was no express bar towards the Arbitration Act, the Court opined that there was an implied bar of exclusion of the applicability of the Arbitration Act for deciding the disputes relating to trusts through private arbitration as the remedies provided in the Trusts Act were adequate and sufficient.**

**Subject Matter :** Execution of Trusts Deed.

**Relevant Section : Section 3:** A trust is an obligation annexed to the **ownership of property**, and arising out of a confidence reposed in and declared and **accepted by owner for the benefit of another owner**.

**Key Issue :** Whether the object of dedication of the property shall decide the nature of it being considered a trust or not?

**Citation Details :** Swami Shivshankargiri Chella Swami and Ors. vs. Satya Gyan Niketan and Ors. (23.02.2017 - SC): [MANU/SC/0206/2017](#)

**Summary Judgment :**

**Facts:** The applications is permitted to the Appellants to file suit Under Section 92 of Code of Civil Procedure, 1908. The District and **Sessions Judge observed that the object of dedication of the property shall decide the nature of it being considered a trust.** then the Respondents has filed civil revision Under Section 115 of Code of Civil Procedure before against the decesion of District and Sessions Judge and therefore after the high court judgement against them, the Appellants have appealed to the court.

**Held:** The Appellants are granted liberty to move appropriate application in accordance with law, within a period of 30 days from the date of pronouncement of this judgment. **Civil Courts having jurisdiction to entertain any suit in this country are expected to carefully examine applications.**

## COMPANIES ACT, 2013

**Subject Matter :** Refusal of registration and appeal against refusal.

**Relevant Section : Section 58:** (1) If a private company limited by shares refuses, to register the transfer or the transmission by operation of law of the right to, any securities or interest of a member in the company, it shall within a period of thirty days from that date send notice of the refusal to the transferor and the transferee with reason of such refusal.

(2) the securities or other interest of any member in a public company shall be freely transferable.

(3) The transferee may appeal to the Tribunal against the refusal within a period of thirty days from the date of receiving of such notice.

**Key Issue :** Are the shares of a company '**freely transferable**'?

**Citation Details :** Re The Bahia and San Francisco Railway Co Ltd v Trittin and others L.R. 3 Q.B. 588

**Summary Judgment :**

**Facts:** Miss Trittin left her share certificates with a broker. A forged transfer together with the certificates, was lodged with and registered by the company. The new certificates certified that the named person as registered holder. He then sold them to innocent purchasers who in turn lodged transfers and certificates and obtained certificates in their own names. The company had become obliged to restore Miss Trittin's name to the register but refused to recognise the innocent purchasers as shareholders. A special case was stated for the opinion of the Court between the innocent purchasers as claimants and the company for the purpose of determining the amount of damages (if any) which the company was liable to pay them respectively.

**Held:** The Court held that the capital of a company is divided into parts, called shares. The shares are said to be a movable property and, subject to certain conditions, freely transferable, so that no shareholder is permanently or necessarily wedded to a company. When the joint-stock companies were established, the object was that their shares should be capable of being easily transferred.

**Subject Matter :** Memorandum of Association

**Relevant Section : Section 2(56):** “memorandum” means the memorandum of association of a company as originally framed and altered from time to time in pursuance of any previous company law or this Act.

**Key Issue :** Can a shareholder ratify a contract as per the 'memorandum'?

**Citation Details :** Rajendra Nath Dutta and Ors. vs. Shibendra Nath Mukherjee and Ors. (12.05.1981 - CALHC): MANU/WB/0119/1981

**Summary Judgment :**

**Facts:** The company entered into a contract with M/s. Riche, a firm of railway contractors to finance the construction of a railway line in Belgium. On subsequent repudiation of this contract by the company on the ground of its being ultra vires, Riche brought a case for damages on the ground of breach of contract, as according to him the words “general contractors” in the objects clause gave power to the company to enter into such a contract and, therefore, it was within the powers of the company. More so because the contract was ratified by a majority of shareholders.

**Held:** The House of Lords held that the contract was ultra vires the company and, therefore, null and void. The Court held that if every shareholder of the company had been in the room and had said, “That is a contract which we desire to make, which we authorise the directors to make”, still it would be ultra vires. The shareholders cannot ratify such a contract, as the contract was ultra vires the objects clause, which by Act of Parliament, they were prohibited from doing.

**Subject Matter :** Articles of Association

**Relevant Section : Section 2(5):** ‘articles’ means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act. It also includes the regulations contained in Table A in Schedule I of the Act, in so far as they apply to the company.

**Key Issue :** Does 'Memorandum' and 'Article of Association' compliment each other?

**Citation Details :** Ashbury Railway Carriage and Iron Co. Ltd. v. Riche, (1875) L.R. 7 H.L. 653

**Summary Judgment :**

**Facts:** Incorporated under the Companies Act 1862, the Ashbury Railway Carriage and Iron Company Ltd's memorandum, clause 3, stated that its objects were "to make and sell, or lend on hire, railway-carriages" and clause 4 stated that activities beyond this needed a special resolution. But the company agreed to give Riche and his brother a loan to build a railway from Antwerp to Tournai in Belgium. Later, the company repudiated the agreement. Riche sued, and the company pleaded that the action was ultra vires. The general functions of the articles have been aptly summed up by Lord Cairns, in the case.

**Held:** The Court held that "The articles play a part that is subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, rights and powers of the governing body as between themselves and the company at large, and the mode and form in which business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made. The memorandum, is as it were the area beyond which the action of the company cannot go inside that area shareholders may make such regulations for the governance of the company as they think fit". Thus, the memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.

**Subject Matter :** Promoters

**Relevant Section : Section 2(69): "promoter" means a person-**

- (a) who has been named as such in a prospectus or is identified by the company in the annual return;
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:

**Provided** that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity.

**Key Issue :** Whether a person who joins can be a promoter?

**Citation Details :** Erlanger v. New Sombrero Phosphate Co (1878 LR 3 AC 1218)

**Summary Judgment :**

**Facts:** In the case of Bosher Case, Promoter is someone who starts the incorporation process and organizes the company. He brings people who are helpful in developing the organization, also helps in the subscription process as well as starts the wheels of formation of the company

**Held:** The Court held that, even if a person joins the company after registration and in his professional capacity helps in the floatation of the company, he can be counted as a promoter of a company. Therefore, we can say that there exists a fiduciary relationship between the company based on finance and benefits with the promoter.

**Subject Matter :** Winding Up

**Relevant Section : Section 272:** A company may be wound up by the Tribunal,

- (a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;
- (b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
- (c) if on an application made by the Registrar or any other person authorised by the Central

Government, the Tribunal is convinced of the fraudulent behaviour or unlawful purpose of the company or the persons concerned;

(d) if the company has made a default in filing its financial statements or annual returns for immediately preceding five consecutive financial years; or

(e) if the Tribunal seems it deem fit.

**Key Issue :** Can a company wound up on the basis of '**inability to pay debts**'?

**Citation Details :** Reliance Infocomm Ltd. and Ors. vs. Sheetal Refineries Pvt. Ltd. (07.09.2007 - APHC): MANU/AP/0411/2007

**Summary Judgment :**

**Facts:** The petitioner, a public limited company incorporated under the Companies Act, 1956 with its registered office at Jamnagar, Gujarat, is engaged in the business of providing telecommunication and internet services in India. The respondent is a private limited company incorporated under the Companies Act, 1956 with its registered office in Ranga Reddy District of Andhra Pradesh. According to the petitioner, the respondent is indebted to it for a sum of Rs. 10,97,574/-, that, despite its repeated requests and demands, the respondent had failed and neglected to pay its dues and as such is unable to pay its debts and is, therefore, liable to be wound up.

**Held:** The expression "inability to pay debts" has been interpreted by Andhra Pradesh High Court in the case of Reliance Infocomm Limited v. Sheetal Refineries Private Limited, to mean a situation where a company is commercially insolvent, i.e. the existing and provable assets would be insufficient to meet the existing liabilities. Therefore, a remedy to initiate winding proceedings against financially solvent companies that had defaulted in payment of debts was not available under the earlier regime. However, this is now feasible under The Insolvency and Bankruptcy Code, 2016.

## INSOLVENCY AND BANKRUPTCY CODE, 2016

**Subject Matter :** Persons who may initiate corporate insolvency resolution process; Initiation of Insolvency Process (Corporate Persons)

**Relevant Section : Section 6:** Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor.

**Section 7 r/w Section 5(7): Financial Creditor** is any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to; **U/s 7 (1)** the financial creditor himself or jointly file for the initiation of insolvency process, only if it is filed by **not less than one hundred of such creditors/ allottees in the same class or less than 10% of the total number of creditors**, whichever is less.

**Section 8 r/w Section 5(20): Operational Creditor** is a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred.

**Section 8 (1):** A demand notice may be delivered by the operational creditor on the occurrence of default demanding the payment.

**(2) Within 10 days of such receipt,** the corporate debtor shall bring to the notice of the

operational creditor that:

- (a) existence of a dispute;
- (b) the payment of such unpaid debt; by sending the attested copies of the record of electronic transfer from the bank account or by sending the record of the encashment of the cheque by operational creditor.

**Section 9:** (1) If there is default in complying with the provisions of section 8, the operational creditor may file an application for corporate insolvency process.

(3) The operational creditor shall, along with the application furnish—

- (a) a copy of invoice demand payment or notice;
- (b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;
- (c) a certificate copy from the financial institution that there is no payment of unpaid operational debt;
- (d) a copy of any record with information utility confirming that there is no payment of unpaid operational debt; any other proof.

**Key Issue :** Whether provision of removing defects within seven days was mandatory in nature?

**Citation Details :** Surendra Trading Company vs. Juggilal Kamlapat Jute Mills Company Ltd. and Ors. (19.09.2017 - SC): [MANU/SC/1248/2017](#)

**Summary Judgment :**

**Facts:** The National Company Law Appellate Tribunal was held that the time of seven days prescribed in proviso to Sub-section (5) of Section 9 of the Insolvency and Bankruptcy Code, 2016 was mandatory in nature and if the defects contained in the application filed by the operational creditor for initiating corporate insolvency resolution against a corporate debtor were not removed within seven days of the receipt of notice given by the adjudicating authority for removal of such objections, then such an application filed under Section 9 of the Code was liable to be rejected. Hence, present appeal.

**Held:** The judgments cited by the NCLAT and the principle contained therein applied while deciding that **period of fourteen days within which the adjudicating authority had to pass the order is not mandatory but directory in nature would equally apply while interpreting proviso to Sub-section (5) of Section 7, Section 9 or Sub-section (4) of Section 10 as well.** After all, the applicant did not gain anything by not removing the objections inasmuch as till the objections were removed, such an application would not be entertained. Therefore, it was in the interest of the applicant to remove the defects as early as possible.

**Subject Matter :** Public Announcement of Corporate Insolvency Resolution Process; Appointment of Resolution Professional.

**Relevant Section : Section 15:** (1) The public announcement shall contain the following information:

- (a) name and address of the corporate debtor;
- (b) name of the authority with which the corporate debtor is registered;
- (c) The last date for submission of claims;
- (d) details of the interim resolution professional who shall be responsible for the process;
- (e) Penalties for false or misleading claims;
- (f) The closing date of the process which shall be **180th day from the date of admission** of the application.

**Key Issue :** Whether impugned order passed by Appellate Tribunal in respect of resolution plan for rehabilitating corporate debtor warrant any interference?

**Citation Details :** Committee of Creditors of Essar Steel India Limited vs. Satish Kumar Gupta and Ors. (15.11.2019 - SC): [MANU/SC/1577/2019](#)

**Summary Judgment :**

**Facts:** National Company Law Tribunal admitted Company Petition and resolution professional was appointed. The resolution professional invited expressions of interest from all interested resolution applicants to present resolution plans for rehabilitating the corporate debtor. The resolution plans were submitted and NCLT, allow resolution plan filed by company. Appeal was filed against said order of NCLT. The Appellate Tribunal held that in a resolution plan there could be no difference between a financial creditor and an operational creditor in the matter of payment of dues, and that therefore, financial creditors and operational creditors deserve equal treatment under a resolution plan.

**Held:** In the **public announcement of the CIRP, Under Section 15(1)**, information as to the last date for submission of claims, as may be specified, is to be given; details of the interim resolution professional, who shall be vested with the management of the corporate debtor and be responsible for receiving claims, shall also be given, and the date on which the CIRP shall close is also to be given-see Section 15(1)(c), (d) and (f) of the Code.

**Subject Matter :** Public Announcement of Corporate Insolvency Resolution Process; Appointment of Resolution Professional.

**Relevant Section : Section 22: (1)&(2)** This section enumerates the process of **appointment of the Resolution Professional** by giving an application to the Adjudicating Authority by the committee of creditors having at least 66% of the majority vote within 7 days of the committee meeting.

(3) If the committee resolves that the interim resolution professional shall continue as such, they shall notify the same in writing to the creditors, resolution professional and the adjudicating authority. Otherwise, they shall file an application with the adjudicating authority about there placement with a written consent of the proposed resolution professional.

(4) The adjudicating authority shall forward the same to the board and shall confirm once the consent of the board is given.

**Key Issue :** Whether Appellant-resolution applicant was eligible to submit resolution plan?

**Citation Details :** Arcelor Mittal India Private Limited vs. Satish Kumar Gupta and Ors.

(04.10.2018 - SC): [MANU/SC/1123/2018](#)

**Summary Judgment :**

**Facts:** Adjudicating Authority, passed an order under Section 7 the Insolvency and Bankruptcy Code, 2016 at the behest of financial creditors, admitting a petition filed under the Code for financial debts owed to them by the corporate debtor and appointed the Interim Resolution Professional. Resolution Professional published advertisement, seeking expression of interest from potential resolution applicants who wished to submit resolution plans for the revival of company. Appellant and one company submitted their resolution plans. Resolution Professional found both companies to be ineligible under Section 29A of Code. On appeal, the Company Tribunal found that there was no patent illegality in the decision of the RP for declaring ineligible to applicants. Appeals were filed by both companies against said order which was dismissed.

**Held: Under Section 22,** the first meeting of the Committee of Creditors is to be held within 7 days of its constitution in order to appoint a Resolution Professional. The Committee of Creditors either continues the Interim Resolution Professional or replaces the Interim Resolution Professional by a majority vote of 66%. The application to replace the Interim

Resolution Professional is then to be sent to the Adjudicating Authority, who is to forward the same to the Insolvency and Bankruptcy Board of India (hereinafter referred to as the "IBBI") for confirmation. Upon such confirmation, the Adjudicating Authority then appoints the Resolution Professional. In case the IBBI does not confirm the name of the proposed Resolution Professional within 10 days of receipt of the same, the Adjudicating Authority is then to direct the Interim Resolution Professional to continue to function as the Resolution Professional until such time as the IBBI confirms the appointment of the Resolution Professional.

**Subject Matter :** Initiation of Insolvency Process (Individual and partnership firm)

**Relevant Section : Section 14:** On the insolvency commencement date, the Adjudicating Authority shall by order declare **moratorium** for prohibiting any and all kinds of proceedings against the corporate debtor.

**Section 94:** A **debtor** who commits a default may directly or through resolution professional may apply to the Adjudicating Authority for insolvency resolution process, however, if the debtor is a partner in a firm, he shall only process such application only when majority or all the partners apply for the same. A debtor shall not be able to make such application if he is;

- (a) an undischarged bankrupt;
- (b) undergoing a fresh start process;
- (c) undergoing insolvency resolution process; or
- (d) undergoing a bankruptcy process. Even if such application has been filed within 12 months after filing similar application, the debtor shall not be allowed to file under sub section(1).

**Section 95:** A **creditor** may file an application with the Adjudicating Authority by himself or through resolution professional under this section in relation to any partnership debt owed to him for initiating the process against any of the partners or the firm.

**Key Issue :** a. Whether by virtue of fact that order of moratorium had been passed under Section 14 of code in favour of principal borrower, suit against guarantors also had to be stayed and could not proceed?

b. Whether the provisions of Part II of the Code shall apply to Part III as well?

**Citation Details :** Sicom Investments and Finance Ltd. vs. Rajesh Kumar Drolia and Ors. (28.11.2017 - BOMHC): [MANU/MH/3324/2017](#)

**Summary Judgment :**

**Facts:** Summons for judgement filed by Plaintiff for seeking judgment against Defendants jointly and severally to pay to Plaintiffs sum of Rs. 3,22,25,615/- with further interest @ 23% per annum from date of filing of suit till payment and/or realization.

**Held:** a. It was absolutely clear from provisions of code that for guarantor there was no automatic protection was available when moratorium order passed in favour of corporate debtor. It was only once insolvency resolution process had been initiated either by or against guarantor only then benefit of moratorium would be available to guarantor subject of-course to other provisions of code. Therefore reliance placed by Defendants on Section 60 of code to establish that guarantor automatically gets benefit of moratorium order passed in favour of corporate debtor under Section 14, was wholly misplaced. So far as merit of case was concerned defences raised by Defendants on merits was totally moonshine and illusory. There was no real dispute on merits of case. However, purely out of mercy, leave was granted to Defendants to contest suit subject to condition that Defendants jointly and/or severally depositing in court sum of Rs. 3.22 Crores within period of Twelve weeks from today. Summons for judgement disposed of.

b. **Part III deals with Insolvency Resolution and Bankruptcy for Individuals and**

**Partnership Firms (other than Limited Liability Partnerships).** Chapter III of Part III deals with the Insolvency Resolution Process. Chapter III (which deals with Insolvency Resolution Process) consists of Section 94 to Section 120. **Section 94** deals with an application filed by the debtor to initiate the insolvency resolution process subject to what is stated in Section 94. **Section 95** on the other hand deals with an application filed by a creditor to initiate the insolvency resolution process of the debtor (who may be an individual or a partnership firm). This too is subject to what is further stated in Section 95. Thereafter, **Section 96** provides for an interim-moratorium and clearly stipulates that when an application is filed under section 94 or section 95, the interim moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application. During the interim-moratorium period, any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed and the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt. Sub-section 2 of Section 96 further shows that where the application has been made in relation to a firm, the interim-moratorium under subsection 1 shall operate against all the partners of the firm as on the date of the application.

**Subject Matter :** Bar of Jurisdiction and Limitation

**Relevant Section : Section 231:** It bars the jurisdiction of civil courts in respect of any matter in which the Adjudicating Authority i.e. the NCLT or the NCLAT is empowered by the Code to pass any order.

**Section 238A:** The provisions of the **Limitation Act, 1963** shall apply to the proceedings or appeals before the Adjudicating Authority, the National Company Law Appellate Tribunal, the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal.

**Key Issue :** a.Whether the Winding up Petition, on the date that it was filed, is barred by lapse of time?

**Citation Details :** Jignesh Shah and Ors. vs. Union of India (UOI) and Ors. (25.09.2019 - SC): [MANU/SC/1319/2019](#)

**Summary Judgment :**

**Facts:** With the introduction of Section 238A into the Code, the provisions of the Limitation Act apply to applications made under the Code, winding up petitions filed before the Code came into force are now converted into petitions filed under the Code.

**Held:** If such petition is found to be time-barred, then Section 238A of the Code will not give a new lease of life to such a time-barred petition. On the facts of this case, it is clear that as the **Winding up Petition was filed beyond three years from August, 2012 which is when, even according to IL & FS, default in repayment had occurred, it is barred by time.**

# INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY OF INDIA ACT, 1999

**Subject Matter : ESTABLISHMENT AND INCORPORATION OF AUTHORITY & DUTIES, POWERS AND FUNCTIONS OF AUTHORITY**

**POWER TO MAKE REGULATION**

**Relevant Section : Section 3:** (1) With effect from such date as the Central Government may, by notification, appoint, there shall be established, an Authority to be called "**the Insurance Regulatory and Development Authority**".

**Section 9:** The Chairperson shall have the powers of general superintendence and direction in respect of all administrative matters of the Authority.

**Section 14:** (1) The Authority shall have the duty to regulate, promote and ensure orderly growth of the insurance business and re-insurance business.

**Key Issue :** Does IRDA Act give wide powers to regulatory authority?

**Citation Details :** Wills India Insurance Brokers Pvt. Ltd. vs. Insurance Regulatory and Development Authority (07.03.2011 - BOMHC): [MANU/MH/0326/2011](#)

**Summary Judgment :**

**Facts:** The first Petitioner is a company registered in India incorporated under the laws of Netherlands. The first Petitioner for the period from 2003 till 18th August, 2010 was a joint venture amongst the second Petitioner which held 74% of the issued capital. Since the earlier license granted to the first Petitioner was to expire in 2009, the first Petitioner applied, on 16th February, 2009, for the renewal of their composite broking license. At the time of submitting the renewal application, a show cause notice was issued to the first Petitioner for cancellation of the composite broking license of the first Petitioner. It was challenged by the Petitioners. The first Respondent, IRDA, established under Section 3(1) of the IRDA Act is the authority within the meaning of the IRDA Regulations. The IRDA consists of a Chairman and not more than 5 whole time members and not more than 4 part time members. The second and third Respondents are permanent members (life and non life) of the first Respondent.

**Held:** In view of the Act, while deciding the renewal application afresh, it will be open to the authority to consider any other relevant material by which it may not be possible to renew the license such as any legal impediments in this behalf. The authority to take a fresh decision in accordance with law. The earlier Committee which took the decision now may take a fresh decision on the renewal application in accordance with law. It is clarified that if there is any other ground available with the authority, the same may also be considered provided the same should be brought to the notice of the Petitioners. It is, however, clarified that since they have found that nondisclosure of the dispute between Bhaichand and ECGC was not a relevant aspect, the same may not be taken into consideration while deciding the renewal application afresh.

**Subject Matter : RULES AND REGULATIONS TO BE LAID BEFORE PARLIAMENT.**

**Relevant Section : Section 27:** Every rule and every regulation made shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a **total period of thirty days** which may be comprised in one session or in two or more successive sessions.

**Key Issue :** Can any regulation drafted come into effect without notified and passed by the Parliament?

**Citation Details :** Indian Institute Of Insurance Surveyor and Loss Assessor vs Union Of India & Ors. (20.08.2020 DE HC): [MANU/DE/1689/2020](#)

**Summary Judgment :**

**Facts:** The challenge raised in the present writ petition is to the decision taken in the board meeting by which the Insurance Regulatory and Development Authority of India (Insurance Surveyors and Loss Assessors) (Amendment) Regulations, 2020 was approved by the Board. By the said Regulations, the earlier regulations of 2015 are sought to be amended. The challenges raised by the Petitioner are multi-fold. Broadly, the Petitioner's stand is that the amendments proposed are arbitrary, unjust and illegal. The prayer is that the decision of the Board Meeting held on 13th August, 2020 be quashed and the Regulations not be given effect to.

**Held:** The Court considering the fact that **the regulations which are sought to be challenged are still in a draft form, and the stand of the IRDAI that the same would not be given effect to until they are notified and passed by Parliament, in the opinion of this Court, the challenge is premature.** Accordingly, the writ petition is disposed of as premature, leaving open the rights of the Petitioner to avail its remedies in accordance with law once the regulations are duly notified and placed before the Parliament.

**Subject Matter : DUTIES, POWERS AND FUNCTIONS OF AUTHORITY**

**Relevant Section : Section 14:** (1) The Authority shall have the duty to regulate, promote and ensure orderly growth of the insurance business and re-insurance business.

(2) The powers and functions of the Authority shall include, -

- (a) issue to the applicant a certificate of registration, renew, etc or cancel such registration;
- (b) protection of the interests of the policy holders;
- (c) specifying requisite qualifications, code of conduct and practical training for intermediary or insurance intermediaries, agents, surveyors and loss assessors;
- (f) promoting and regulating professional organisations connected with the insurance and re-insurance business;
- (g) levying fees and other charges for carrying out the purposes of this Act;
- (h) calling for information from organisations connected with the insurance business;
- (k) regulating investment of funds by insurance companies;
- (l) regulating maintenance of **margin of solvency**;
- (m) adjudication of disputes between insurers and intermediaries or insurance intermediaries;
- (o) specifying the percentage of premium income of the insurer to finance schemes for promoting and regulating professional organisations.
- (p) specifying the percentage of life insurance business and general insurance business to be undertaken by the insurer in the rural or social sector.

**Key Issue :** a. Whether the fixation of premium rates for third party liability by the IRDA was without jurisdiction?

b. Whether it is arbitrary and violative of Article 14 of the Constitution as well as ultra vires of the provisions of the Insurance Act, 1938?

**Citation Details :** Erode District Bus Owners Association and Ors. vs. Insurance Regulatory and Development Authority and Ors. (14.06.2011 - MADHC): MANU/TN/2249/2011

**Summary Judgment :**

**Facts:** the subject matter of the challenge is to the order, dated 15.4.2011 issued by the first Respondent, i.e., Insurance Regulatory and Development Authority (for short IRDA) constituted under the Insurance Regulatory and Development Authority Act, 1999. By the impugned order, the IRDA had fixed the Motor Insurance Premium Rates for third party liability only cover. The Petitioners in all these writ petitions were either associations of bus

operators, lorry operators, trade union of Auto rickshaw drivers and associations of matriculation schools, self finance colleges and deemed universities.

**Held:** The Court held that even if the parameters shown by the Supreme Court are applied, the Petitioners have not made out any case. The impugned order is based upon rational classification and subject to sound reasoning and evolved after public consultation with the stake holders. And thus, all the writ petitions will stand dismissed. The Petitioners are given eight weeks time to pay the balance of the premium amounts to the respective insurers without fail. However, there will be no order as to costs. Consequently, connected miscellaneous petitions stand closed.

## MOTOR VEHICLES ACT, 1988

**Subject Matter :** If deceased was self-employed and below the age of 40 years, 40% addition would be made to their income as future prospects.

**Relevant Section : Section 140:** A claim for compensation shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

**Key Issue :** Whether the deductions made by the High Court need modification?

**Citation Details :** Rahul Sharma and Ors. vs. National Insurance Company Ltd. and Ors.  
(07.05.2021 - SC) : [MANU/SC/0348/2021](#)

**Summary Judgment :**

**Facts:** Parents of Appellants died in a road accident. Appellants initiated claim petition before MACT seeking compensation. The present appeal was in respect of Appellant's mother who was aged about 37 years and was a self-employed individual. Tribunal applied multiplier of 15 and determined liability upon the insurer. High Court in appeal deducted 50% of income towards personal and living expenses, while holding deceased ineligible for the grant of future prospects as she was self-employed. Hence the present appeal.

**Held:** The compensation as awarded to the Appellants by the High Court is modified to the extent of deduction towards personal and living expenses, determined to be one-third, and 40% addition towards future prospects. The multiplier of 15 is appropriate, considering the age of the deceased. No reason found to interfere with any other heads as determined by the High Court.

**Subject Matter :** INSURANCE OF MOTOR VEHICLES AGAINST THIRD PARTY

**Relevant Section : Section 163A :** In case of death or permanent disablement or injury due to accident arising out of use of motor vehicle, the owner of the motor vehicle or the authorised insurer is obligated to pay compensation to the person concerned or legal beneficiaries, as the case may be.

**Key Issue :** Whether in a claim proceeding Under Section 163 A of the Motor Vehicles Act, 1988; it is open for the Insurer to raise the defence/plea of negligence?

**Citation Details :** United India Insurance Co. Ltd. v. Sunil Kumar & Anr (24.11.2017 - SC):  
MANU/SC/1562/2017

### **Summary Judgment :**

**Facts:** The claim petition was filed by the Respondent under Section 163-A of the Motor Vehicles Act, 1988, claiming compensation for the injury sustained by him in a road accident occurred on 20.11.2006. The Tribunal after recording the evidence and after hearing the parties, vide its order dated 16.8.2011 passed an award for a sum of Rs.3,50,000/- along with interest at the rate of 7% per annum from the date of the filing of the petition till realization. Aggrieved by the same, the Insurance Co. filed an appeal before the High Court which dismissed the appeal on the ground of non-compliance of Section 170 of the Act by the Insurance Company. Hence, the appeal lies before the Supreme Court.

**Held:** Grant of compensation on the basis of the structured formula is in the nature of a final award and the adjudication there under is required to be made without any requirement of any proof of negligence of the driver/owner of the vehicle(s) involved in the accident. This is made explicit by Section 163A(2). In light of the above reasons, the Court answered the question by holding that in a proceeding under Section 163A of the Act it is not open for the Insurer to raise any defence of negligence on the part of the victim.

**Subject Matter : INSURANCE OF MOTOR VEHICLES AGAINST THIRD PARTY**

**Relevant Section : Section 146 :** No person can either himself use, or allow another person to make use of a motor vehicle, unless there is in force an insurance policy in relation to that vehicle.

#### **Exception:**

(a) Vehicle owned by the Central or State Government & used for government purposes unconnected with any commercial enterprise, or where an exemption from the requirement of insurance has been given by the appropriate government.

(b) Vehicle carrying, or meant to carry, dangerous or hazardous goods, there shall also be a policy of insurance under the Public Liability Insurance Act, 1991

**Key Issue :** Whether the insurance company can escape the liability of compensation and the liability on the owner also, on account of alleged breach of Insurance Policy?

**Citation Details :** Uttar Pradesh State Road Transport Corporation vs. Kulsum and Ors.

(25.07.2011 - SC): [MANU/SC/0846/2011](#)

### **Summary Judgment :**

**Facts:** Ajai Vishen, the owner of mini bus, entered into an Agreement of Contract with the Corporation on 07.08.1997 for allowing it to ply mini bus, as per the permit issued in favour of Corporation, by the concerned Road Transport Office. On account of State amendment incorporated in Section 103 of the Motor Vehicles Act, 1988 the Corporation is vested with right to take the vehicles on hire as per the contract and to ply the same on the routes as per the permit granted to it. According to the terms and conditions of the Agreement, the mini bus was to be plied by the Corporation, on the routes as per the permit issued by R.T.O. in its favour. Except for the services of the driver, which were to be provided by the owner, all other rights of owner were to be exercised by the Corporation only. The conductor was to be an employee of the Corporation, and he was authorised and entitled to collect money after issuing tickets to the passengers and had the duty to perform all the incidental and connected activities as a conductor on behalf of the Corporation. The collection so made was to be deposited with the Corporation. Feeling aggrieved by the awards of the Tribunal, Corporation comes with the appeal before this Court.

**Held:** Insurance Company cannot escape its liability of payment of compensation to **Third Parties** or claimants. Admittedly, owner of the vehicle has not violated any of the terms and

conditions of the policy or provisions of the Act. The owner had taken the insurance so as to meet such type of liability which may arise on account of use of the vehicle, the Insurance Company would be liable to pay the amount of compensation to the claimants.

**Subject Matter : INSURANCE OF MOTOR VEHICLES AGAINST THIRD PARTY**

**Relevant Section : Section 168 :** On receipt of the application for compensation, the Tribunal shall make an award to determine the amount of compensation which appears to be “just” after giving an opportunity to the parties of being heard and inquiring into the claim. The Tribunal shall deliver the copies of the award to the concerned parties within the 15 days from the date of award.

**Key Issue :** Whether the grant of just and reasonable compensation for the injuries suffered can be confined to the claimed amount of Rs. 3 lacs?

**Citation Details :** Jabbar vs. Maharashtra State Road Transport Corporation (13.11.2019 - SC): [MANU/SC/1666/2019](#)

**Summary Judgment :**

**Facts:** The Appellant was a fruit seller whose right hand was amputated after the accident. In the claim petition, the claimant has claimed that he is entitled for compensation of Rs. 9,05,000/- from the Respondents jointly and severally and the claimant is suffering from financial crisis, therefore, he is unable to pay court fees on the said amount. Therefore, he had restricted his claim to the tune of Rs. 3,00,000/-. The Tribunal accepted the case by the Appellant and allowed the claim to Rs. 1.50 lacs. Aggrieved by the said order, the appeal was filed in the High Court. The High Court found substance in the appeal and allowed the appeal by enhancing compensation from Rs. 1.50 lacs to Rs. 2.50 lacs. Aggrieved by the decision, the appeal lies to Supreme Court.

**Held:** The Appellant has expressly stated that if it is entitled to get more than Rs. 3 lacs the claimant is ready to deposit deficient court fee. This clearly means that neither the Tribunal nor the High Court was precluded from awarding higher than Rs. 3 lacs. Considering the entire facts and circumstances of the case, Supreme Court awards an amount of Rs. 5 lacs as compensation to the appellant; which shall be **just and reasonable**. Hence, allowed the appeal and enhanced the compensation amount to Rs. 5 lacs. The compensation amount shall also bear 9% interest per annum from the date of claim petition.

**Subject Matter : OFFENCES & PENALITIES**

**Relevant Section : Section 161 :** To be paid as compensation-

- (a) in respect of the death of any person resulting from a hit and run motor accident, a fixed sum of two lakh rupees or such higher amount as may be prescribed by the Central Government;
- (b) in respect of grievous hurt to any person resulting from a hit and run motor accident, a fixed sum of fifty thousand rupees or such higher amount as may be prescribed by the Central Government.

**Section 165:** Provides for the constitution of Claims Tribunal. A State Government may notify for the constitution of one or more Claims Tribunals for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising or both.

**Key Issue :** Whether the Tribunal can award any compensation under Section 165 and 168 of the Motor Vehicles Act, 1988 read with Section 161 of M.V Act for a hit and run claim as interim measure for no such bar to maintain, later for final claim under the Special Scheme as per Section 163 of M.V. Act so to deduct out of final payment on determination?

**Citation Details :** M. Laxmamma vs. Hanmappa and Ors. (14.11.2016 - HYHC):

[MANU/AP/0907/2016](#)

**Summary Judgment :**

**Facts:** On 25.07.2005 while the deceased Narayana was proceeding towards Padmini Show room at about 4.30 pm when he reached Marrichenna Reddy Statue, Mettuguda, the auto allegedly came in rash and negligent manner at high speed and dashed against him, as a result, he sustained fractured injuries and on the same day night he was succumbed to injuries at NIMS hospital while undergoing treatment. The fact that the deceased as a pedestrian sustained injuries having been dashed by unknown auto is therefrom on record. The unsuccessful claimant maintained O.P. No. 394 of 2006 on the file of Motor Accidents Claims Tribunal against two respondents i.e., owner and insurer of auto bearing No. AP 22U 7736 for a compensation of Rs. 2,00,000/- under Section 166 of M.V Act for the accidental death of her husband M.Narayana. The Tribunal, after contest by the 2nd respondent-insurer, from 1st respondent-owner remained ex parte, dismissed the claim on 25.03.2008. Impugning the same, the claimant maintained the present appeal.

**Held:** Coming to the case on hand from the above legal position, it is since a proved death case of hit and run by unknown vehicle and as such, the Tribunal can award Rs. 25,000/- under **Section 161** of M.V Act without prejudice to the rights of the claimant to approach the authorities concerned under the Special Scheme under **Section 163** of M.V Act for any higher compensation to enquire and determine.

**Subject Matter : OFFENCES & PENALITIES**

**Relevant Section : Section 200:** Highlights the list of 14 compoundable offences that allow an offender to pay the fine on the spot to the designated police officer at the scene.

**Section 194:** Enacts penal sanctions for driving a vehicle in violation of Sections 113 to 115 of the Act with a minimum fine of Rs. 2,000 and additional amount of Rs. 1,000 per tonne of excess load together with liability to pay charges for off-loading of the excess load.

Imposes penalty on the driver who refuses to stop and submit the vehicle to weighing after being directed to do so by the authorised officer or refuses to remove or causes to remove the load or part of it, prior to weightment.

**Key Issue :** Whether the discretion given in Section 200(1) of the Act is unguided, uncanalised and arbitrary and the right to levy penalty thereunder would not arise until an accused is convicted under Section 194?

**Citation Details :** P. Ratnakar Rao and Ors. vs. Government of Andhra Pradesh and Ors. (10.05.1996 - SC): [MANU/SC/0636/1996](#)

**Summary Judgment :**

**Facts:** The petitioners are the owners of goods motor vehicles and were plying the same on the basis of pucca national/State permits issued by the appropriate transport authorities. When they challenged the validity of order issued by the Department of Transport (Roads and Buildings) enhancing the compounding fee from Rs. 10 per k.g. to Rs. 100 per k.g. as being violative of the Motor Vehicles Act, 1988 and arbitrary being violating Article 14 of the Constitution, the Division Bench in the impugned judgment upheld the said order. Therefore, this special leave petition arises from the Judgment and order of the Andhra Pradesh High Court.

**Held:** As regards canalisation and prescription of the amount of fine for the offences committed, **Section 194**, the penal and charging section prescribes the maximum outer limit within which the compounding fee would be prescribed. The discretion exercised by the

delegated legislation, i.e., the executive is controlled by the specification in the Act. It is not necessary that Section 200 itself should contain the details in that behalf. So long as the compounding fee does not exceed the fine prescribed by penal section, the same cannot be declared to be either exorbitant or irrational or bereft of guidance. It would, therefore, be clear that the Government as a delegate, did not exceed its power under **Section 200** of the Act in prescribing the compounding fee for the offence punishable under **Section 194** of the Act.

#### **Subject Matter : OFFENCES & PENALITIES**

**Relevant Section : Section 185:** Whoever while driving or attempting to drive a motor vehicle has in his blood alcohol surpassing 30 mg for each 100 ml of blood identified in a test by a breath analyser shall be punished with imprisonment of 6 months or with fine or both. Whereas in case he is under the influence of drug to such an extent as to be incapable of exercising proper control over the vehicle shall be punishable with imprisonment for a term which may extend to two years, or with fine of fifteen thousand rupees, or with both.

**Section 128:** The driver of a two-wheeled motor cycle shall not carry more than one person in addition to himself on the motor cycle and no such individual shall be carried otherwise than sitting on a proper seat which is safely fixed behind the driver's seat with appropriate safety measures.

The Central Government may prescribe additional safety measures as it may deem necessary.  
**Key Issue :** Can the negligence of the other party pleaded as a defence to section 185 and 128 of the Act?

**Citation Details :** Sanjay Arora vs. Pritam Singh and Ors. (11.03.2005 - HPHC):

MANU/HP/0054/2005

#### **Summary Judgment :**

**Facts:** According to the claimant-petitioner on 29.5.1992 he was travelling from Kangra to Palampur by a scooter. He claims that he was driving the scooter and was alone on the scooter. At a place known as 61 Miles, a bus belonging to respondent No. 2 and driven by Pritam Singh, respondent No. 1, is alleged to have come from the opposite direction. He further alleged that the said bus was driven by its driver in a rash and negligent manner and it struck against the scooter as a result of which he was thrown on the ground. The appellant-claimant claims that he sustained multiple grievous injuries including fracture of his right leg. He stated that his right leg was amputated at the mid-thigh level resulting in 80 per cent permanent disability. The respondents resisted the claim petition and they have stated that scooter was not hit at all by the bus. As per the respondents, there were three persons riding on the scooter and the scooter was driven by one Mohinder Singh and the claimant was in fact a pillion rider. As per version of the respondents, there was no impact between the bus and the scooter. All the three persons riding the scooter were in state of intoxication. The scooter skidded and fell down resulting in injuries to the three persons. The respondent No. 1 as a humanitarian gesture had taken the three injured to the hospital where they were got admitted. In fact, according to the Tribunal the accident was result of rash and negligent driving on the part of the scooter driver. The claim petition, therefore, was dismissed.

**Held:** The scooter is meant actually for two persons, i.e., driver and the pillion rider. The scooter is not expected to be ridden by three persons. When three persons who are under the influence of alcohol go on a scooter ride, it is clear that they are asking for a trouble to say the least. This by itself may not be a sufficient ground to hold that the claimant or the other scooter driver was negligent. However, when this is coupled with the fact that claimant has tried to hide material facts especially with regard to driving of the scooter, the number of persons on the scooter, the manner in which the accident occurred, etc., it can safely be

presumed that accident had occurred due to rash and negligent driving of the scooter driver who along with pillion riders was under the influence of alcohol at the relevant time. The claimant who has obviously violated **Sections 128 and 185** of the Motor Vehicles Act and has told blatant lies in court cannot be granted any relief.

**Subject Matter : CODE OF CONDUCT**

**Relevant Section : Section 118:** Enables the Central Government to make regulations for the driving of motor vehicles by issuing notification in the Official Gazette.

**Key Issue :** Whether the directions given by High Court to State Government holds the legality under Section 118 of the Act?

**Citation Details :** State of Kerala vs. E.T. Rose Lynd and Ors. (22.02.2012 - SC):

[MANU/SC/0150/2012](#)

**Summary Judgment :**

**Facts:** P.C. Krishnakumar was traveling on the pillion of a motorcycle bearing registration No. KRH-7599 which was ridden by Respondent No. 2 along Koimbatore-Palakkadu National Highway. On reaching Puthusserichellakkadu, the motorcycle dashed against the rear side of a stationary lorry which was parked at the national highway. The parking lights of the stationary lorry were not switched on and as a result of the impact Krishnakumar sustained serious injuries and he succumbed to those injuries on way to Palakkadu District Hospital. Legal heirs of the deceased Krishnakumar, who are Respondent Nos. 3 to 5 herein, filed a claim petition before the Tribunal seeking compensation for the accidental death of Krishnakumar. In the claim petition, they alleged that the accident occurred due to the composite negligence of the owner, driver and insurer (Respondents Nos. 8, 9 and 10 herein) of the truck as well as the Respondent No. 2 who was riding the motorcycle. The Tribunal, on consideration of the evidence on record, passed an award on June 3, 2002 in the sum of Rs. 4,76,500/- with interest at 9% per annum from November 8, 1997 till realization in favor of the claimants. The liability was apportioned in the award as the accident was found to have occurred due to composite negligence of the two vehicles. The details of the liability are not relevant. Aggrieved by the award, the owner and rider of the motorcycle preferred appeal before the High Court of Kerala. The High Court proposed to issue some directions related to driving regulations to the State of Kerala relying heavily on Section 118 of the Act, accordingly directed the guidelines to the State. Aggrieved by certain directions (3 and 5) on the decision of High Court, the State of Kerala through Chief Secretary presents this appeal.

**Held:** Directions 3 and 5 suffer from serious flaw and cannot be sustained. We set aside directions 3 and 5 accordingly and the remaining three directions to be accepted by the Court under **Section 118** of the Motor Vehicles Act, 1988.

**Subject Matter : CODE OF CONDUCT**

**Relevant Section : Section 129:** Every person driving or riding a two-wheeler shall wear protective headgear.

**Key Issue :** Whether the order issued by the Government making wearing of protective headgear as optional in respect of every person driving or riding on a motor cycle including scooter is ultra vires the S.129 of this Act?

**Citation Details :** C.S. Subba Rao and Ors. vs. The Secretary to Government of Andhra Pradesh, Transport Department, Secretariat and Ors. (30.10.2002 - APHC):

[MANU/AP/0993/2002](#)

**Summary Judgment :**

**Facts:** The petitioners invoked Article 226 of the Constitution of India accordingly pray for issuance of appropriate directions directing the respondents herein to implement the

provisions of Sections 128 and 129 of the Motor Vehicles Act, 1988 requiring compulsory wearing of protective headgear (helmet) by two wheeler drivers and pillion riders. The petitioners further state that two wheeler vehicle is very vulnerable as its balance can be tilted with a slight touch by another vehicle, skidding and individual losing balance due to absent mindedness. They have given variety of reasons for the fall of a scooter by itself. On the recommendation of G.O.Ms. No. 303, Transport, Roads & Buildings Department, the Government thought it fit to direct the wearing of protective headgear (helmet) to be optional in respect of every person driving or riding on a motorcycle including scooter and moped. It is under these circumstances, the petitioners invoke the jurisdiction of this Court under Article 226 of the Constitution of India in purported public interest.

**Held:** In such view of the matter, we find it difficult to sustain order, dated 23-12-1989 issued by the Government in purported exercise of power under **Section 129** of the Act. It is set aside as the same is ultra vires the **Section 129** of the Act. Consequently, there shall be a direction directing the respondents herein to implement and enforce the provisions of Section 129 of the Act with such exceptions as the State Government may think fit and proper in its discretion, for which purpose the State Government may have to make rules in accordance with law.

**Subject Matter : CODE OF CONDUCT**

**Relevant Section : Section 134:** In case of an accident, it is the duty of the driver of motor vehicle to stop and report the nearest police station , to give all the details of the accident on demand by the police officer and when someone is injured or any third party property is damaged he should take the reasonable steps to provide the injured person with medical-aid. Non-compliance for the same results in respective penalties.

**Key Issue :** Whether the benefit of Section 134 of the Act can be availed without following the proper procedure?

**Citation Details :** ICICI Lombard General Insurance Company Ltd. vs. Mohit Kumar and Ors. (17.05.2016 - PHHC): [MANU/PH/2291/2016](#)

**Summary Judgment :**

**Facts:** Respondent/claimants have been awarded compensation to the tune of Rs. 9,32,880/- on account of death of Smt. Gianwati, the mother of the claimants, in the motor vehicular accident which took place on 03.03.2013. Learned counsel for the appellant-Insurance Company contended that the driver and owner of the vehicle did not appear to contest the claim petition and they were proceeded against ex parte. He contended that the driver and owner of the vehicle have not placed on record the driving licence of the vehicle. He contended that as per Section 134(c) of the Motor Vehicles Act, 1988, it was the duty of the driver to supply the information to the Insurance Company with respect to the particulars of his driving licence. The said statutory duty has not been performed either by the owner or the driver of the vehicle. Thus, he contended that the learned Tribunal has wrongly fastened the liability to pay the amount of compensation upon the appellant-Insurance Company. Therefore, the present appeal has been preferred by the appellant against the award passed by the Tribunal.

**Held:** The protection of **Section 134(c)** cannot be availed by the appellant-Insurance Company to evade its liability to pay the amount of compensation as it is an admitted fact that the appellant-Insurance Company has taken no steps to show that the driver of the vehicle **had no valid driving licence at the time of the accident, thereby not following the proper procedure.**

**Subject Matter : MAINTENANCE OF VEHICLE**

**Relevant Section : Section 66:** lays down that no motor vehicle shall be used as a transport vehicle without a permit issued by transport authorities to use the vehicle as such in a public place. It also provides for exemption of certain vehicles from the operation of the provisions of this clause on certain conditions and for usage for certain specific purposes.

**Section 192:** Provides for punishment for anyone who drives or causes or allows a motor vehicle to be used violating Sec. 39 (compulsory registration) with a fine not exceeding five thousand rupees for the first offence but shall not be less than two thousand rupees for the second offence with imprisonment which may extend to one year or with fine.

**Exception:** Emergency vehicles

**Section 192A:** Whoever drives a vehicle violationg Sections 66 & 192 shall be punishable for the former offence with the imprisonment for a term which may extend to six months and a fine of ten thousand rupees and for the latter offence with imprisonment which may extend to one year but shall not be less than six months or with fine of ten thousand rupees or with both.

**Key Issue :** Whether the vehicle was plied contrary to the statutory provisions under Section 66 of the Act?

**Citation Details :** Rampati Jaiswal and Ors. vs. State of U.P. and Ors. (16.05.1996 - ALLHC): MANU/UP/0025/1997

**Summary Judgment :**

**Facts:** Petitioner was granted a stage carriage permit on non-notified route known as Allahabad to Kunda, via Nawabganj, Dahiyyaha, Babuganj Chauraha and petitioner is plying her vehicle on the said route. It appears that she entered into an agreement with M/s Rada Ram Singh and sons (filling station), Lalgopalganj, district Allahabad, which is 15 kms. away from Nawabganj, a town on the route of the petitioner. Thus under the pretext of taking diesel the vehicle of the peti-tioner goes out of the route 15 kms. up and 15 kms. down. Petitioner is plying her vehicle daily 30 kms. off the route on which she had been granted permit under the provisions of the Motor Vehicles Act, 1988, hereinafter called the Act. The route of the petitioner originates from Allahabad and ends at Kunda and there is no scarcity of diesel, service stations for washing and cleaning or garage for repairing the vehicle either at Allahabad or at Kunda. Lalgopalganj is comparatively a smaller town and does not provide sufficient facilities except having the filling station. The petitioner is seeking relief that the transport and the police authorities be restrained from checking or interfering with the plying of the vehicle when it goes off the route to Lalgopalganj.

**Held:** The present petitioners are taking the advantage by plying the vehicle in contravention of the statutory provisions under **Section 66** of the Act. They have themselves extended/varied their respective routes and started plying their vehicles on the extended/varied portion of the routes and are committing the offences by violating the terms and conditions of their respective permits every day, we direct the respondent No. 3, the Regional Transport Officer, Allahabad to check the case of the petitioners regularly and if they violate the conditions of permit, then to issue them show cause notice under Section 86 of the Act as to why their permits should not be cancelled or suspended under **Section 192** of the Act and to punish them under the provisions of Section 192A of the Act.

**Subject Matter : MAINTENANCE OF VEHICLE**

**Relevant Section : Section 39:** Prohibits the driving of a motor vehicle in any public place or in any other place without registering it under the provisos of this Act. It also empowers the State Government to prescribe conditions subject to which the provisions of this clause will not apply to the motor vehicles in possession of dealers.

**Key Issue :** Whether the using a vehicle on the public road without any registration an offence punishable Under Section 39 and 192 of the Act?

**Citation Details :** Narinder Singh vs. New India Assurance Company Ltd. (04.09.2014 - SC): [MANU/SC/0762/2014](#)

**Summary Judgment :**

**Facts:** The Petitioner-complainant had purchased a Mahindra Pick UP BS-II 4WD vehicle and got it insured for an amount of Rs. 4,30,037/- with Respondent No. 1-M/s. New India Assurance Company Ltd. for the period 12.12.2005 to 11.12.2006. The vehicle was temporarily registered for one month period, which expired on 11.1.2006. However, on 2.2.2006, the vehicle met with an accident and got damaged. The complainant lodged FIR and informed about it to the Respondent-Company, which appointed a surveyor and Assessed the loss at Rs. 2,60,845/- on repair basis. The insurance claim was, however, repudiated by the opposite party on the ground that the person Rajeev Hetta, who was driving the vehicle at the time of the accident, did not possess a valid and effective driving licence and also the vehicle had not been registered after the expiry of the temporary registration. Consequently, the Appellant filed a consumer complaint before the District Forum. After hearing parties on either side and scanning the record of the case meticulously, the District Forum allowed the complaint and directed the Respondent-Company to indemnify the complainant to the extent of 75% of 4,30,037/- along with interest at the rate of 9% per annum thereon with effect from the date of filing of the complaint. Aggrieved by the decision of the District Forum, Respondent-Company as well as the Appellant-complainant approached State Commission by way of appeal. The State Commission by its common order disposed of both the appeals, allowing appeal of the Company and dismissing the complaint of the Complainant due to which the appeal preferred by the Appellant-complainant was dismissed as infructuous. Aggrieved by the decision of the State Commission, the Appellant preferred revision petition before the National Commission Under Section 21(b) of the Consumer Protection Act, 1986, which also stood dismissed. Hence, present appeal by special leave by the complainant

**Held:** Indisputably, a temporary registration was granted in respect of the vehicle in question, which had expired on 11.1.2006 and the alleged accident took place on 2.2.2006 when the vehicle was without any registration. Nothing has been brought on record by the Appellant to show that before or after 11.1.2006, when the period of temporary registration expired, the Appellant, owner of the vehicle either applied for permanent registration as contemplated Under **Section 39** of the Act or made any application for extension of period as temporary registration on the ground of some special reasons. In our view, therefore, using a vehicle on the public road without any registration is not only an offence punishable Under Section 192 of the Motor Vehicles Act but also a fundamental breach of the terms and conditions of policy contract.

**Subject Matter : MAINTENANCE OF VEHICLE**

**Relevant Section : Section 19:** Contains provisions for the disqualification of the holder of the licence, by the licensing authorities, for holding or obtaining the licence for a specified period or for revoking the licence if he is a habitual criminal/drunkard or he has committed any act which is likely to cause nuisance /danger to the public or used his motor vehicle in the commission of an offence. It also makes provision for appeal against the orders of the licensing authorities to the prescribed authorities.

**Key Issue :** Is it mandatory for licensing authority to issue show-cause notice to the licensee in order to pass orders under Section 19 of the Act?

**Citation Details :** K. Sundararasu vs. State of Tamil Nadu and Ors. (04.12.2018 - MADHC): [MANU/TN/7510/2018](#)

### **Summary Judgment :**

**Facts:** The petitioner is working as driver in Tamil Nadu Transport Corporation at Erode Region. The bus which was driven by the petitioner involved in accident and upon a complaint criminal case has been registered against him. Since one of the offences alleged against petitioner is cognizable one, the licensing authority concerned had issued show-cause notices to the petitioner invoking the provision in Section 19(1)(c) of the Act. Thereafter, appropriate enquiry was conducted and final order has also been passed by the Licensing Authority/Regional Transport Officer thereby suspending the license of the petitioner for a specified period. It is this order which is now under challenge in the instant writ petition. The petitioner submitted that the impugned order suspending the license of the petitioner has been passed by the licensing authority concerned in a cryptic manner in printed format wherein the name of the petitioner and the period of suspension alone has been written in pen and no reason whatever has been assigned to arrive at such conclusion which is totally in violation of the provisions contained in Section 19(1) of the Act. The licensing authority concerned in the instant case did not record any reason whatsoever for suspending the license and the impugned order has been passed in a total non application of mind. The impugned order has been passed in the printed form without assigning any valid reasons for arriving at the satisfaction and the authority had simply filled in the name of the license and the period of suspension of license.

**Held:** It is mandatory on the part of the licensing authority to issue show-cause notice to the holder of a driving license and the licensee should also be given an opportunity of being heard and after due enquiry, if the licensing authority is satisfied himself that the driving license is liable to be suspended on account of the contingency specified in the show-cause notice, after recording reasons for the same, he may pass appropriate orders as enshrined in **Section 19(1)(h)(i) or (ii)** of the Act. Thus, the licensing authority in the instant case has flouted the mandatory procedures while invoking the power under **Section 19(1)** of the Act and on this ground alone the impugned order is liable to be set aside. As the period of suspension is concerned, the license was suspended for the period of six months from 30.06.2018 to 29.12.2018. Now, almost 5 months of suspension period was already over. In the above circumstances, this Court is of the view that there is no need to remit back the matter to the authorities for passing fresh order. Hence, the impugned order is set aside.

## **DEPOSITORIES ACT, 1996**

**Subject Matter :** Rights of depositories and beneficial owner.

**Relevant Section : Section 10:** Depository shall be deemed as registered owner for effecting transfer of ownership of security on behalf of beneficial owner; Shall not have any voting right. Beneficial owner shall have all rights and liabilities and benefits.

**Key Issue :** Whether the Protection of beneficial owner is the duty of depositor or not?

**Citation Details :** In Re: Maharashtra Polybutenes Ltd. (25.07.2017 - SEBI / SAT):

[MANU/SB/0153/2017](#)

**Summary Judgment :**

**Facts:** SEBI conducted investigation into the alleged irregular trading in the shares of Maharashtra Polybutenes Ltd. and into the possible violation of the provisions of the SEBI Act, 1992 and Regulations made thereunder. MPL had incurred losses till the financial year 2006-07 and made a meagre profit for the financial years 2007-08 and 2008-09 respectively. MPL shares were infrequently traded but during the relevant period, there was a spurt in the volumes traded and prices. An increase of 49.85% within 5 months without there being any change in the economic fundamentals of the company was noticed and therefore an enquiry officer was appointed to look into the same.

**Held:** It was held that there is no material on record that quantified the profit made by the Noticee. Continuous wrong disclosures to the stock exchange regarding shares held by promoter group consecutively for four quarters is a matter to be viewed seriously. The steep reduction of the shareholding of the promoter group was withheld from the public. **In terms of Section 10 of the Depositories Act, 1996, the beneficial owner is the person whose name is recorded as such with a depository and is entitled to all the rights and benefits and also subjected to all liabilities in respect of its securities held by a depository.** By virtue of making wrongful and misleading disclosures to the BSE and also failure to make necessary disclosures in the prescribed forms the investors were deprived of the correct information at the relevant point of time. General public were made to believe through repeated wrong disclosures continuously for four quarters to BSE that there was no change in the shareholding of the promoters whereas the shareholding of promoter group has come down drastically. The default by the Noticee is repetitive in nature as the Noticee has made wrongful and misleading disclosures to the BSE on more than one occasion i.e. continuously for four quarters. **Hence, held liable.**

**Subject Matter :** Pledge or Hypothecation of securities.

**Relevant Section : Section 12:** With previous approval of depository, beneficial owner may create pledge securities. Entry in the register by depository shall be evidence of pledge.

**Key Issue :** Whether the other defendants who purchased shares from defendant No. 1 can be said to be bona fide purchasers for value without notice?

**Citation Details :** Jry Investments Private Limited vs. Deccan Leafine Services Ltd. and Ors. (11.03.2003 - BOMHC): MANU/MH/1427/2003

**Summary Judgment :**

**Facts:** The plaintiff is an investment company. D1 is a company which carries on the business of providing finance. The plaintiff claims that D2 to D21 are companies and individuals who have participated in fraudulently receiving equity shares of ETC Network Ltd., which belong to the plaintiff. The plaintiffs aver that they parted with 6,50,000 shares in favour of D1 in order to secure repayment of a loan proposed to be taken from D1. Eventually, D1 did not give the loan. However, it transferred the shares to other defendants. The plaintiffs contention is that under the loan agreement the plaintiffs transferred 15 lakh shares to D1 with the intention of creating security. The plaintiffs did not intend and in fact did not, transfer title in the shares to D1. Therefore, the said defendant did not have any authority to transfer the shares in favour of the other defendants. The plaintiffs' case is that under the loan agreement the intention of transferring the shares to the defendants was for the purpose of securing the loan which was to be taken from D1. Since no loan was taken the transfer of the shares in favour of the defendants is void and therefore the plaintiffs remain the owner of the shares.

**Held:** It was held that it is clear that the other defendants had no reason to suspect that there was any defect in title of D1 particularly since the shares stood in the name of D1 as beneficial owner upon transfer by the plaintiffs. I am of view that the present purchasers from D1 are on a better footing in this case since D1 himself did not acquire title through any fraud but acquired title to the shares under the loan agreement. **It is far from dear at this stage that D1 had any intention of defrauding the plaintiffs particularly when in the very first letter the defendants had made it clear that it would be necessary for the plaintiffs to transfer the shares to D1 and the plaintiffs did so.** There does not seem to have been any dispute between the two since D1 at the request of the plaintiffs also returned about 8,50,000 shares to the plaintiffs and in the affidavit before this court states that D1 is willing to disburse the loan which has not been demanded by the plaintiffs himself admittedly.

**Subject Matter :** Inquiry and Inspection.

**Relevant Section : Section 18:** Power of Board to call for information and the Board may call upon any issuer, depository, participant or beneficial owner to furnish in writing such information relating to the securities held in a depository as it may require in order to protect the interests of the investors

**Key Issue :** Whether the conversion of status from Stock Broker to registrar and Share Transfer agent allows you to cross the permissible limits of 100 times of its networth as stipulated under Regulation 19 (a) (viii) of the said Regulations?

**Citation Details :** SEBI vs. Integrated Enterprises (India) Ltd. (02.07.2004 - SEBI / SAT): MANU/SB/0140/2004

**Summary Judgment :**

**Facts:** Integrated Enterprises (India) Ltd. was registered as Registrar and Share Transfer Agent and the registration was valid till 31.10.2003. SEBI issued a Certificate of Registration to Integrated as a Stock Broker. Integrated was also issued a Certificate of registration as Depository Participant of National Securities Depositories Limited. SEBI advised IEL to stop accepting any fresh business and opening of fresh accounts, since the aggregate value of the custody holdings of IEL, as a Depository Participant was crossing the permissible limits of 100 times of its networth. But it continued opening new accounts and contended that they were entitled for conversion of status from Stock Broker to Registrar and Share Transfer Agent and hence there was no violation of the said Regulations by IEL-DP. SEBI appointed an Investigating officer for the same. Aggrieved by the order of the Inquiry officer the present appeal before the SAT.

**Held:** It was held that the mandate of SEBI is to protect the interests of the investors and orderly development of the securities market. Any intermediary including a Depository Participant, who transgresses the Regulations, if left unpunished, will send wrong signals to the market and also will create an atmosphere which is not conducive for the orderly development of the securities market. A broker who is also acting as a Depository Participant is literally using his networth for dual purposes, one for having exposure on Exchange and the other for having custodial holdings of beneficial owners of the Participant. Any transgression of the limits in either of the areas will have grave repercussions on the other activities. IEL-DP by not bringing down the custodial holdings to the approved limits has put the whole market, more specifically the clients of IEL as a broker and the beneficial owner who opened accounts with IEL-DP were exposed to grave risk. The court found that the recommendations of the Enquiry Officer are adequate and agreed with the recommendations of the Enquiry Officer for suspension of suspend the certificate of registration granted to the Integrated Enterprises (India) Ltd., as a Depository Participant, for a period of six months.

**Subject Matter :** Power of the board.

**Relevant Section : Section 19:** Power of Board to give directions in certain cases. The board has power to give directions in order to prevent interest of the investors.

**Section 19H:** Power to adjudicate-the Board may appoint any officer not below the rank of a Division Chief of the Securities and Exchange Board of India to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty

**Key Issue :** a) Whether the DIS submitted by the POA holders on behalf of clients of the Noticee not signed by the POA holder i.e. stock broker are in consonance with the regulations?

b) Whether it can be held liable when it was unable to produce records of instructions received for execution of DIS by the POA holder for the sample selected despite seeking the same repeatedly?

**Citation Details :** In Re: Punjab National Bank (25.06.2018 - SEBI / SAT):

[MANU/SB/0265/2018](#)

**Summary Judgment :**

**Facts:** SEBI conducted inspection of the books of accounts/records/documents maintained by Punjab National Bank in respect of activities carried out by it as a SEBI registered Depository Participant with a focus to verify whether the necessary documents are being maintained by it in the manner specified by the concerned Acts, rules, regulations and circulars made/issued thereunder and to verify the extent of compliance with respect to provisions relating to pledge, DIS and transfer of securities and other matters related thereto. The observations made during the inspection were communicated to the Noticee. SEBI felt satisfied that there are sufficient grounds to adjudicate upon the aforesaid alleged violations by the Noticee and appointed the undersigned as Adjudicating Officer under Section 19-H of Depositories Act, 1996 to inquire into and adjudge the alleged violations imposed on.

**Held:a)** The court held that trading of share takes place with the electronically given consent of the client on POA holder website and website of the Noticee. Thus the requirement as specified under regulation 42 (3) of the DP Regulations that "Every entry in the beneficial owner's account shall be supported by electronic instructions..." remains fulfilled as **the systems and procedures adopted by the Noticee reflects substantial compliance on the part of the Noticee with the provisions of the said regulations.** the depository NSDL which is conducting annual audit of the Noticee from past 10 years, including the period prior to and post inspection, has not pointed out such alleged discrepancy in the systems and procedures adopted by the Noticee for handling instructions on behalf of the clients from POA holders.

**b)** As per regulation 49(1)(c) of the DP Regulations a depository participant, is obligated to maintain two documents viz.

(i) records of instructions received from beneficial owners; and

(ii) statements of account provided to beneficial owners. However, the allegation is that the Noticee had been unable to produce records of instructions received for execution of DIS submitted to it by the POA holder for the sample selected despite seeking the same repeatedly. Thus, the allegation levelled against the Noticee to this extent is vague. The violations as alleged do not stand established and the case does not warrant imposition of any monetary penalty.

**Subject Matter :** Special court to take cognizance of case.

**Relevant Section : Section 22D:** Any offence under the Depositories Act, 1996 is required to be tried by the Special Court established under the Depositories Act, 1996.

**Key Issue :** Whether the Special Court established under the Act of 1996 can try the offences under IPC?

**Citation Details :** Dinesh Kashiram Mange vs. State of Maharashtra and Ors. (21.12.2018 - BOMHC): [MANU/MH/3470/2018](#)

**Summary Judgment :**

**Facts:** The non-applicant files a complaint before Chief judicial magistrate against a private limited company and against its managers and directors that the accused had induced him with malafide intention to sign the Demat slips with instructions being filled up in the slips, and those slips were kept with the accused to be used in emergency, however, the accused committed breach of trust and misused the Demat slips with fraudulent intention and transferred valuable shares to the accounts of the accused and their associates. The learned Magistrate directed issuance of process against the accused .This order was challenged by the applicant before the Sessions Court in revision which is dismissed by the impugned judgment. Being aggrieved in the matter, the accused has filed this application before the hon'ble High Court.

**Held:** It was held that Section 22-C (3) of the Act of 1996 provides for the qualifications of a person who can be appointed as a Judge of a Special Court under the Act of 1996. **It lays down that a person shall not be qualified for appointment as a Judge of a Special Court unless he is, immediately before such appointment, holding the office of a Sessions Judge or an Additional Sessions Judge, as the case may be.** As per Section 28 of the Code of Criminal Procedure, the Sessions Judge or an Additional Sessions Judge can **pass any sentence authorized by law subject to the limitation that any sentence of death passed by the Sessions Judge or the Additional Sessions Judge shall be subject to confirmation by the High Court.** If the provisions of Section 22-C (3) of the Act of 1996 are read harmoniously with Section 28 of the Code of Criminal Procedure, **it cannot be said that the Special Court presided over by a person who had been a Sessions Judge or an Additional Sessions Judge immediately before his appointment as Special Judge, cannot try the complaint in respect of the offences under IPC along with the complaint in respect of the offence/offences under the Act of 1996.** As the complaint in respect of the offences under the Act of 1996 is to be tried by the Special Court under the Act of 1996, whether the accusations made in the complaint filed by the non-applicant cull out an offence under the Act of 1996 will have to be examined and determined by the Special Court under the Act of 1996. In view of the facts of the case and considering the provisions of Section 22-D of the Act of 1996, the Chief Judicial Magistrate, has no jurisdiction to entertain and try the complaint, and in view of the Securities Laws Act 2014, the complaint is required to be transferred to the Special Court established under the Act of 1996. Consequently, the order passed by the learned Magistrate directing issuance of process against the accused and the judgment passed by the learned Sessions Judge dismissing the criminal revision application are also not sustainable.

**Subject Matter :** Appeals to Securities Appellate Tribunal.

**Relevant Section : Section 23A:** Any person aggrieved by an order of the Board made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the regulations made thereunder 2[or by an order made by an adjudicating officer under this Act], may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

**Key Issue :** Whether the appeal is maintainable before this Hon'ble Tribunal?

**Citation Details :** Axis Bank Ltd. vs. Securities and Exchange Board of India (17.12.2019 - SEBI / SAT): [MANU/SB/1714/2019](#)

### **Summary Judgment :**

**Facts:** The appeal has been filed aggrieved by the communication issued by the National Securities Depository Limited , whereby preventing the appellant from accessing the securities pledged with the appellant by Karvy Stock Broking Limited . The appellant is a bank who has lent money to Karvy on the basis of securities pledged by Karvy, it is the illegal extension of that order by NSDL that has impacted the appellant. The appellant submits that the ex parte ad interim order passed by the WTM of SEBI did not contain any direction preventing the appellant from operating Demat Account N which is named "Karvy Stock Broking Limited- Client Account-NSE . NSDL has kept the said account in abeyance and hence the appellant could not invoke the pledge when tried to do so.

**Held:** It was held that the preliminary objection regarding maintainability of the appeal is not sustainable since the appellant is an affected party impacted by all the impugned communications/orders together which the appeal is also challenging. It is a fact that the appellant as a bank has lent funds to Karvy under a permitted Loan against Shares arrangement and under the Depositories Act, rights and sanctity are provided to such pledged accounts. Therefore, **the appellant is an affected party is clearly undisputed. It is also a fact that the appellant was not heard either by SEBI or by the Exchanges or Depositories before passing the impugned directions.** Though, the account frozen explicitly by the WTM is not the same account as that of the appellant implicitly the order has got extended to such accounts because of the sweeping nature of the WTM's directions to protect the interest of the investors. Hence, **the action by NSDL is also a consequential one as clearly stated in their communication.**

**Subject Matter :** Bar on Civil Court's jurisdiction.

**Relevant Section : Section 23E:** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Securities Appellate Tribunal is empowered by or under this Act to determine.

**Key Issue :** Whether the Civil Court can go into the questions which had already been decided by a specialized adjudicatory body i.e. SAT?

**Citation Details :** Tendril Financial Services Pvt. Ltd. and Ors. vs. Namedi Leasing and Finance Ltd. and Ors. (03.04.2018 - DELHC): [MANU/DE/1275/2018](#)

### **Summary Judgment :**

**Facts:** The plaintiffs, who are investment companies pledged equity shares of defendant Blue Coast owned by them in favour of another defendant Morgan Securities and Credits Pvt. Ltd. as security for the financial facility availed of by the defendant Morepen from the other defendant Morgan. That disputes arose between the parties as to the amount remaining unpaid under the aforesaid financial facility and which disputes were referred for adjudication to the Sole Arbitrator. The defendant Morepen could not discharge its repayment liability within the time stipulated in the Award and that the defendant No. 7 Morgan purports to have sold the pledged shares in contravention of the terms of the pledge and in breach of statutory provisions including S.176 of the Indian Contract Act, 1872, requiring mandatory prior legal notice preceding such sale and in breach of fiduciary duty of a pledge to act honestly and fairly.

**Held:** It was held that since **the shares were not in physical form but in fungible form, the provisions of the Depositories Act, 1996 apply thereto**, even assuming that S.176 of the Contract Act applies to pledges created under the Depositories Act and the pledge fails to exercise its right in accordance with the provisions of S.176 of the Contract Act, it would

make no difference as far as the purchaser of the dematerialized shares from the pledge is concerned. The sale of shares in the present case is admittedly through market transactions and the **finding of the SAT**, being a specialized Tribunal, in this regard and which has attained finality, **would bind the parties**.

## FOREIGN TRADE (DEVELOPMENT AND REGULATION) ACT, 1992

**Subject Matter :** Import and Export Policy.

**Relevant Section : Section 3:** The Central Government has power to make provisions for prohibiting, restricting or otherwise regulating, in all cases or in specified classes of cases for the development and regulation of foreign trade by facilitating imports and increasing exports.

**Section 4:** All Orders made under the Imports and Exports (Control) Act, 1947, and in force immediately before the commencement of this Act shall, if they are not inconsistent with the provisions of this Act, continue to be in force and shall be deemed to have been made under this Act.

**Section 5:** The Central Government may, from time to time, formulate, announce and amend, by notification in the Official Gazette, the foreign trade policy.

**Key Issue :** a) Whether the power to make provisions relating to import and export also includes power to modify such provisions?

b) Whether the Circular dated 21st January, 2009 is illegal on the ground that it is contrary to the Foreign Trade Policy 2004-2009?

**Citation Details :** Nola Ram Dulichand Dal Mills and Ors. vs. Union of India (UOI) and Ors. (14.02.2020 - SC): [MANU/SC/0185/2020](#)

**Summary Judgment :**

**Facts:** The present case pertains to "Vishesh Krishi Upaj Yojna" for giving incentives to promote export of fruits, vegetables, flowers, minor forest produce, dairy, poultry and their value added products. In the Scheme notified for the year 2005-06, few exports were not to be taken into account for duty credit entitlement. The Appellant has sought quashing of the Circular, on the ground that it is contrary to the Policy notified on 7th April, 2006. The Scheme has been notified under the Act, therefore, such Scheme has a statutory force which cannot be amended or modified by the Executive issuing the impugned Circular. The Revenue has drawn distinction between the two Schemes notified on the same day, which shows that the Revenue has treated two Schemes differently, therefore, exports other than by units in SEZ and EUO units are entitled to benefit of exports. The benefit of exports is not available if the exports are made by EOU or units situated in SEZ Units. It is contended that only exports by these units are not entitled to incentive whereas the Appellants are not part of either EOU or SEZ Unit as the expression used is exports made 'by' EOU and SEZ Unit and not 'through' them.

**Held:** a) The court held that Section 5 of the Act empowers the Central Government to formulate and announce Foreign Trade Policy and may also amend it. The Circular dated 21st January, 2009 does not modify or amend the Scheme notified for the year 2006-07. It only

clarifies that 100% export-oriented units which are not entitled to seek exemption cannot avail benefit indirectly through the purchasers from them. **It is modification or amendment of the Scheme which is required to be carried out by publication in the official gazette but not the clarifications to remove ambiguity in the existing Scheme.**

**b) Since the Government has reserved right in public interest in terms of the Scheme notified under the Act, therefore, the Circular dated 21st January, 2009 cannot be said to be illegal in any manner.** The purpose of the Scheme is that 100% Export Oriented Units or units situated in Special Economic Zone are not to be granted incentives. The purpose and object of the Scheme notified cannot be defeated by granting incentives to units which exports through 100% Export Oriented Units. **Since the Appellant is a purchaser from 100% export-oriented unit, therefore, the medium of the Appellant cannot be used to avoid the intended purport of the policy for the year 2006-07. It was held that the export-oriented units cannot use the Appellant for export under the Scheme and to claim benefit of export when it is not permissible for them directly.**

**Subject Matter :** Suspension and cancellation of Importer- Exporter Code.

**Relevant Section : Section 8:** Importer-exporter Code Number will be suspended or cancelled when a person has contravened any of the provisions of this Act or has committed any other economic offence under any other law for the time being in force.

**Section 11(2):** When any person makes or abets or attempts to make any export or import in contravention of any provision of this Act he shall be liable to a penalty .

**Key Issue :** Whether imposing a penalty on a high seas seller for abetment of import in violation of the FTDR Act arises when the person who imported the goods in question is not guilty of any willful concealment/importation of offending goods?

**Citation Details :** Rashmi Jain vs. Additional Director General of Foreign Trade (14.10.2014 - DELHC): [MANU/DE/2605/2014](#)

**Summary Judgment :**

**Facts:** The late husband of the petitioner was in the business of import of metal scrap under the name M/s. Balaji Impex. Sometime in October 2004, Balaji placed an order for supply of Heavy Melting Scrap from M/s. Sun Metal Casting LLC, UAE. Pursuant to the said order, HMS was supplied, enclosed with an invoice. The said consignment was accompanied by a no-war material certificate and a pre-shipment Inspection Certificate certifying that the said consignment was free from any explosive materials. The said consignment was sold by Balaji to M/s. S.G Steels Pvt. Ltd., Uttaranchal on high seas. After the customs authorities had examined the consignment, some used and rusted empty cartridges/shells were found in some of the containers. The entire goods/consignment was confiscated by the Commissioner of Customs, New Delhi and a penalty was imposed on SGS as well as Balaji. Whereas penalty on SGS was waived off when appeal of Balaji was still pending the respondent initiated proceedings for collection of penalty from Balaji on charges of abetment of import of goods in contravention of the provisions of the FTDR Act.

**Held:** The impugned order specifically alleges that Balaji had "misdeclared the description of goods in the import documents for HMS but have imported objectionable items of war materials and sold to the final importer in a clandestine manner with an intention to smuggle the same into India". Undisputedly, this allegation cannot be sustained. In the first instance, Balaji had not imported any objectionable items into India. Further, the intention to smuggle the said items cannot be ascribed to Balaji as Balaji was not the beneficiary of the import of the goods in question in India. It is implicit in an allegation of abetting an offence that another person is guilty of that offence which is alleged to have been abetted. **In this case, SGS would have been the offender as well as a beneficiary of the import of goods into**

**India.** It has already been held that the person who imported the goods in question is not guilty of any willful concealment/importation of offending goods, **the question of imposing a penalty on a high seas seller for abetment of import in violation of the FTDR Act does not arise.** Also balaji relied on certification by Moody as it is an authorized agency listed in appendix 5 to the handbook of procedures. The petitioners, thus, proceeded on the basis that Moody International (Iran) which is an affiliate of Moody International (India) Pvt. Ltd. would also be accredited for certification purposes.

**Subject Matter :** Adjudicating authority.

**Relevant Section : Section 13:** The Director General can impose any penalty or any confiscation may be adjudged under this Act by the Director General;

**or,**

by such other officer as the Central Government may, by notification in the Official Gazette, authorise in this behalf.

**Key Issue :** Whether the show cause notice for imposition of fine and confiscation of goods was valid even beyond limitation period?

**Citation Details :** Kothari Foods and Fragrance Pvt. Ltd. vs. Commissioner of Customs (Export), New Delhi (27.09.2019 - CESTAT - Delhi): [MANU/CE/0315/2019](#)

**Summary Judgment :**

**Facts:** A show cause notice was served upon the Appellant observing the contravention on part of Appellant exporter for the provisions which stated that the exporters to disclose technical characteristics, quality and specifications of the essential oil said to have been used in manufacture of Paan Masala/ Gutka in their shipping bills at the time of export and thereafter while applying for the duty free import authorisation under Foreign trade policy 2004-09. The confiscation of goods & the imposition of penalty upon the Appellant was proposed accordingly. The appellant contended before the HC that the declaration requirement of the exception notification is applicable only if the exported goods are included in the list of items and that the show cause notice is served beyond limitation period but it was not accepted by the Hon'ble High court.

**Held:** It was held that although the show cause notice, issued by Lucknow DGFT is in the accordance of **Section 13** of the FTD & R Act 1992, yet in the present case it has been issued after a period of expiry of two years. But the show cause notice itself has alleged the suppression of facts on part of the exporter. **The non disclosure of the technical characteristics as a consciously done act of the exporter.** It also held that the said DFIAAs were obtained by suppression of facts and utilized for the purpose for which they were not used. **Hence, the department has committed no error by invoking the extended period of limitation.**

**Subject Matter :** Powers of Adjudicating and other authority.

**Relevant Section : Section 17:** Every authority making any adjudication or hearing any appeal or exercising any powers of Review under this Act shall have all the powers of a civil court under the Code of Civil Procedure, 1908, while trying a suit.

**Section 17(4):** Clerical or arithmetical mistakes in any decision or order or errors arising therein from any accidental slip or omission may at any time be corrected by the authority by which the decision or order was made, either on its own motion or on the application of any of the parties.

**Key Issue :** Whether the show cause notice for imposition of fine and confiscation of goods was valid?

**Citation Details :** Tegs Masrado Pvt. Limited vs. Commissioner of Central Excise and ST, Chandigarh (09.01.2018 - CESTAT - Chandigarh): [MANU/CJ/0007/2018](#)

### **Summary Judgment :**

**Facts:** The brief facts of the case are that the appellant is a 100% EOU engaged in the manufacture of canned mushrooms. They were registered and imported capital goods and raw materials and also procured certain capital goods and raw materials indigenously free of duty. The department issued the show cause notice proposing confiscation of the imported capital goods, raw materials, indigenous capital goods and raw materials besides the duty demand on the ground that the appellant have not fulfilled the export obligation. The appellant contested against it. However, after due process of law, the Commissioner has confirmed the demands and imposed penalties. Thereafter, the show cause notice was issued to the appellant by Development Commissioner. The said show cause notice was adjudicated and the charges levelled in the show cause notice were dropped against the appellant. Thereafter, the application for rectification of mistake was filed against the order of this Tribunal and the same was dismissed by this Tribunal being without any merits. Thereafter, another show cause notice was issued by the Development Commissioner to the appellant.

**Held:** It was held that the present **show cause notice issued is not merely to correct the clerical or arithmetical mistake in the decision but on account of the new facts of enhanced import brought to the notice subsequent to the original order passed.**

Therefore, it cannot review the order passed by the then Development Commissioner in absence of power of review conferred upon it under the FTDR Act and under Section 17(4) of the FTDR Act. Therefore, **the proceedings against the appellant are not sustainable.**

**Subject Matter :** Application of other laws not barred.

**Relevant Section : Section 18A:** The provisions of this Act **shall be in addition to, and not in derogation of**, the provisions of any other law for the time being in force.

**Key Issue :** Whether application of other law is barred?

**Citation Details :** Commissioner of Customs vs. Atul Automations Pvt. Ltd. and Ors.

(24.01.2019 - SC): [MANU/SC/0067/2019](#)

### **Summary Judgment :**

**Facts:** The Respondents during 2016 imported certain consignments of Multi-Function Devices. Commissioner of Customs held that, imports were in violation of Foreign Trade Policy framed under the Act, 1992 and Hazardous and Other Wastes Rules, 2016. So, a redemption fine was imposed and consignment released for re-export only. In appeal before the Tribunal, it held that, MFDs did not constitute "waste" under the Rules and had a utility life of 5 to 7 years, as certified by Chartered Engineer. Therefore, Release of consignment was directed. In appeal preferred by Revenue, High Court held that, MFDs correctly fell in category of "other wastes" under Waste Management Rules dealing with used Multi-Function Printer and Copying Machines. After taking into consideration provisions of the Act and Foreign Trade Policy framed thereunder, it was held that, MFDs were not prohibited but restricted items for import. Order for release of goods was upheld subject to execution of a simple bond without sureties for 90% of enhanced assessed value, with further liberty to Director General of Foreign Trade, along with directions.

**Held:** It was held that the Central Government had permitted import of used MFDs with utility for at least five years keeping in mind that, they were not being manufactured in country. Rule 15 of Waste Management Rules dealing with illegal traffic, provided that import of "other wastes" shall be deemed illegal if it was without permission from Central Government under Rules and was required to be re-exported. Significantly the Customs Act does not provide for re-export. Central Government under Foreign Trade Policy had not

prohibited but restricted import subject to authorisation. High Court therefore rightly held that, MFDs having a utility period, Extended Producer Responsibility would arise only after utility period was over. Therefore, there was no error in direction to Respondents for deposit of bond without sureties for 90% of enhanced valuation of goods leaving it to DGFT to decide whether confiscation needed to be ordered or release be granted on redemption at market value, in which event Respondents shall be entitled to set off.



# Securities Act, 1933

## **SECURITIES ACT, 1933**

### **CHAPTER 38**

[H.R. 5480.]

[Public, No. 22.]

**[27th May, 1933]**

### **PREAMBLE**

*An Act to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.*

Securities Act of 1933.

Post, p. 1028.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

### **TITLE I**

#### **1. Short Title**

#### **Title cited**

This title may be cited as the "i".

#### **2. Definitions**

When used in this title, unless the context otherwise requires--

"Security." Post, p. 905.

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate or interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing.

"Person."

"Trust."

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

"Sale," etc.

Preliminaries not included.

Security given with purchase considered part of subject.

Issue of security with right to convert.

When conversion right exercised.

(3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The issue or

transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be a sale of such other security but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

"Issuer."

Equipment-trust securities.

(4) The term "issuer" means every person who issues or proposes to issue any security or who guarantees a security either as to principal or income; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an incorporated investment trust not having a board or directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities' are issued; and except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used.

"Commission."

(5) The term "Commission" means the Federal Trade Commission.

"Territory."

(6) The term "Territory" means Alaska, Hawaii, Puerto Rico, the Philippine Islands, Canal Zone, the Virgin Islands, and the insular possessions of the United States.

"Inter state commerce."

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign

country and any State, Territory, or the District of Columbia, or within the District of Columbia.

"Registration statement."

Post, p. 78.

(8) The term "registration statement" means the statement provided for in Section 6, and includes any amendment thereto and any report, document, or memorandum accompanying such statement or incorporated therein by reference.

"Write "or" written."

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

"Prospectus."

Exceptions.

Post, pp. 81, 905.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to such communication a written prospectus meeting the requirements of Section 10 was received, by the person to whom the communication was made, from the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of Section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed.

"Underwriter."

Persons not included.

"Issuer."

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the

distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

"Dealer."

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

### **3. Exempted Securities**

(a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

Priorsale.

New offering excluded.

(1) Any security which, prior to or within sixty days after the enactment of this title, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

Securities guaranteed by United States, State, or political subdivision, etc.

Post, p. 906.

Government corporations.

National, etc., banks.

Federal reserve bank obligations.

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by

any public instrumentality of one or more States or Territories exercising an essential governmental function, or by any corporation created and controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or by any national bank, or by any banking institution organized under the laws of any State or Territory, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal reserve bank;

Current transactions.

Short-term paper.

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

Religious, etc., organizations.

Post, p. 906.

(4) Any security issued by a corporation organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual;

Building and loan associations, etc., where business substantially confined to members.

Exception.

Farmers' cooperatives.

Vol. 47, pp. 193, 194.

(5) Any security issued by a building and loan association, homestead association, savings and loan association, or similar institution, substantially all the business of which is confined to the making of loans to members (but the foregoing exemption shall not apply with respect to any

such security where the issuer takes from the total amount paid or deposited by the purchaser, by way of any fee, cash value or other device whatsoever, either upon termination of the investment at maturity or before maturity, an aggregate amount in excess of 3 per centum of the face value of such security), or any security issued by a farmers' cooperative association as defined in paragraphs (12), (13), and (14) of Section 103 of the Revenue Act of 1982;

Common carriers.

Vol. 41, p. 494.

U.S.C., p. 1670.

(6) Any security issued by a common carrier which is subject to the provisions of Section 20a of the Interstate Commerce Act, as amended;

Certificates in bankruptcy proceedings.

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

Annuity contracts, etc.

Post, p. 908.

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia.

Additional classes permitted.

Restriction.

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this Section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this sub-section where the aggregate amount at which such issue is offered to the public exceeds \$100,000.

#### **4. Exempted Transactions**

The provisions of Section 5 shall not apply to any of the following transactions:

By individuals.

Post, p. 906.

Post, p. 79.

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not with or through an underwriter and not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the last date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under Section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

Brokers' transactions.

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.

Issuance of securities to existing security holders, creditors, etc.

(3) The issuance of a security of a person exchanged by it with its existing security holders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with such exchange; or the issuance of securities to the existing security holders or other existing creditors of a corporation in the process of a bona fide reorganization of such corporation under the supervision of any court, either in exchange for the securities of such security holders or claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors.

#### **5. Prohibitions Relating to Interstate Commerce and the Mails**

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly--

Transmission of broker's prospectus, etc.

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

Transporting such security for sale or delivery after sale.

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Unlawful to transmit.

(b) It shall be unlawful for any person, directly or indirectly--

Prospectus Relating to registered security.

Post, p. 81.

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of Section 10; or

Security.

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of Section 10.

Intra state sales excluded.

Post, p. 906.

(c) The provisions of this Section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single State or Territory, where the issuer of such

securities is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.

## **6. Registration of Securities and Signing of Registration Statement**

Foreign or Territorial person.

Security of foreign governments.

Signatures.

Unauthorized Signing.

(a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this title. A Registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

Filing fee.

(b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one one-hundredth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall such fee be less than \$25.

Registration statement effective on filing, etc.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place

upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under sub-Section (b).

Availability of registration information.

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photo static or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

Not operative first 40 days.

(e) No registration statement may be filed within the first forty days following the enactment of this Act.

### **Information Required; Schedules**

Post, p. 88

Foreign government securities

Post, p. 91

Optional, in certain classes

Professional statements.

Written consent to use, required.

Additional information, etc.

## **7. Information Required in Registration Statement**

The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A, and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure

fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

#### **Registration statements and amendments thereto**

#### **8. Taking Effect of Registration Statements and Amendments There to**

Effective date.

Foreign securities.

(a) The effective date of a registration statement shall be the twentieth day after the filing thereof, except as hereinafter provided, and except that in case of securities of any foreign public-authority, which has continued the full service of its obligations in the United States, the proceeds of which are to be devoted to the refunding of obligations payable in the United States, the registration statement shall become effective seven days after the filing thereof. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.

Incomplete or inaccurate statements.

Opportunity to amend.

Effective date of amended statement.

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

Amendment filed after effective date.

Determination of date, if not defective

(c) An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect, shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

Stop order provisions.

Notice.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

Investigations authorized.

Powers of Commission.

Grounds for issuance of stop order.

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under sub-section (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

Service of notice.

(f) Any notice required under this Section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement.

### **Court Review of Commission's orders**

#### **9. Court Review of Orders**

Petition allowed to appropriate circuit court of appeals, etc.

Copy thereof to Commission.

Proceedings and evidence.

Jurisdiction of court.

Certiorari to Supreme Court.

U.S.C., p. 906.

(a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit

wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. Copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

Commission's Order not stayed.

(b) The commencement of proceedings under sub-section (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

## **INFORMATION REQUIRED IN PROSPECTUS**

### **10. Information Required In Prospectus**

(a) A prospectus--

Domestic Securities.

Post, p. 91.

(1) when relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the same

statements made in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of Schedule A;

Foreign Government, etc., securities.

Post, p. 92.

(2) when relating to a security issued by a foreign government or political subdivision thereof shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (13)and (14) of Schedule B.

(b) Notwithstanding the provisions of sub-section (a)--

Statement in prospectus used more than 13 months.

Post, p. 908.

(1) when a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use.

Statements that may be omitted.

(2) there may be omitted from any prospectus any of the statements required under such sub-section (a) which the Commission may by rules or regulations designates not being necessary or appropriate in the public interest or for the protection of investors.

Additional Information required.

(3) any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

Classification of prospectuses.

Regulations Governing form, etc., of classes.

(4) in the exercise of its powers under paragraphs (2) and (3) of this sub-Section, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use, and, by rules and

regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate to such use and consistent with the public interest and the protection of investors.

Printing Requirement.

(c) The statements or information required to be included in a prospectus by or under authority of sub-section (a) or (b), when written, shall be placed in a conspicuous part of the prospectus in type as large as that used generally in the body of the prospectus.

Radio Broadcasts.

Copies to be filed.

(d) In any case where a prospectus consists of a radio broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing without of forms of prospectuses used in connection with the sale of securities registered under this title.

## **CIVIL LIABILITIES ON ACCOUNT OF FALSE REGISTRATION STATEMENT**

Post, p. 907.

### **11. Civil liabilities on Account of False Registration Statement**

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--

Responsibility of signator.

(1) every person who signed the registration statement;

Director, Partner, etc.

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

Prospective Director, partner, etc.

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

Accountant's, etc., statements.

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

Underwriter to such security.

(5) every underwriter with respect to such security.

Exemption, if burden of proof sustained.

(b) Notwithstanding the provisions of sub-section (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof--

Resignation, etc., before effective date of statement.

Notification to Commission, etc., accordingly.

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

Advised Commission of false statement.

Public Notice, additional.

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and

advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

Belief in probity of statements, not expert, etc.

No Material fact omitted.

Statement Made as Expert True.

No Omitted nor misleading statements.

Registration Statement at variance, etc

Statement of expert (other than himself) .

Post, p. 907.

Public Officials or documents.

Post, p. 907.

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy

of or extract from a report or valuation of an expert (other than himself), he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement of the expert or was a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true, and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement made by the official person or was a fair copy of or extract from the public official document.

Reasonable investigation or ground for relief.

Post, p. 907.

(c) In determining, for the purpose of paragraph (3) of sub-Section (b) of this Section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a person occupying a fiduciary relationship.

Becoming underwriter after liability attaches.

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of sub-Section (b) of this Section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

Suits authorized herein.

Security Payment.

Post, p. 907.

Damages.

(e) The suit authorized under sub-Section (a) may be either (1) to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or (2) for damages if the person suing no longer owns the security.

Liability, joint and several.

Contribution.

Exception.

(f) All or any one or more of the persons specified in sub-Section (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this Section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

Recovery limitation.

(g) In no case shall the amount recoverable under this Section exceed the price at which the security was offered to the public.

## **CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS**

### **12. Civil Liabilities Arising in Connection with Prospectuses and Communications**

Any person who--

Sales through interstate commerce and mails.

Ante, p. 77.

(1) sells a security in violation of Section 5, or

Through false prospectuses, etc.

Ante, p. 75.

(2) sells a security (whether or not exempted by the provisions of Section 3, other than paragraph (2) of sub-Section (a) thereof), by the use of any

means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

Recovery by purchaser.

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

### **LIMITATION OF ACTIONS**

Post, p. 908.

#### **13. Limitation of Actions**

No action shall be maintained to enforce any liability created under Section 11 or Section 12 (2) unless brought within two years after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under Section 12 (1), unless brought within two years after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under Section 11 or Section 12 (1) more than ten years after the security was bona fide offered to the public.

### **CONTRARY STIPULATIONS VOID**

#### **14. Contrary Stipulations Void**

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

### **LIABILITY OF CONTROLLING PERSONS**

Post, p. 908.

## **15. Liability of Controlling Persons**

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under Section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable.

## **ADDITIONAL REMEDIES**

## **16. Remedies to be additional to existing rights, etc.**

The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

## **FRAUDULENT INTERSTATE TRANSACTIONS**

## **17. Fraudulent Interstate Transactions**

(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--

Unlawful practices, transactions, etc., in sale of securities.

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material factor any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Unlawful Advertisement of securities.

Receipt of consideration and amount to be disclosed.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular,

advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

Exempted Securities.

Ante, p. 75.

(c) The exemptions provided in Section 3 shall not apply to the provisions of this Section.

## **STATE CONTROL OF SECURITIES**

### **18. State Control of Securities**

Jurisdiction of commissions.

Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

## **SPECIAL POWERS OF COMMISSION**

### **19. Special powers of Commission**

Prescribe Regulations.

Post, p. 908.

Registration Statements and prospectuses.

Prescribe forms.

Preparation of accounts, appraising, etc.

Common carrier.

Rules affecting.

Vol.24, p. 386; U.S.C., p. 1668.

Rules Effective on publication.

(a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the

provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of Section 20 of the Inter-state Commerce Act, as amended, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such Section 20. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe.

Power to summon witnesses, production of books, etc.

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

## **INJUNCTIONS AND PROSECUTION OF OFFENSES**

### **20. Injunctions and prosecution of offenses**

Investigations authorised.

(a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in

writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

Injunctions.

Evidence to Attorney General.

Venue.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such, acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

Jurisdiction of district court to issue write of mandamus.

(c) Upon application of the Commission the district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof.

## **HEARINGS BY COMMISSION**

### **21. Hearings by Commission**

All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

## **JURISDICTION OF OFFENSES AND SUITS**

### **22. Jurisdiction of offenses and suits**

Service of process.

Judgment subject to review.

Vol.36, pp. 1133, 1157.

U.S.C., pp. 895, 906.

No court assessments against Commission.

(a) The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in Sections 128 and 240 of the Judicial Code, as amended (U.S.C., title 28, Secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

Punishment for disobeying subpoena, etc.

(b) In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

No person excused from testifying, etc.

Personal immunity.

Perjury.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

## **UNLAWFUL REPRESENTATIONS**

### **23. Unlawful Representations**

Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing provisions of this Section.

## **PENALTIES**

### **24. Penalties**

Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than \$5,000 or imprisoned not more than five years, or both.

## **JURISDICTION OF OTHER GOVERNMENT AGENCIES OVER SECURITIES**

### **25. Jurisdiction of other Government agencies not impaired**

Nothing in this title shall relieve any person from submitting to the respective supervisory units of the Government of the United States information, reports, or other documents that are now or may hereafter be required by any provision of law.

## **SEPARABILITY OF PROVISIONS**

### **26. Separability of Provisions**

If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

## **SCHEDULE A**

Information to be included.

Name of issuer.

(1) The name under which the issuer is doing or intends to do business;

State, etc.

(2) the name of the State or other sovereign power under which the issuer is organized;

Location of issuer's business office.

United States agency, if foreign issuer.

(3) the location of the issuer's principal business office, and if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

Names and addresses of corporation directors, partners, etc.

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, association, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

Underwriters.

(5) the names and addresses of the underwriters;

Stockholders.

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

Schedule of securities.

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5), and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

Character of business.

(8) the general character of the business actually transacted or to be transacted by the issuer;

Capitalization,etc.

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

Outstanding Options.

(10) a statement of the securities, if any, covered by options outstanding or to be created in connection with the security to be offered together with the names and addresses of all persons, if any, to be allotted more than 10 per centum in the aggregate of such options:

Capital stock.

(11) the amount of capital stock of each class issued or included in the shares of stock to be offered;

Funded debt, etc.

Statement, if substitution permitted.

(12) the amount of the funded debt outstanding and to be created by the security to be offered, with a brief description of the date maturity, and character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefore If substitution of any security is permissible, a summarized statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

Detailed Amounts and purposes.

(13) the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

Remuneration paid by issuer, etc., to its directors, officers, etc.

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded \$25,000during any such year;

Estimated net proceeds.

(15) the estimated net proceeds to be derived from the security to be offered;

Price security offered to public, etc.

Variation to be reported to Commission.

(16) the price at which it is proposed that the security shall be offered to the public or the method by which such price is computed and any variation there format which any portion of such security is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

Commissions, discounts, etc.

(17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of such security. A commission paid or to be paid in connection with the sale of such security by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer. Where any such commission is paid the amount of such commission paid to each underwriter shall be stated;

Other Expenses.

(18) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than commissions specified in paragraph (17) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, authentication, and other charges;

Net Proceeds from previous sales.

(19) the net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration statement, the price at which such security was offered to the public, and the names of the principal underwriters of such security;

Payment to promoter.

(20) any amount paid within two years preceding the filing of the registration statement or intended to be paid to any promoter and the consideration for any such payment;

Vendors, Names, addresses, purchase price of property, etc.

Cost of financing.

(21) the names and addresses of the vendors and the purchase price of any property, or good will, acquired or to be acquired, not in the ordinary course of business, which is to be defrayed in whole or in part from the proceeds of the security to be offered, the amount of any commission payable to any person in connection with such acquisition, and the name or names of such person or

persons, together with any expense incurred or to be incurred in connection with such acquisition, including the cost of borrowing money to finance such acquisition;

Interest of every stockholder holding more than 10 per cent of any class.

(22) full particulars of the nature and extent of the interest, if any, of every director, principal executive officer, and of every stockholder holding more than 10 per centum of any class of stock or more than 10 per centum in the aggregate of the stock of the issuer, in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement or proposed to be acquired at such date;

Names, etc., of counsel.

(23) the names and addresses of counsel who have passed on the legality of the issue;

Material Contracts, not made in ordinary business.

Management Contract, special bonuses, or profit sharing, etc., deemed material contract.

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing. Any management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of \$2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

Balance Sheets.

Contents.

Certificate of public accountant.

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the

nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of \$20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent public or certified accountant, of a date not more than one year prior to the filing of the registration statement, shall be submitted;

Profit and loss statement.

Certificate of public Accountant.

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income they shall be shown separately with a statement of the basis upon which the credit is computed, Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

If proceeds are to be applied to purchase of any business, statement of such business to issue.

(27) if the proceeds, or any part of the proceeds, of the security to be issued is to be applied directly or indirectly to the purchase of any business, a profit and loss statement of such business certified by an independent public or certified accountant, meeting the requirements of paragraph (26) of this schedule, for the three preceding fiscal years, together with a balance sheet, similarly certified, of such business, meeting the requirements of paragraph (25) of this schedule of a date not more than ninety days prior to the filing of the registration statement or at the date such business was acquired by the issuer if the business was acquired by the issuer more than ninety days prior to the filing of the registration statement;

Agreements with any underwriter.

(28) a copy of any agreement or agreements (or, if identical agreements are used, the forms thereof) made with any underwriter, including all contracts and agreements referred to in paragraph (17) of this schedule;

Counsel's Opinion as to legality of issue.

(29) a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language;

Copy of material contracts; restriction.

(30) a copy of all material contracts referred to in paragraph (24) of this schedule, but no disclosure shall be required of any portion of any such contract if the Commission determines that disclosure of such portion would impair the value of the contract and would not be necessary for the protection of the investors;

Copy of articles of incorporation, etc.

(31) unless previously filed and registered under the provisions of this title, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing bylaws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association and all other papers pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; and

Copy of underlying Indentures affecting stock, etc.

Rules and regulations to be established.

(32) a copy of the underlying agreements or indentures affecting any stock, bonds, or debentures offered or to be offered.

In case of certificates of deposit, voting trust certificates, collateral trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment trust certificates, interim or other receipts for certificates, and like securities, the Commission shall establish rules and regulations requiring the submission of information of a like character applicable to such cases, together with such other information as it may deem appropriate and necessary regarding the character, financial or otherwise, of the actual issuer of the securities and/or the person performing the acts and assuming the duties of depositor or manager.

## **SCHEDULE B**

Name of borrowing government, etc.

(1) Name of borrowing government or subdivision thereof;

Purposes and amounts for which security offered is to supply funds.

(2) specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

Funded and floating debts.

Substitution Conditions.

(3) the amount of the funded debt and the estimated amount of the floating debt outstanding and to be created by the security to be offered, excluding intergovernmental debt, and a brief description of the date, maturity, character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefore. If substitution of any security is permissible, a statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

Whether issuer has defaulted, etc.

Inter Governmental debts excluded.

(4) whether or not the issuer or its predecessor has, within a period of twenty years prior to the filing of the registration statement, defaulted on the principal or interest of any external security, excluding intergovernmental debt, and, if so, the date, amount, and circumstances of such default, and the terms of the succeeding arrangement, if any;

Receipts and expenses, in detail.

(5) the receipts, classified by source, and the expenditures, classified by purpose, in such detail and form as the Commission shall prescribe for the latest fiscal year for which such information is available and the two preceding fiscal years, year by year;

Names, etc., of underwriters.

(6) the names and addresses of the underwriters;

United States agent.

(7) the name and address of its authorized agent, if any, in the United States;

Estimated net proceeds from sales in United States.

(8) the estimated net proceeds to be derived from the sale in the United States of the security to be offered;

Price.

(9) the price at which it is proposed that the security shall be offered in the United States to the public or the method by which such price is computed. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

Commissions paid.

(10) all commissions paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of another persons in which the underwriter is interested, made, in connection with the sale of such security. Where any such commission is paid, the amount of such commission paid to each underwriter shall be stated;

Other Expenses.

(11) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than the commissions specified in paragraph (10) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, and other charges;

Names, etc., of counsel.

(12) the names and addresses of counsel who have passed upon the legality of the issue;

Copy of any underwriter's agreement as to United States sales.

(13) a copy of any agreement or agreements made with any underwriter governing the sale of the security within the United States; and

Counsel's Opinion as to legality of issue.

(14) an agreement of the issuer to furnish a copy of the opinion or opinions of counsel in respect to the legality of the issue with a translation, where necessary, into the English language. Such opinion shall set out in full all laws, decrees, ordinances, or other acts of Government under which the issue of such security has been authorized.

## **TITLE II**

### **Corporation of Foreign Bondholders, 1933**

Principal Office, agencies.

#### **201. "Corporation of Foreign Security Holders" created**

For the purpose of protecting, conserving, and advancing the interests of the holders of foreign securities in default there is hereby created a body corporate with the name "Corporation of Foreign Security Holders" (herein called the "Corporation"). The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices in any city or cities of the United States under rules and regulations prescribed by the board of directors.

#### **202. Control vested in board of directors**

Federal Trade Commission to appoint six directors, designate a chairman, etc.

Post, p. 908.

Appointment of successors.

Tenure of office.

Vacancies.

Removals.

The control and management of the Corporation shall be vested in a board of six directors, who shall be appointed and hold office in the following manner: As soon as practicable after the date this Act takes effect the Federal Trade Commission (hereinafter in this title called "Commission") shall appoint six directors, and shall designate a chairman and a vice chairman from among their number. After the directors designated as chairman and vice chairman cease to be directors, their successors as chairman and vice chairman shall be elected by the board of directors itself. Of the directors first appointed, two shall continue in office for a term of two years, two for a term of four years, and two for a term of six years, from the date this Act takes effect, the term of each to be designated by the Commission at the time of appointment. Their successors shall be appointed by the Commission, each for a term of six years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of such predecessor. No person shall be eligible to serve as a director who within the five years preceding has had any interest, direct or indirect, in any corporation, company, partnership, bank or association which has sold, or offered for sale any foreign securities. The office of a director shall be vacated if the board of directors shall at meeting specially convened for that purpose by resolution passed by a majority of at least two thirds of the board of directors, remove such member from office, provided that the member whom it is proposed to remove shall have seven days' notice sent to him of such meeting and that he may be heard.

## **203. Corporate Powers**

To require Information relative to foreign securities holders, etc.

To take over functions of agent of defaulted foreign securities.

Borrow and pledge for such loans.

Officers, employees, etc.

Prescribe, etc., rules for conduct of business.

Determine manner obligations incurred and expenses allowed.

The Corporation shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to require from trustees, financial agents, or dealers in foreign securities information relative to the original or present holders of foreign securities and such other information as may be required and to issue subpoenas therefore; to take over the functions of any fiscal and paying agents of any foreign securities in default; to borrow money for the purposes of this title, and to pledge as collateral for such loans any securities deposited with the Corporation pursuant to this title; by and with the consent and approval of the Commission to select, employ, and fix the compensation of officers, directors, members of committees, employees, attorneys, and agents of the Corporation, without regard to the provisions of other laws applicable to the employment and compensation of officers or employees of the United States; to define their authority and duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which fits general business may be conducted and the powers granted to it bylaw may be exercised and enjoyed, together with provisions for such committees and the functions thereof as the board of directors may deem necessary for facilitating its business under this title. The board of directors of the Corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid.

#### **204. Authority of board over foreign securities**

The board of directors may--

Call meetings of holders of.

(1) Convene meetings of holders of foreign securities.

Action on defaulted securities.

(2) Invite the deposit and undertake the custody of foreign securities which have defaulted in the payment either of principal or interest, and issue receipts or certificates in the place of securities so deposited.

Appoint committees to represent such holders.

(3) Appoint committees from the directors of the Corporation and/or all other persons to represent holders of any class or classes of foreign securities which have defaulted in the payment either of principal or interest and determine and regulate the functions of such committees. The chairman and vice chairman of the board of directors shall be ex officio chairman and vice chairman of each committee.

Carry out arrangements for resuming payments.

(4) Negotiate and carry out, or assist in negotiating and carrying out, arrangements for the resumption of payments due or in arrears in respect of any foreign securities in default or for rearranging the terms on which such securities may in future be held or for converting and exchanging the same for new securities or for any other object in relation thereto; and under this paragraph any plan or agreement made with respect to such securities shall be binding upon depositors, providing that the consent of holders resident in the United States of 60 per centum of the securities deposited with the Corporation shall be obtained.

Collecting, etc., funds derived from foreign securities.

(5) Undertake, superintend, or take part in the collection and application of funds derived from foreign securities which come into the possession of or under the control or management of the Corporation.

Collect, etc., information respecting foreign securities.

(6) Collect, preserve, publish, circulate, and render available in readily accessible form, when deemed essential or necessary, documents, statistics, reports, and information of all kinds in respect of foreign securities, including particularly records of foreign external securities in default and records of the progress made toward the payment of past-due obligations.

Securing simple forms, etc.

(7) Take such steps as it may deem expedient with the view of securing the adoption of clear and simple forms of foreign securities and just and sound principles in the conditions and terms thereof.

Act as representative of holders.

(8) Generally, act in the name and on behalf of the holders of foreign securities the care or representation of whose interests may be entrusted to the Corporation; conserve and protect the rights and interests of holders of foreign securities issued, sold, or owned in the United States; adopt measures for the protection, vindication, and preservation or reservation of the rights and interests of holders of foreign securities either on any default in or on breach or contemplated breach of the conditions on which such foreign securities may have been issued, or otherwise; obtain for such holders such legal and other assistance and advice as the board of directors may deem expedient; and do all such other things as are incident or conducive to the attainment of the above objects.

#### **205. To keep and publish an audited general account and balance sheet**

The board of directors shall cause accounts to be kept of all matters relating to or connected with the transactions and business of the Corporation, and cause a general account and balance sheet of the Corporation to be made out in each year, and cause all accounts to be audited by one or more auditors who shall examine the same and report thereon to the board of directors.

#### **206. Annual Report of operations**

Proviso.

Free distribution.

The Corporation shall make, print, and make public an annual report of its operations during each year, send a copy thereof, together with a copy of the account and balance sheet and auditor's report, to the Commission and to both Houses of Congress, and provide one copy of such report but not more than one on the application of any person and on receipt of a sum not exceeding \$1:Provided, That the board of directors in its discretion may distribute copies gratuitously.

#### **207. Prorata levy on holders of foreign securities**

Provisos.

Charge limitation.

Additional charges.

The Corporation may in its discretion levy charges, assessed on a pro ratabasis, on the holders of foreign securities deposited with it: Provided, That any charge levied at the time of depositing securities with the Corporation shall not exceed one fifth of 1 per centum of the face value of such securities: Provided further, That any additional charges shall bear a close relationship tothe cost of operations and negotiations including those enumerated in Sections 203 and 204 and shall not exceed 1 per centum of the face value of such securities.

**208. Subscription may be received from any foundation, etc**

The Corporation may receive subscriptions from any person, foundation with a public purpose, or agency of the United States Government, and such subscriptions may, in the discretion of the board of directors, be treated as loans repayable when and as the board of directors shall determine.

**209. Reconstruction Finance Corporation to advance funds for Corporation use**

The Reconstruction Finance Corporation is hereby authorized to loan out of its funds not to exceed \$75,000 for the use of the Corporation.

**210. Unlawful Acts**

Notwithstanding the foregoing provisions of this title, it shall be unlawful for, and nothing in this title shall be taken or construed as permitting or authorizing, the Corporation in this title created, or any committee of said Corporation, or any person or persons acting for or representing or purporting to represent it--

Claiming to represent Government or State Department.

(a) to claim or assert or pretend to be acting for or to represent the Department of State or the United States Government;

Statements to that effect to foreign Government.

(b) to make any statements or representations of any kind to any foreign government or its officials or the officials of any political subdivision of any foreign government that said Corporation or any committee thereof or any individual or individuals connected therewith were speaking or acting for the said Department of State or the United States Government; or

Interference, etc.. with Government policies.

(c) to do any act directly or indirectly which would interfere with or obstruct or hinder or which might be calculated to obstruct, hinder or

interfere with the policy or policies of the said Department of State or the Government of the United States or any pending or contemplated diplomatic negotiations, arrangements, business or exchanges between the Government of the United States or said Department of State and any foreign government or any political subdivision thereof.

#### **211. Title not effective until President so declares**

This title shall not take effect until the President finds that its taking effect is in the public interest and by proclamation so declares.

#### **212. Citation of title**

This title may be cited as the "Corporation of Foreign Bondholders Act, 1933."

Approved, May 27, 1933.



## **SECURITIES CONTRACTS REGULATION ACT, 1956**

**Subject Matter :** POWER OF STOCK EXCHANGES & CENTRAL GOVERNMENT

**Relevant Section : Section 9:** Bye-laws shall be subject to the prescribed conditions in the existing regulations and, when approved by the SEBI, it shall be published in the Gazette of India & Official Gazette of State in which the principal office of the recognised stock exchange is situated, effective from the date of its publication.

**Exception:** Immediate introduction of bye-laws in the interest of trade or public interest.

**Section 7A:** A recognised stock exchange may make or amend rules for restricting voting rights, regulating voting rights. Rules made hereunder shall have effect after approval of Central Government and publication in the Official Gazette.

**Section 8:** Empowers Central Government to direct rules to be made or to make rules.

**Section 3(2):** Every application for recognition of stock exchange shall contain the following particulars: about the governing body of such stock exchange, powers & duties of office bearers, admission and procedure.

**Key Issue :** Whether by-laws framed by the Bombay Stock Exchange are subordinate legislation?

**Citation Details :** Vinay Bubna vs. Yogesh Mehta and Ors. (07.09.1998 - BOMHC):

[MANU/MH/0450/1998](#)

**Summary Judgment :**

**Facts:** Petitioner by letter had pointed out to the Arbitral Tribunal that the appointment of a third Arbitrator was absolutely necessary and that matter ought to be decided first. The Tribunal held that it was properly constituted and proceeded with the Arbitration

proceedings. The grievance made was to the manner of appointment. However, it is contended that the Rules, Bye-laws and Regulations framed by the Stock Exchange and travelled beyond the provisions of the Rules, Bye-laws and Regulations of Mumbai Stock Exchange.

**Held:** **Section 9(4)** of the Securities Contract Act requires previous publication of the by-laws before they can come into force. Publication is another incidence of subordinate legislation. Therefore, there is no difficulty in holding that the by-laws framed under **Section 9** are subordinate legislation. **Section 9** of the Securities Contract Act itself confers power on the Board to make by-laws pertaining to regulation and control of contracts. Bye-laws have been framed under the Securities Contracts (Regulation) Act, 1956. For that purpose, the relevant sections of the Act which need to be referred to are **Section 7A** of the Securities Contracts (Regulations) Act, 1956 confers a power on a recognised Stock Exchange to make rules restricting voting rights, etc. **Section 8** is the power conferred on the Central Government to direct rules to be made and/or to make rules itself after consultation with the Governing bodies of the Stock Exchanges generally or with the governing body of any Stock Exchange in particular for matters specified in **Section 3(2)**, In case the Governing Body fails to make Rules as directed power is conferred under sub-section (2) on the Central Government.

**Subject Matter :** VOID ABILITY & ILLEGALITY OF CONTRACTS

**Relevant Section :** **Section 13:** Central Government has the power to declare a state or an area as notified area. While notifying this, due consideration is given to the nature or volume of transactions or securities in such state or area.

**Section 14:** Any contract entered into in any notified area which is in contravention of any bye-laws specified in that behalf shall be void.

**Key Issue :** Whether agreement for purchase of shares was illegal and void under the provisions of Securities Contracts (Regulation) Act, 1956?

**Citation Details :** Norman J. Hamilton and Ors. vs. Umedbhai S. Patel and Ors. (24.07.1978 - BOMHC): [MANU/MH/0066/1979](#)

**Summary Judgment :**

**Facts:** The plaintiffs had entered into an agreement with the defendants where under the plaintiffs had agreed to sell "1,000 ordinary and 2,300 redeemable cumulative preference shares" of A. MacRae and Co. Private Ltd. Defendants paid to the plaintiffs a sum of Rs. 10,000 on the signing of the agreement. They however, did not pay any of the annual installments as agreed between the parties. The present suit is to recover the amount due to the plaintiffs under the fourth and the fifth installments of price for sale of shares in a private limited company. Apparently, the agreement does not contain any provision regarding acceleration of payment in the event of a default. Hence, separate suits have been filed by the plaintiffs to recover the amounts of the installments as and when the amounts became due.

**Held:** The shares of a private limited company are not governed by the provisions of this Act, it is not necessary for me to go into this aspect of the question. Under the circumstances, issue is decided in the negative. The contract is legal and binding on the parties, not violative of **Section 13** of the Securities Contracts (Regulation) Act, 1956. Apart from the sum of Rs. 10,000, which was paid on the signing of the agreement, no further amount has been paid by the defendants to the plaintiffs.

**Subject Matter :** LISTING & DE-LISTING

**Relevant Section :** **Section 21:** Where securities are listed in any recognised stock exchange on the application of any person then such person shall comply with the conditions of the

listing agreement with that stock exchange.

**Section 16(1):** To prevent undesirable speculation in specified securities in any State or area, Central Government may issue a notification. It may thereby declare that no person in such State or area shall enter into any contract for the sale or purchase of any such security without its permission.

**Key Issue :** a) Whether provisions of Regulation Act was applicable to shares of a public limited company which were admittedly not listed on any stock exchange?  
b) Whether the transfer of shares was against provisions of Sections 13 and 16 of Regulation Act?

**Citation Details :** Bhagwati Developers Pvt. Ltd. vs. Peerless General Finance and Investment Company Ltd. and Ors. (15.07.2013 - SC): [MANU/SC/0696/2013](#)

**Summary Judgment :**

**Facts:** R-2 approached Bhagwati for a loan for purchasing 3530 equity shares of R-1. Bhagwati after advancing a sum entered into a formal agreement with Tuhin in respect of the aforesaid loan and Tuhin assured to repay the loan. It seems that the transfer deeds were not properly filled in and executed so Bhagwati asked Tuhin to put his signature in the fresh transfer deeds and return them to it. Tuhin, it appears, did not sign the fresh transfer deeds and retained the bonus shares. Bhagwati re-lodged the shares for transfer with Peerless but again Peerless did not register those shares in the name of Bhagwati. Appellant aggrieved by the judgment passed by the High Court of Judicature at Calcutta affirming the judgment passed by the Company Law Board, Calcutta is before us with the leave of the Court.

**Held:** a. Shares of Respondent, a public limited company in respect of which Appellant had sought rectification were not listed in stock exchange.

b. Notwithstanding that if shares came within definition of "securities" as defined under **Section 2(h)(i)** of Regulation Act, then indictments contained in **Section 13** of Regulation Act, would apply. Shares of public limited company though not listed in stock exchange came within definition of securities and hence, provisions of Regulation Act were applicable. Therefore, shares of Public Limited Company not listed in stock-exchange was covered within ambit of Regulation Act. **Section 16(1)** of Act, conferred power on Central government to prohibit contracts in certain cases. Appellant could come out of rigors of **Section 16** of Act, only when it satisfied that transaction came within definition of "**spot delivery contract**" under **Section 2(i)** of Regulation Act. Contract in question was not a spot delivery contract. Reasoning and conclusion of Company Law Board and High Court did not require any interference.

**Subject Matter : LISTING & DE-LISTING**

**Relevant Section : Section 21A(2):** A listed company or an aggrieved investor may file an appeal before the Securities Appellate Tribunal against the decision of recognised stock exchange, about delisting of the securities, within 15 days from the date of such decision.

**Exception:** Extension of period of appeal in certain cases.

**Section 23L:** Allows a person aggrieved by the order or decision of a recognized Stock Exchange or the adjudicating officer or any order made by the Securities and Exchange Board of India to prefer an appeal before the Securities Appellate Tribunal. Also refers to appeals to the Tribunal under sections 22B, 22C, 22D & 22E.

**Section 22E:** No civil court shall have jurisdiction to proceed in any matter for which a Securities Appellate Tribunal is empowered to proceed with, under this Act. Also, no injunction shall be granted by any court in respect of any action by the Tribunal under this Act.

**Key Issue :** Whether impugned decision, refusing to grant in principle approval for delisting of equity shares was perverse?

**Citation Details :** Ashoka Marketing Limited and Ors. vs. The Calcutta Stock Exchange Limited and Ors. (16.11.2017 - CALHC): MANU/WB/0899/2017

**Summary Judgment :**

**Facts:** The writ petitioners have challenged the decision of the Calcutta Stock Exchange, refusing to grant in principle approval for delisting of the equity shares of the first petitioner. The equity shares of the first writ petitioner is listed with the Calcutta Stock Exchange. Such shares are infrequently traded. The first petitioner has decided to delist its equity shares from the Calcutta Stock Exchange and referred to the provisions of the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 and submitted that, a stock exchange cannot withhold grant of in principle approval, unfairly. The only grievance of the investors is the non-fixation of the exit price. Exit price is required to be fixed only after the first petitioner receives the in principle approval. Since such approval is still awaited, the sufficiency of such grievance need not be considered at the present moment. It was contended that Calcutta Stock Exchange has exceeded its jurisdiction in purporting to act beyond the statute and the regulations governing it.

**Held:** In the present case, the impugned decision of the Calcutta Stock Exchange in refusing to grant in principle approval to delist the equity shares of the first petitioner has been contended to be appealable under **Section 21A(2)** of the Securities Contracts (Regulation) Act, 1956. Stock Exchange had claimed to have consulted with SEBI prior to petitioners being informed with impugned decision. It could not be said that, impugned decision was vitiated by breach of principles of natural justice. Since impugned order was appealable and Petitioners had statutory alternative remedy available, thus no need to interfere in impugned order. Provisions of **Section 23L** of the Act of 1956 have also been relied upon to suggest that, appeal to the Security Appellate Tribunal would lie against such a decision of a Stock Exchange.

**Subject Matter : OFFENCES & PENALTIES**

**Relevant Section : Section 23A:** Any person who fails to-

- a) provide any information, documents, books, returns, or report to a recognized stock exchange or
- b) maintain books of account or records, as per the listing agreement or bye-laws shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees whichever is less.

**Section 23J:** In deciding the quantum of penalty the adjudicating officer shall consider the following factors- the amount of unfair gain in quantifiable terms, the amount of loss caused to the investor and the repetitive nature of the default.

**Section 23E:** If a company or any person managing collective investment scheme or mutual fund, fails to comply with the listing or delisting conditions, he shall be liable to a penalty not exceeding 25 crore rupees.

**Key Issue :** Whether the Notices are liable for monetary penalty under Section 23A and 23E of the Act?

**Citation Details :** In Re: Oasis Securities Limited and Ors. (25.06.2018 - SEBI / SAT):

[MANU/SB/0266/2018](#)

**Summary Judgment :**

**Facts:** SEBI conducted a detailed examination on receipt of complaints of misstatements and misleading disclosure in financial statements of Notice 1. He had transferred its stock broking

and depository participant businesses to IKAB. Both OSL and IKAB are listed on BSE. It is noted that the Notices while undertaking the aforesaid transaction and on certain other instances had violated the provisions of the Listing Agreement read with section 21 of the Act, 1956. Adjudicating Officer was appointed under Section 23-I(1) to inquire into and adjudge the violations committed by Notices.

**Held:** Considering all the facts and circumstances of the case together with the replies of Notices and exercising the powers conferred under **Section 23-I**, a monetary penalty of Rs. 20,00,000/- is imposed under **Section 23A** and **Section 23E** of the Act on M/s. Oasis Securities Limited and 5,00,000/- each on Shri Indra Kumar Bagri and Shri Anil Kumar Bagri under **Section 23A** of the SC(R)A. While determining the quantum of penalty under Section 23A of the SC(R)A against the Notices it is important to consider the factors relevantly as stipulated in **Section 23J** of the SC(R)A. Penalty imposed is commensurate with the default committed by the Notices.

**Subject Matter : NON-APPLICABILITY**

**Relevant Section : Section 28(1)(b):** This Act does not apply to any convertible bond or share warrant if it entitles the person issued to obtain at his option from the company or other body corporate issuing the same or from any of its shareholders or duly appointed agents shares of the company or other body corporate whether by conversion of the bond or warrant or otherwise, on the basis of the price agreed upon when the same was issued.

**Section 2(h):** Securities includes instruments such as shares, bonds, scrips, stocks or other marketable securities of similar nature in or of any incorporate company, government securities, derivatives, units of collective investment scheme, interests and rights in securities or security receipt.

**Key Issue :** Whether OFCDs (Optionally Fully Convertible Debentures) issued by Appellants were convertible bonds falling within scope of Section 28(1)(b) of SCR Act?

**Citation Details :** Sahara India Real Estate Corporation Ltd. and Ors. vs. Securities and Exchange Board of India and Ors. (31.08.2012 - SC): [MANU/SC/0702/2012](#)

**Summary Judgment :**

**Facts:** Appellants were offering Optionally Fully Convertible Debentures ("OFCD") to all the people who were associated with the SAHARA group. The proposal of issuance of OFCD was approved by way of special resolution passed in terms of Companies Act. It was specifically indicated in the registered Red Herring Prospectus (RHP) by the SIRECL that did not intend to get their securities listed on any recognized stock exchange. Further, it was also stated in the RHP that only those persons to whom the Information Memorandum was circulated and/or approached privately who were connected in any manner with Sahara Group, would be eligible to apply. The same strategy was adopted by SHICL. High Court dismissed Application filed by Appellants for restoration of order passed by SEBI and Securities Appellate Tribunal wherein SEBI held that SHICL/Appellant had not complied with provisions of Regulations of ICDR Regulations and directed Appellant to refund money collected under Prospectus to all investors. SAT upheld the order of SEBI. The Ld. Tribunal took the view that SEBI had jurisdiction over the Saharas since OFCDs issued were in the nature of securities and should have been listed on any of the recognized exchanges within the Country. Hence, this Appeal.

**Held: Section 28** was inserted by SCR Act. **Section 28(1)(b)** is clear that Act would not apply to 'entitlement' of buyer, inherent in convertible bond. Entitlement might be severable, but did not itself qualify as security that could be administered by SCR Act, unless it was issued in detachable format. Therefore inapplicability of SCR Act as contemplated in **Section**

**28(1)(b)**, was not to convertible bonds, but to entitlement of person to whom such share, warrant or convertible bond had been issued to have shares at his option. Thus Act was inapplicable only to options or rights or entitlement that were attached to bond/warrant and not to bond/warrant itself. Expression "insofar as it entitles person" clearly indicated that it was not intended to exclude convertible bonds as class. **Section 28(1)(b)** clearly indicated that it was only convertible bonds and share/warrant of type referred to therein that were excluded from applicability of SCR Act and not debentures which were separate category of securities in definition contained in **Section 2(h)** of SCR Act. Hence provisions of SCR Act would not apply in view of **Section 28(1)(b)** of SCR Act could not be sustained.

**Subject Matter : CONTRACTS IN DERIVATIVES**

**Relevant Section : Section 18A:** Contracts in derivatives shall be legal and valid if such contracts are traded on or settled on the clearing house of; recognised stock exchange in accordance with the rules and bye-laws.

**Key Issue :** Whether the options in securities violate Section 18A of the SCRA as they are not traded and settled through a stock exchange?

**Citation Details :** SMCX Stock Exchange Limited vs. Securities and Exchange Board of India and Ors. (14.03.2012 - BOMHC): [MANU/MH/0289/2012](#)

**Summary Judgment :**

**Facts:** R-4 who is a promoter of the Petitioner made an application for recognition of the Petitioner as a Stock Exchange. The Petitioner has two promoters, R-3 & R-4. Petitioner applied to SEBI for the grant of recognition as a Stock Exchange. SEBI granted recognition under Section 4 of the SCRA for operating a Stock Exchange for a period of one year. Petitioner's Board of Directors called upon the initial promoters(R-3 & R-4) to reduce their shareholding by cancelling their shares in excess of the prescribed limit, by a scheme of reduction cum arrangement. Petition was filed in this Court for sanctioning a Scheme of Reduction cum Arrangement which stated that though the reducing shareholders had a right to transfer the warrants to other investors or to exercise the option under the warrants, the Petitioner would ensure compliance with the MIMPS Regulations as well as the regulatory regime. Division Bench of this Court disposed of the Writ Petition by directing SEBI to take a final decision on the application submitted by the Petitioner.

**Held:** The issue pertains to whether options can be traded only on the stock exchange, or whether they can be entered into privately on a negotiated basis. This is in view of **Section 18A** of the SCRA which provides that contracts in derivatives are legal only if they are traded on a recognised stock exchange. The Court did not pronounce its opinion on this issue because violation of the provisions of **Section 18A** on the basis that the buy back agreements constitute options in securities or derivatives was not a ground taken in the show cause notice which resulted in the impugned order of the Whole Time Member, nor for that matter, is it a ground in the impugned order itself. This ground was raised only in subsequent submissions. Hence left unanswered.

# **SECURITIES EXCHANGE BOARD OF INDIA ACT, 1992**

**Subject Matter :** Functions of the Board

**Relevant Section : Section 11:** This section gives a brief about the functions of the SEBI Board. It will be the duty of the Board to protect the interests of the investors in securities and take measures for the same.

**Section 11A:** The Board will regulate or prohibit issue of prospectus, offer document or advertisement seeking money for issue of securities.

**Section 11B:** The Board has the power to impose penalty and issue directions to others keeping in mind the interests of the investors.

**Key Issue :** Whether SEBI has the power to investigate and adjudicate in this matter as per Sec 11, 11A, 11B of SEBI Act and under Sec 55A of the Companies Act?

**Citation Details :** Subrata Roy Sahara vs. Union of India (UOI) and Ors. (06.05.2014 - SC): [MANU/SC/0406/2014](#)

**Summary Judgment :**

**Facts:** The Sahara Group and its two group companies Sahara India Real Estate Corporation Limited and Sahara Housing Investment Corporation Limited floated an issue of Optionally Fully Convertible Debentures and started collecting subscriptions from investors and collected Rs 17,656. The amount was collected from about 30 million investors in name of a PRIVATE PLACEMENT. The Whole Time Member of the SEBI took cognizance of this and restrained company from dealing in such amount and also directed to return the same to the investors. Sahara Company filed an appeal to such decision before SAT. The SAT upheld the Whole Time Member's decision. Then aggrieved by the decision the company filed an appeal before the apex court.

**Held:** The Supreme Court held that the matter falls well within the jurisdiction of SEBI. It is also contented that SEBI Act should be read in consonance with other acts. This act has been formulated to protect the interest of the investors with a view of not violating the provisions of the other acts and the powers, functions and jurisdiction of SEBI does not conflict with Ministry of Corporate Affairs under section 55A of Companies Act.

**Subject Matter :** Jurisdiction of SEBI

**Relevant Section : Section 12A:** This section states that the stock brokers, sub-brokers, share transfer agents etc they should obtain registration certificate from the Board and should deal accordingly with securities as per the certificate.

**Key Issue :** Whether SEBI has jurisdiction in matters pertaining to Global Depository Receipts (GDRs)?

**Citation Details :** In Re: GDR Issues of Asahi Infrastructure and Projects Ltd. (26.05.2020 - SEBI / SAT): [MANU/SB/0347/2020](#)

**Summary Judgment :**

**Facts:** Pan Asia Advisors Limited, a merchant banking firm, was the lead manager in the issuance of Global Depository Receipts of Asahi Infrastructure and Projects Limited. The SEBI investigations found that in all stages of the above transactions, entities related to Pan Asia had been involved in the purchase or sale of GDRs or shares. Pan Asia had facilitated transactions of the GDR issue, arranging of investors, providing of exit options for investors and conversion of GDRs into equity shares in the Indian market. These transactions were

undertaken with the underlying intention of increasing the liquidity and market reputation of the Asahi. SEBI cancelled the dealings of securities for 10 years. Aggrieved by the decision PAN Asia appealed to SAT and got decision in its favor. SEBI appealed to the Apex court for its judgment.

**Held:** The SC by taking into consideration various definitions of the securities and relying on section 2(h) of Securities Contract (Regulation) Act, 1956 held that a GDR can be construed as a right or interest in securities and therefore, SEBI has jurisdiction to take cognizance of this subject matter. Also, the managers acted in a manner to deceive the investors about the contributions therefore, the regulatory power of SEBI over GDRs shall prevail and matter was sent back to SAT for the decision.

**Subject Matter :** Penalties and Adjudication of SEBI

**Relevant Section : Section 15A:** This section talks about penalty for failure to furnish information, return etc.

**Section 15HA:** Penalty for fraudulent and unfair trade practices shall not be less than five lakh rupees but may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.

**Section 15J:** It enumerates the factors to be taken into account by the Adjudicating Officer while adjudging the quantum of penalty.

**Key Issue :** Whether conditions stipulated in Section 15-J of SEBI Act were exhaustive to govern discretion in Adjudicating Officer to decide on quantum of penalty or said conditions were merely illustrative?

**Citation Details :** Adjudicating Officer, Securities and Exchange Board of India vs. Bhavesh Pabari (28.02.2019 - SC): [MANU/SC/0296/2019](#)

**Summary Judgment :**

**Facts:** The facts of the case are such that the Adjudicating officer fined the respondent to an amount to the tuning of Rs 1 Crore. In case of violation of Sections 15-A to 15-HB i.e. penalty provisions of the SEBI Act, an AO is appointed under Section 15-I for holding an inquiry for the purpose of imposition of the penalty. If he is satisfied with the existence of a failure of compliance with the relevant provisions, he may impose such penalty as he thinks fit in accordance with the concerned Sections.

**Held:** SC observed that sections 15A to 15HA have to be harmoniously read along with section 15J in such a manner as to avoid any inconsistency; the provision of one section cannot nullify the another unless it is impossible to reconcile the two. SC observed that in cases where there was no violation pertaining to mobilization of funds from the public under various schemes or arrangements. This illustrative proposition cannot stand in view of the Court's harmonious interpretation of Section 15-J stated above.

**Subject Matter :** Bar on civil court jurisdiction

**Relevant Section : Section 20A:** This sections puts a bar on civil court jurisdiction in matters where SEBI is empowered to take cognizance of as per the Act.

**Section 11B:** Power to issue directions to persons in interest of investors, to prevent affairs detrimental to investors and to secure proper management of intermediary or an other person

**Key Issue :** Whether the jurisdiction of Civil Courts is barred by virtue of 20A of the SEBI Act in disgorgement of profits?

**Citation Details :** Rakesh Agrawal vs. Securities Exchange Board of India (SEBI / SAT): MANU/SB/0208/2003

**Summary Judgment :**

**Facts:** The Appellant is the Managing Director of ABS Industries Ltd., Vadodara (ABS) a company incorporated under the Companies Act 1956 ,name of the company has been subsequently changed to Bayer ABS Ltd. SEBI on investigations found that there were allegations of purchases being made prior to announcement of Bayer acquiring controlling stake in ABS. SEBI's investigation revealed that one Mr. I. P. Kedia, brother in law of the Appellant had purchased shares preceding acquisition of ABS and that the said acquisition was made at the behest of the Appellant and he funded the acquisition. The investigation is also stated to have revealed that the shares were acquired on the basis of the unpublished price sensitive information relating to impending takeover by ABS by Bayer, which the Appellant had by virtue of his position as the Managing Director of ABS and also as the negotiator from the side of ABS. SEBI contended that the power to direct disgorgement of alleged profits, to aggrieved investors is an equitable power which vests in SEBI. Whereas the Respondent argued that if the power to direct disgorgement of alleged profits is not read into Section 11B of the SEBI Act, pursuant to Section 20A of the SEBI Act no civil court would have jurisdiction to award such compensation, as its jurisdiction in this regard would be barred.

**Held:** It was held that SEBI does not have the equitable power to direct disgorgement of any alleged profits and therefore the jurisdiction of the Civil Court sustains. It is well established that equitable powers can only be exercised by courts and not any quasi-judicial tribunals/ bodies. Accordingly, SEBI does not have the power to direct disgorgement of any alleged profits. That it is always open to any aggrieved investors to seek disgorgement of any alleged profits, made in breach of the said Regulation, by using the process of a Civil Court.

**Subject Matter :** Cognizance of offence by the civil courts

**Relevant Section : Section 26:** It states that no court will take cognizance of the case until the case is referred by the Board.

**Key Issue :** Whether a court inferior to that of to that of a Metropolitan Magistrate (or, a Judicial Magistrate of the first class) shall try an offence punishable under this Act?

**Citation Details :** Securities and Exchange Board of India vs. Classic Credit Ltd.

(21.08.2017 - SC): [MANU/SC/1030/2017](#)

**Summary Judgment :**

**Facts:** Complaints were filed against the private parties, for offences punishable under the Securities and Exchange Board of India Act, 1992. The change of 'forum' for trial, was contended by some of the private parties, before the Court to which the matters were committed. Their challenge failed. The matters were then went to the High Court. A Division Bench of the High Court, through the impugned judgment collectively disposed of all matters pending before it, by setting aside the judgment rendered by the Court of Session. The SEBI therefore approached this Court to assail the judgment rendered by the High Court.

**Held:** SC held that Section 26(2) of the Act expressly provided, No court inferior to that of a Metropolitan Magistrate (or, a Judicial Magistrate of the first class) shall try an offence punishable under this Act. It was therefore apparent, that the forum for trial of offences under the unamended Section 24 of the Act would be conducted only by a Metropolitan Magistrate (or, a Judicial Magistrate of the first class). Trials for offences under the SEBI Act, even prior to the Amendment Act, could well have been conducted by a Court of Session, or an Additional Sessions Judge.

**Subject Matter :** Compounding of offences

**Relevant Section : Section 24A:** It states that an offence punishable under this Act, not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may either before or after the institution of any proceeding, be compounded by a Securities Appellate Tribunal or a court before which such proceedings are pending.

**Section 24(2):** Punishment of imprisonment for a term which shall not be less than one month but which may extend to [ten years or with fine, which may extend to twenty-five crore rupees or with both] for not complying with the orders of the Board or Adjudicating officer. **Section 26:** It states that no court will take cognizance of the case until the case is referred by the Board.

**Section 15HA:** Penalty for fraudulent and unfair trade practices shall not be less than five lakh rupees, may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.

**Key Issue :** Whether the SEBI Adjudicating Officer was correct in passing order of conviction for the accused?

**Citation Details :** SEBI and Ors. vs. Prem Chand Batra (06.01.2009 - SEBI / SAT):  
MANU/SB/0010/2009

**Summary Judgment :**

**Facts:** On investigations by SEBI it was found that the accused Prem Chand Batra, Director of M/s. MKM Finsec Pvt. Ltd. issued fictitious contract notes and bills to some of the companies engaged in the business of manufacturing iron and steel products and therefore, SEBI initiated adjudication proceedings under the Securities and Exchange Board of India Act, 1992 against the accused to inquire into and adjudge the alleged violations of the provisions of regulations 4 (1), 4 (2) (a), (b), (g) & (p) of the SEBI Regulations, 2003. It is pleaded that SEBI appointed the Adjudicating Officer to inquire into and adjudge unfair trade practices as per the SEBI Act. On notice being served accused failed to submit his reply. Adjudicating Officer after duly considering the material on record, facts and circumstances of the matter and the law on the subject proceeded with the matter in accordance with the powers conferred upon him and imposed a penalty of Rs.5,00,000/ on the accused under Section 15HA of the SEBI Act. The Ld. ACMM after considering the material on record, took cognizance of the offence under Section 26 read with Section 24 (2) of the Securities and Exchange Board of India Act vide order dated 11.02.2014 after which the present case was sent to the Sessions Court.

**Held:** It was held that the complainant has proved beyond reasonable doubt that the accused Prem Chand Batra has not complied with the Adjudication Order which was duly served upon him and did not deposit the penalty amount of Rs.5 lacs to SEBI within 45 days despite reminder being served. It was held that the accused Prem Chand Batra was guilty of the offence under Section 24 (2) of the SEBI Act and hence should be convicted.

**Subject Matter :** Offences by companies

**Relevant Section : Section 27:** Offences by the Company Where a contravention of any of the provisions of this Act has been committed by a company, every person, who at the time of the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty and shall be liable to be punished accordingly.

**Key Issue :** Whether a director who resigned before the offence and was not aware of day to day activities should be held liable?

**Citation Details :** Sayanti Sen vs. Securities and Exchange Board of India (09.08.2019 - SEBI / SAT): [MANU/SB/0698/2019](#)

**Summary Judgment :**

**Facts:** SEBI received a complaint against Silicon Projects India Limited (SPIL) in respect of the issue of Secured Redeemable Non-Convertible Debentures (NCDs) and made an investigation as to whether SPIL made any public issue of securities without complying with the provisions of the Companies Act, 1956. On investigation, it was found that SPIL had made an offer of NCDs in the financial years 2009-10, 2010-11, 2011-12 and raised an amount of Rs 18.03 crore from 406 allottees. This offer was found to be in violation of the provisions of SEBI Act, 1992, the Companies Act, 1956 and SEBI Regulations, 2008. Accordingly, SEBI passed an order for their debarment and refund to the investors against SPIL and its Directors. Since the directions were not complied with, SEBI initiated recovery proceedings against the Company and its Directors and passed an order to restrain from assessing the securities of the company. The appellant in her reply contended that she was appointed as a secretary first and later on director and by the end of the year she has resigned from the post of Director. But the Whole Time Member did not pay attention to that and as per the Section 73(2) he held the directors liable on the assumption that in the absence of any officer being nominated as an officer in default then all the Directors were liable under Section 5(g) of the Companies Act.

**Held:** It was held by the SAT that the liability is not imposed on all the officers of the company en bloc. And on reading of Section 27 it was held that an appellant who has nothing to do with the day-to-day affairs of the Company cannot be held guilty of any violation as there is no such thing as vicarious liability under Section 11-B of the SEBI Act.

**Subject Matter :** Regulations made by SEBI

**Relevant Section : Section 30:** The Board may, by notification, make regulations consistent with this Act.

**Key Issue :** Whether the accused can take the defence that his was lured by the broker and was not aware of the regulations framed?

**Citation Details :** Basic Clothing Pvt. Ltd. Vs Securities and Exchange Board of India (21.08.2019 - SEBI / SAT): [MANU/SB/0793/2019](#)

**Summary Judgment :**

**Facts:** SEBI observed reversal of trade in Stock Options segment of BSE Ltd., leading to the creation of artificial volume. On investigation, it was found that trades executed in Stock Options segment of BSE were not genuine trades and they created artificial volume to the tune of 826.21 crore units. The appellant was one of the various entities which indulged in this. A show-cause notice was issued indicating that the appellant had indulged in reversal trades which were non-genuine and creating a false and misleading appearance of trading in terms of artificial volumes in Stock Options and, therefore, were manipulative and deceptive in nature, thus, violating the provision of Regulations 3 and 4 of the PFUTP Regulations, 2003. The Adjudicating Officer for this case imposed a penalty of Rs 5,50,000 for violation of the said Regulations on the appellant. The appellant contended before the AO ,a specific relief was prayed that the authority should summon the stockbroker and question him as to how he has executed the trades.

**Held:** It was held that the stand taken by the appellant before the AO was that he was trapped by R.K. Stockholding Pvt. Ltd. who was their stockbroker and who gave them assurance of high volatility with high rate of return in securities market and succeeded to gain confidence of the appellant by opening a trading account after signing the account opening booklet the trades were performed in the account of the appellant under supervision of the stockbroker. Thus, it is clear that the appellant was doing trades which amounted to a violation of

Regulations 3 and 4 of the PFUTP Regulations. In light of the same, the order passed by the AO was upheld.



## INDIAN EASEMENTS ACT, 1882

**Subject Matter :** THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS

**Relevant Section : Section 8:** An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.

**Key Issue :** Whether High Court was correct holding that appellants-plaintiffs did not acquire any right either by grant or by prescription by way of easement?

**Citation Details :** Ayyaswami Gounder and Ors. vs. Munnuswamy Gounder and Ors. (25.09.1984 - SC): MANU/SC/0226/1984

**Summary Judgment :**

**Facts:** The parties are descendants from a common ancestor and they owned joint properties. A partition took place between the parties where under survey Nos. 95 and 96 fell to the share of the plaintiffs and 15 cents of land in plot where the common well is situated and the channel running from that common well were, however, kept joint for the common enjoyment of the parties. The defendants objected to the use of the common land and the common channel for taking water from their exclusive well. Hence the plaintiffs filed the suit. The trial court by its judgment found that the plaintiffs being co-owners of the common property were entitled to use the property in the way most advantageous to them and the defendants having not pleaded or proved any damage or loss to the common property cannot obstruct the plaintiffs from taking water to their lands from their exclusive well through the common channel. On the first appeal by the defendants , with the little modification the first Appellate Court confirmed the decree of the trial court. The defendants feeling aggrieved took up the matter in second appeal and the High Court reversed the judgments and decrees of the two courts below and dismissed the suit holding that the plaintiffs did not acquire any right either by grant or by prescription by way of easement. The plaintiffs-appellants have now approached this Court.

**Held:** In absence of any specific pleading regarding detriment to respondents-defendants, appellants-plaintiffs have every right to use common land and common channel. Appellants were claiming their right on basis of admitted co-ownership rights which includes unrestricted user, unlimited in point of disposition, and High Court was not justified in holding that appellants' right to take water was not acquired by any grant from respondents or from any other sale deed. Right of co-ownership presupposes a bundle of rights which has been lost sight of by High Court. Appellants claim easementary right only as an alternative ground but main ground on which they based their claim is on right of co-ownership. In these days of scarcity when every effort is being made at all levels to increase agricultural production to country's teeming millions it would not be desirable to allow respondents to

create any hurdle in irrigation of appellants' plots through common channel from their exclusive well. Thus, neither law nor expediency warrants a conclusion as desired by respondents

**Subject Matter : THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS**

**Relevant Section : Section 12:** An easement may be acquired by the owner of the immovable property for the beneficial enjoyment of which the right is created, or on his behalf, by any person in possession of the same.

One of two or more co-owners of immovable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immovable property can acquire, for the beneficial enjoyment of other immovable property of his own, an easement in or over the property comprised in his lease.

**Key Issue :** Whether under the Indian Easement Act a lessee can acquire a right to light over adjoining property which belongs to his landlord?

**Citation Details :** Ambaram Popat Vankar vs. Budhalal Mahasukram Shah (15.01.1943 - BOMHC): MANU/MH/0129/1943

**Summary Judgment :**

**Facts:** The plaintiff possessed a lease of land on which he erected a building, which building had windows overlooking the adjoining land which belonged to the plaintiff's lessor. There was a division of the freehold interest, the freehold of the land leased to the plaintiff going to the sons of the former owner, and the freehold of the alleged servient tenement, to his grandsons. The plaintiff acquired the freehold of the property on which he held the lease, and the defendant acquired the adjoining land, that is to say, the alleged servient tenement." This suit was filed. It is, therefore, clear that the plaintiff cannot prove twenty years' enjoyment of light and air through his windows without including part of the period when the alleged servient tenement belonged to his landlord.

**Held:** An easement of light, like any other easement, must be acquired, under **Section 12**, by the owner, or on his behalf, by the person in] possession. Therefore, if the lessee acquires a right to light, he acquires it on behalf of the owner which means the absolute owner, and he cannot acquire it on behalf of the owner as against such owner, A man cannot acquire an easement as against himself. In present case, a lessee cannot acquire by prescription a right to light over adjoining property which belongs to his landlord.

**Subject Matter : THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS**

**Relevant Section : Section 15:** Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land or things affixed thereto, has been peaceably received by another person's land, as an easement, without interruption, and for twenty years, and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption, and for twenty years,

the right, to such access and use of light or air, support, or other easement, shall be absolute.

**Key Issue :** Whether Section 15 of the Act applies to the present case?

**Citation Details :** Luhar Tulsidas Narsibhai vs. Vrajlal Lalji Vaghela (14.08.2006 - GUJHC): [MANU/GJ/8357/2006](#)

**Summary Judgment :**

**Facts:** Certain properties belonged to Ranchhbhai, which were succeeded by his two sons, namely, Laxman Ranchhbhai and Tulsidas Ranchhbhai. The said two brothers agreed to partition the properties and since after the partition enjoyed as the absolute owners without any interference by the other party. The property of Laxman Ranchhbhai was sold to Kurgi Jina, who, in his turn, sold the property in favour of the present plaintiff - Vrajlal in 1976. As the present defendant, Tulsidas, started erecting a wall adjoining the wall of the plaintiff, the plaintiff filed the suit seeking injunction against the defendant-Tulsidas that he be restrained from raising the wall, as the plaintiff has perfected his easementary right to get light and air. It was submitted that conditions, as provided under **Section 15**, read with Section 35, of the Indian Easement Act, 1882 have not been fully satisfied and that the right enjoyed by the plaintiff's predecessor in title was a permissive right, the present plaintiff would not be entitled to claim the easementary rights. Trial Court held the evidence as inadmissible and as Laxman and since thereafter the predecessors were exercising their easementary right over the servient heritage belonging to Tulsidas and as the right has perfected by lapse of time, the defendant cannot raise the wall. The dissatisfied defendant preferred an appeal, who, being unsuccessful before the first Appellate Court, is before this Court.

**Held:** Once it is held that the document of 1946 (Exh.58) is inadmissible in evidence, then, the very first condition of **Section 15** of the Easement Act would stand proved because right from 1946, the access and use of light or air to and for any building have been peaceably enjoyed therewith by Laxman at least for a period of twenty six years. The right was uninterrupted and was within the knowledge of the servient heritage. It is settled law that when a property is sold, it passes to the purchaser with all the rights and obligations. If the plaintiff has purchased the property with all the rights and obligations, then, the right of easement would also stand transferred in his favour and he would be entitled to tack the right of easement in retrospection right from 1946 to 1976, that is, for a period of thirty years.

**Subject Matter : THE IMPOSITION, ACQUISITION AND TRANSFER OF EASEMENTS**

**Relevant Section : Section 19:** Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

**Key Issue :** Whether Appellate Court was right in holding out the access on foot and no motorable access to Appellant through plot of R-1?

**Citation Details :** Joy Auto Works and Ors. vs. Sumer Builders (P) Ltd. and Ors.  
(02.04.2009 - SC): [MANU/SC/0520/2009](#)

**Summary Judgment :**

**Facts:** Appellant was running motor garage on suit plot for which she had motorable access only through plot of, R-1., who constructed gate on his plot which obstruct the way approaching Appellant's plot. Appellant opposed the same and filed suit for injunction to restrain R-1 from constructing or placing any gates upon way of Appellants. Trial Court initially granted interim injunction. Respondent opposed the same on grounds that he acquired right over said plot through valid sale deed. Thus, Trial Court dismissed suit. Appellant approached Appellate Court which granted access on foot and denied motorable access to Appellant through plot of R-1. Hence, present appeal.

**Held:** From facts it is established that till the construction of road on adjacent plot, Appellant had no motorable access to her premises. Thus, balance of convenience lies in her favour.

Directed that motorable access through plot of R-1 must be provided to Appellant till completion of road through which Appellant can access her plot. After completion of road, Appellants easementary right over said plot will expire.

**Subject Matter : THE INCIDENTS OF EASEMENTS**

**Relevant Section : Section 24:** The dominant owner is entitled , as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage. Accessory rights are the rights to do acts necessary to secure the full enjoyment of an easement.

**Section 25:** The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

**Section 45:** An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

**Section 23:** Subject to the provisions of section 22, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.

**Exception:** The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

**Section 22:** The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

**Section 51:** An easement extinguished under section 45 revives

(a) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion;

(b) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site, and

(c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

**Key Issue : a.** Whether the owner of an easement was entitled to alter the mode and place of enjoying the easement as laid down in Section 23 of the Indian Easements Act, 1882?

**b.** Whether right of privacy can be established except by pleading and proof of a customary right which has not been done by the plaintiffs in the instant case?

**Citation Details :** Anguri and Ors. vs. Jiwan Dass and Ors. (30.08.1988 - SC):

MANU/SC/0445/1988

**Summary Judgment :**

**Facts:** The plaintiffs are the owners of two houses adjacent to each other and also to the property of the defendants. The defendants had a structure on their own property. On the roof of that structure they had made three morries (narrow outlets for the outflow of dirty water). These morries opened towards the property of the plaintiffs. In an earlier suit, the defendants had obtained an injunction directing the plaintiffs not to block the flow of dirty water from the said three morries. The defendants were, however, permitted to fix up pipe lines to receive the said water and carry it to a nali (drain) towards the East of their houses. The plaintiffs complied with the terms of the decree granting the said injunction. The defendants then raised the height of the first floor of their structure by three feet and on a part of the

terrace over the first floor they constructed two additional storeys. In raising the height of the roof over the first floor, the defendants blocked the three original morries and opened three new morries on the roof over the first floor and opened six more morries on the respective terraces over the second and third floors in the new construction. They opened all the morries in such a way that the outflow of water from all the said morries was directed towards the properties of the plaintiffs. The defendants also constructed new windows which opened towards the houses of the plaintiffs. The plaintiffs blocked these new windows by raising the height of their respective walls and the defendants claimed the right to break these walls which obstructed the view from their new windows.

**Held:** The defendants not merely altered the position of the said three morries by raising the height of his first storey and the roof thereon but have opened six new morries so that in the place of three old morries, there are at present nine morries in existence. Now, it is a matter of commonsense that the outflow of water from the nine morries would be larger than the outflow of water from the three old morries and hence, it must be held that the burden of the easement has been increased by the action of the defendants. **Section 23** of the Indian Easements Act on which reliance was placed provides that the dominant owner may, from time to time, alter the mode and place of enjoying the easement provided that he does not thereby impose any additional burden on the servient heritage. In the present Appeal before us, as additional burden on the property of the plaintiffs has been imposed by the action of the defendants, the provisions of the said section cannot come to the aid of the defendants. As far as the question of opening of new windows is concerned, it is open to the defendants to use their property in any manner permitted by law; and hence they cannot be restrained from opening new windows, as no customary right of privacy appears to have been pleaded or proved. It is, however, equally clear that, if the defendants open any new windows, the plaintiffs are fully entitled to block the same by raising the height of their walls and the defendants are not entitled to break or damage the said walls or any portion thereof so as to remove the obstruction to their new windows.

#### **Subject Matter : THE INCIDENTS OF EASEMENTS**

**Relevant Section : Section 24:** The dominant owner is entitled , as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage. Accessory rights are the rights to do acts necessary to secure the full enjoyment of an easement.

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**Section 22:** The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

**Section 51:** An easement extinguished under section 45 revives

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- (b) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site, and
- (c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

**Key Issue :** Whether the Appellant who was the Plaintiff had a right to go over the vacant space of the Defendant for the purpose of repairing and white washing the northern outer side of the Plaintiff's wall?

**Citation Details :** L. Damodaraswami Naidu vs. S.T. Damodaraswami Naidu (24.09.1964 - MADHC): MANU/TN/0133/1964

**Summary Judgment :**

**Facts:** The Plaintiff and Defendant are owners of adjoining properties, the Defendant being the owner of the northern property. Between the houses of the Plaintiff and the Defendant there is a strip of vacant land. Normally there would have been no obstruction to the Plaintiff having access to the northern side of his compound wall for repairing, over the space of the Defendant. But he brought opposition to this course from the Defendant by his own act, namely his instituting the suit claiming title to the vacant space and a mandatory injunction for pulling down some construction which the Defendant had erected. The wall in question was in the open and the right asserted by the Plaintiff in this suit is the right of access over the available open space to repair and white wash the northern face of the wall periodically. The trial Court decreed the suit subject to some restrictions. The first appellate Court took a contrary view. On second appeal to the High Court.

**Held:** For any enjoyment of the right of the easement of lateral support which the Plaintiff had acquired to his wall, the wall itself must be kept in good repair and as an accessory to that easement, it could be held that he might do acts necessary to secure the full enjoyment of the easement right. Of course, there was a limitation in the exercise of such rights. Section 24 of the Easements Act itself limits the exercise of accessory rights by providing that it must be done at such time and in such manner, as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible. If the act proposed was necessary for the enjoyment of the easement, the dominant owner in such cases had to suit his time and manner to the reasonable convenience of the servient owner. The dominant owner should not increase the burden on the servient owner, nor cause unnecessary inconvenience and hardship to the servient owner. The time and manner of doing it must be such that the dominant owner if he were the servient owner and a reasonable man, would prefer to have it done. In this case the Plaintiff had the right he claimed to go over the vacant space of the Defendant to carry on repairs to the exposed northern wall.

**Subject Matter : THE INCIDENTS OF EASEMENTS**

**Relevant Section : Section 24:** The dominant owner is entitled , as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage. Accessory rights are the rights to do acts necessary to secure the full enjoyment of an easement.

**Section 25:** The expenses incurred in constructing works, or making repairs, or doing any

other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.

**Section 45:** An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

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**Exception:** The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.

**Section 22:** The dominant owner must exercise his right in the mode which is least onerous to the servient owner; and, when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

**Section 51:** An easement extinguished under section 45 revives

(a) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion;

(b) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site, and

(c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

**Key Issue :** a. Whether in the facts and circumstances of the case the lower Appellate Court was right in holding that the suit was barred by time? b. Whether in the facts and circumstances of the case the plaintiff has acquired the right of easement of vertical support from the servient heritage before the storeys were removed and he was entitled to vertical support from the servient heritage for reconstruction of his second and third storeys on the date of suit?

**Citation Details :** Bhim Singh and Ors. vs. Bakhtawar Lal and Ors. (10.03.1993 - RAJHC):

[MANU/RH/0424/1993](#)

**Summary Judgment :**

**Facts:** Concerned house was an ancestral property of plaintiff-appellant Padam Singh and the defendants Bakhtawar Lal son of Gopal Lal and Shanti Lal son of Bakhtawar Lal. On a partition, the ground floor became the property of defendants and the upper storey consisting of first floor and second floor became the property of plaintiff Padam Singh. As a result of this partition of one property, plaintiff became entitled to vertical support of walls of building on ground floor. It appears that the building was in dilapidated condition, there was a notice from the Municipal Council, Udaipur for demolishing of the house. As a result of which the first and second floors belonging to the plaintiffs were demolished. The plaintiff demanded of defendants to repair and reconstruct the ground floor so that he can make reconstruction on his portion of his house. Having failed to get response from the defendants, he has filed the suit for permanent injunction against the defendants that they may be directed to construct ground floor or allow the plaintiff to construct it and to recover the costs of such construction of the defendants and if the plaintiff is not permitted to construct the ground floor, such construction may be made through Public Works Department at the costs of the defendants. The defendant's were restrained from obstructing the plaintiffs in carrying out the construction as directed by the decree.

**Held:** Both the courts below have examined the case from the point of view that the case is covered by Sections **45 and 51** of the Indian Easements Act, 1882. The suit has been filed in

March 1967 within 20 years of the approximate date of the demolition of the upper storey, as admitted by the defendant in the written statement and claiming relief of the repair and reconstruction of servient tenement within 20 years, must be held to be within limitation. It is declared that the plaintiffs had an easement of absolute necessity of vertical support from the whole of ground floor for use and enjoyment of his ownership of the first and second floor of the tenement including his right to construct or reconstruct his share of the original tenement. The plaintiff has acquired a right of easement of vertical support from the servient heritage from the date when the whole tenement which was once a one unit was divided by partition and was converted into two heritages. The owner of the first floor and second floor being the owner of dominant heritage acquired the right of easement of vertical support of the servient heritage of the ground floor. The suit filed by plaintiffs is within limitation. **Section 24** which authorises the dominant owner to do all acts necessary to secure the full enjoyment of the easement, without detriment to the dominant owner. Unless the right of easement enjoyed by the dominant heritage is adversely affected by any act of the servient owner, servient owner is not liable for maintenance and upkeep of servient heritage. Any act of servient owner, the right of enjoyment of easement is affected, the dominant owner is entitled to damages.

#### **Subject Matter : THE INCIDENTS OF EASEMENTS**

**Relevant Section : Section 24:** The dominant owner is entitled , as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage. Accessory rights are the rights to do acts necessary to secure the full enjoyment of an easement.

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(c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

**Key Issue : a.** Whether by pulling down the privy which formed the subject of the former suit and rebuilding it at another place, the plaintiff has thereby lost the right of easement which he had in respect of the previous privy?

**b.** Whether by the removal of the privy which formed the subject-matter of the present suit the decree is no longer capable of execution?

**Citation Details :** Yosef David Varulekar vs. Moses Solomon Talkar (18.02.1931 - BOMHC): [MANU/MH/0063/1931](#)

**Summary Judgment :**

**Facts:** The plaintiff had a privy at one end of his property, which was cleaned by a sweeper who used to pass through a lane (gully) belonging to defendants, and had obtained a decree establishing his right of the easement. Subsequently the defendants having moved the Municipality, the plaintiffs existing privy was demolished, and a new one was erected at a point further down on the plaintiff's property. The defendants having obstructed the plaintiff's sweeper from passing through their lane to clean the new privy, the plaintiff applied to execute his decree.

**Held:** The dominant heritage was not the privy but the plaintiffs house and land within which the privy was. The removal of the privy and its rebuilding on a different spot on the plaintiff's land had not the effect of extinguishing the easement under **Section 45** of the Indian Easements Act, 1882. As long as the sweeper entered the plaintiff's land or rather left the defendants' land at the same point, there was no increase in the burden, and that the case was governed by **Section 23** of the Act. The decree of the plaintiff was capable of execution, since the right of way to which the plaintiff was entitled was in respect of cleaning the privy standing in his land and the fact that the privy was moved further down in the plaintiff's property made no difference.

**Subject Matter : THE INCIDENTS OF EASEMENTS**

**Relevant Section : Section 26:** Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.

**Section 44:** An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement.

**Key Issue :** Whether Section 44 and Section 26 are applicable in the present case?

**Citation Details :** Chanti China Venkatareddi vs. Kurasani Koti Reddy and Ors. (22.12.1965 - APHC): [MANU/AP/0103/1967](#)

**Summary Judgment :**

**Facts:** The respondent-plaintiff filed a suit for declaration of the easementary right of the plaintiff to let off rain water discharged from the western plots A and A-1 towards east across the plots B and B-1 belonging to the defendants and for the issue of a mandatory injunction directing the defendants to remove the elevated portion. It was alleged that the defendants dug up two wells and dug channels also. The earth so removed was placed along the ridge thereby preventing the water from A, A-1 plots to flow into B, B-1 plots with the result that the water was stagnating and causing damage to the lands of the plaintiff. The trial Court after recording the evidence of the parties upheld the contention of the plaintiff and decreed his suit. The matter was then carried in appeal but the 1st defendant was not successful. Hence, the second appeal.

**Held: Section 44** of the Easements Act has no application to the facts of the present case. That section relates to the extinction of easementary right because of permanent alteration of servient heritage by superior force. It is not the defendant's case that the ridge channel and the wells were brought into existence by any superior force. **Section 44 of the Act, therefore, has no relevance.** **Section 26** plainly applies to the easementary rights. The right to drain off

the rainwater according to the lie of the land in a natural way, is a natural right and is not restricted by any such limitation. According to the lie of the land the water was flowing in its natural way. By a device the defendants seem to have obstructed it. The device was employed to create obstruction all along the ridge. I do not think, therefore, that the decree granted by both the Courts below in favour of the plaintiff is in any way inconsistent with the findings of the Courts below.

**Subject Matter : THE INCIDENTS OF EASEMENTS**

**Relevant Section : Section 24:** The dominant owner is entitled , as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement; but such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage. Accessory rights are the rights to do acts necessary to secure the full enjoyment of an easement.

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(b) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site, and

(c) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

**Key Issue :** a. Whether by pulling down the privy which formed the subject of the former suit and rebuilding it at another place, the plaintiff has thereby lost the right of easement which he had in respect of the previous privy?

b. Whether by the removal of the privy which formed the subject-matter of the present suit the decree is no longer capable of execution?

**Citation Details :** Yosef David Varulekar vs. Moses Solomon Talkar (18.02.1931 -

BOMHC): [MANU/MH/0063/1931](#)

**Summary Judgment :**

**Facts:** The plaintiff had a privy at one end of his property, which was cleaned by a sweeper who used to pass through a lane (gully) belonging to defendants, and had obtained a decree establishing his right of the easement. Subsequently the defendants having moved the Municipality, the plaintiffs existing privy was demolished, and a new one was erected at a point further down on the plaintiff's property. The defendants having obstructed the plaintiff's

sweeper from passing through their lane to clean the new privy, the plaintiff applied to execute his decree.

**Held:** The dominant heritage was not the privy but the plaintiffs house and land within which the privy was. The removal of the privy and its rebuilding on a different spot on the plaintiff's land had not the effect of extinguishing the easement under **Section 45** of the Indian Easements Act, 1882. As long as the sweeper entered the plaintiff's land or rather left the defendants' land at the same point, there was no increase in the burden, and that the case was governed by **Section 23** of the Act. The decree of the plaintiff was capable of execution, since the right of way to which the plaintiff was entitled was in respect of cleaning the privy standing in his land and the fact that the privy was moved further down in the plaintiff's property made no difference.

**Subject Matter : REMEDIES**

**Relevant Section : Section 33:** The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto.

**Exception:** Disturbance has actually caused substantial damage to the plaintiff.

**Section 35:** Subject to the provisions 52-57 of the Specific Relief Act, 1877, an injunction may be granted to restrain the disturbance of an easement:

- (a) if the easement is actually disturbed - When compensation for such disturbance might be recovered under this Chapter;
- (b) if the disturbance is only threatened or intended - when the act threatened or intended must necessarily, if performed, disturb the easement.

**Key Issue :** Whether Plaintiff was entitled to an injunction as prayed for?

**Citation Details :** T.R. Bhushnam vs. C. Umapathi Mudaliar and Ors. (17.04.1935 - MADHC): MANU/TN/0454/1935

**Summary Judgment :**

**Facts:** The plaintiff and the defendants are the owners of two contiguous houses. The plaintiff's house has got, besides the ground floor, a first floor and also a second floor. The plaintiff's case is that the defendants are attempting to raise a wall 12 feet above the existing wall of their house in order to build a terraced upstairs and that this wall will shut out the light and air which formerly used to enter through the apertures mentioned above. The defendants resisted the suit on two grounds, namely that the plaintiff had not acquired an easementary right to light and air by prescription as alleged by him and also that the proposed wall would not substantially diminish the light and air which used to be admitted through the apertures in question. The trial Judge found that though the proposed wall would cause some diminution of light and air the diminution would not be so much as to cause physical discomfort. He was of opinion that in the circumstances no injunction should be granted as desired by the plaintiff. Hence, this appeal.

**Held:** A case of this kind is governed by **Section 35**, Easements Act, according to which, subject to the provisions of Sections 52 to 57, Specific Relief Act, an injunction may be granted to restrain the disturbance of an easement where the disturbance is only threatened or intended when the act threatened or intended must necessarily, if performed, disturb the easement. Proposed wall would amount to a nuisance if built though it would to some extent be inconvenient and diminish to some extent light and air that was now available to inmates of Plaintiff's house. In these circumstances, Plaintiff Appellant failed to show that trial Court was wrong in refusing to grant an injunction.

**Subject Matter : REMEDIES**

**Relevant Section : Section 33:** The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto.

**Exception:** Disturbance has actually caused substantial damage to the plaintiff.

**Section 35:** Subject to the provisions 52-57 of the Specific Relief Act, 1877, an injunction may be granted to restrain the disturbance of an easement:

(a) if the easement is actually disturbed - When compensation for such disturbance might be recovered under this Chapter;

(b) if the disturbance is only threatened or intended - when the act threatened or intended must necessarily, if performed, disturb the easement.

**Key Issue :** Whether order of Courts below were just and proper?

**Citation Details :** Krushna Kishore Bal vs. Sankarsan Samal and Ors. (28.11.1973 - ORIHC): MANU/OR/0027/1974

**Summary Judgment :**

**Facts:** Plaintiffs and the defendant are adjacent neighbours. By two separate sale deeds, plaintiffs purchased land from Sidheswar Sahu. In the very year, plaintiffs constructed their residential houses on the land and continued to reside therein. Defendant purchased land from Atul Ghose by a registered sale deed. He started construction on his land. He did not leave a space of 15 feet as required under the Orissa Municipal Rules, 1953 towards the plaintiff's side; he made construction by leaving a space of 1 to 2 feet and by the date of the suit he was proceeding with the construction of his kitchen and latrine in close proximity to the plaintiff's houses. By the aforesaid illegal act, light and air to the houses of the plaintiffs were obstructed and their privacy was affected. Despite repeated requests from the plaintiffs the defendant did not desist in prosecution of the illegal act, the suit was filed. Hence, this Appeal.

**Held:** Authorities are consistent that three sections i.e. **28, 33, 35** must be read together. When so read, interference with light and air which is not substantial does not give a cause of action to a person entitled to the right. There was no provision in Act for an aggrieved person to move municipal authorities for redressal of grievances. Act did not oust, either expressly or impliedly, jurisdiction of Civil Court to take cognizance of suits in which relief sought was against injury caused by unauthorised construction. Thus, obligation of Defendant to Plaintiffs complaining of injury was not enforceable through provisions of Act. Plaintiffs complained of invasion of their rights to light, air and privacy. However, even in case where Plaintiff had acquired right of easement to light and air, an action for damages or injunction was not maintainable unless injury complained of was material. Therefore, it was concluded that Defendant's construction was in violation of municipal plan and rules was final.

**Subject Matter : EXTINCTION AND SUSPENSION OF EASEMENTS**

**Relevant Section : Section 41:** An easement of necessity is extinguished when the necessity comes to an end.

**Key Issue :** Whether High Court was right in its observation that, there was no necessity of easement in facts of present case?

**Citation Details :** S. Kumar and Ors. vs. S. Ramalingam (16.07.2019 - SC):

[MANU/SC/0913/2019](#)

**Summary Judgment :**

**Facts:** The Plaintiff-Respondent filed two suits, firstly, claiming an injunction against the Defendants from using a pathway and claiming exclusive right to use the said path. Another suit was filed restraining the Defendants from preventing the Plaintiff from using the pathway

to reach their land. The learned trial Court dismissed the suits holding the Defendants have right of necessity of access to their property over the pathway in the first suit. However, the First Appellate Court allowed the appeal and granted injunction as prayed holding that, there is no necessity of easement as the said Defendant has access from the property of her husband. The High Court has maintained the judgment and decree of the First Appellate Court. In present matter, Defendants are in appeal aggrieved against judgment and decree passed by High Court.

**Held:** The relationship of D-1 & D-2 will not negate the grant of easement right of passage granted to her in the sale deed only because the recital is generic in nature and usually put by the deed writers. Once the land has been sold with the right of access through the land adjoining the property sold, such right could not be exclusively conferred to the Plaintiff in the sale deed. The Plaintiff has to maintain the 16 feet wide passage in any case in terms of the recital in his sale deed. Therefore, if the D-2 or her transferees use the passage, then such use of passage by D-2 or her transferees cannot be said to be causing any prejudice to the Plaintiff. The subsequent events of inheritance vesting the property in the same person will not take away the right of the Defendants to use the passage adjacent to their land only because the D-2 has gifted part of land to D-1 or that after the death of both the Defendants, the common legal proceedings inherited the property. The Appellants have been granted right to use passage in the sale deed. Thus, it is not easement of necessity being claimed by the Appellants. It is right granted to D-2 in the sale deed therefore, such right will not extinguish in terms of **Section 41** of the Indian Easements Act, 1882. In view thereof, the judgment and decree passed by the High Court suffers from manifest error and, thus, cannot be sustained in law. The passage adjoining the property of the Defendants leading to the property of the Plaintiff is reserved for the common use of D-2 and of the Plaintiff.

**Subject Matter : EXTINCTION AND SUSPENSION OF EASEMENTS**

**Relevant Section : Section 49:** Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

**Key Issue :** Whether an easement is said to be suspended in the instant case?

**Citation Details :** Chotey and Ors. vs. Dal Chand and Ors. (05.07.1929 - ALLHC):

MANU/UP/0513/1929

**Summary Judgment :**

**Facts:** This is the defendant's appeal and arises out of the following circumstances. The plaintiffs brought the suit for recovery of Rs. 600, as damages on the allegation that they had a right to irrigate four plots of land with the water taken from a well situated in plot 2670, that they had grown potatoes in all the plots except plot 2671, that the defendants, without any rhyme or reason stopped the plaintiffs from Irrigating the potatoes field and that a loss was caused to the plaintiffs. The defence was that the well belonged to the defendants themselves, that the plaintiffs had no right to cultivate their lands with the water of the well, that the defendants themselves had been cultivating the four plots which are now in plaintiff's possession and that the plaintiffs were not entitled to recover any damages.

**Held:** It cannot be laid down as a broad proposition of law that a tenant cannot acquire an easement against property held by another tenant under the same landlord. A tenant may acquire a right of easement to the use of water for irrigation from a well owned by an adjoining tenant. An easement remains suspended when the dominant and the servient

tenements become rested in the same person, but revives when the tenements again vest in different persons.

**Subject Matter : GRANTOR'S DUTY**

**Relevant Section : Section 57:** The grantor of a licence is bound to disclose to the licensee any defect in the property affected by the licence, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.

**Section 52:** Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence.

**Section 58:** The grantor of a licence is bound not to do anything likely to render the property affected by the licence dangerous to the person or property of the licensee.

**Key Issue :** a. What was the exact legal relationship between the defendant and Umersey with respect to this building ?

b. What duty, if any, did the defendant owe to Umersey in respect of the privies and wash-house on the fourth floor ?

**Citation Details :** Lakhmichand Khetsey Punja vs. Ratanbai (11.10.1926 - BOMHC):

MANU/MH/0134/1926

**Summary Judgment :**

**Facts:** This case is focused on the liability of a landlord to one of his tenants for the collapse on of part of a large building let out mainly in rooms. Plaintiff No. 1's husband was the tenant of a room on the fourth floor of a building belonging to the defendant. While he was in the privies and the wash-room on that floor that part of the building collapsed killing him and others. The rent-bills only purported to show that a room was let. They were silent about the user of the privies and the wash-room. The trial Judge held that the defendant was negligent in not making proper repairs to the building and awarded Rs. 6,500 as damages to the plaintiffs by the defendant.

**Held:** That there was no contractual obligation on the defendant to repair either the room let or the privies. The deceased's right over the privies amounted to a license under **Section 52** of the Indian Easements Act, it was the duty of the defendant under **Section 57** of the Act to disclose any defect in the building likely to be dangerous to the deceased of which the defendant was aware but the deceased was not. The defendant knew of the dangerous condition of the building, he laid a trap for the deceased or failed in his duty under **Section 57** of the Indian Easements Act to disclose such danger, and was, therefore, liable for negligence. The defendant, therefore, owed a duty to the deceased not to lay a trap for him in respect of such user.

**Subject Matter : REVOCATION AND TRANSFER OF LICENSE**

**Relevant Section : Section 60:** Enumerates the conditions under which a license is irrevocable. Firstly, the license is irrevocable if it is coupled with transfer of property and such right is enforced and secondly, if the licensee acting upon the license executes work of permanent character and incurs expenses in execution.

**Section 61:** The revocation of a licence may be express or implied.

**Section 56:** Unless a different intention is expressed or necessarily implied, a licence to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a licence cannot be transferred by the licensee or exercised by his servants or agents.

**Key Issue :** Whether the license of appellant can be revoked by the grantor under Section 60(b) of the Indian Easements Act, 1882 in the instant case?

**Citation Details :** B.K.N. Narayana Pillai vs. P. Pillai and Ors. (13.12.1999 - SC):  
[MANU/SC/0775/1999](#)

**Summary Judgment :**

**Facts:** The respondent-plaintiff filed a suit against the appellant-defendant praying for the grant of mandatory and prohibitory injunction seeking eviction allegedly on the ground of his being a licensee. In the written statement filed the appellant herein pleaded that he was not a licensee but a lessee. During the trial of the suit the appellant filed an application for amendment of the written statement to incorporate an alternative plea that in case the court found that the defendant was a licensee, he was not liable to be evicted as according to him the licence was irrevocable. He further wanted to add a plea that first and second prayers in the plaint were barred by limitation and that as acting upon the licence he has executed works of permanent nature and incurred expenses in execution of the same his licence cannot be revoked by the grantor under **Section 60(b)** of the Indian Easements Act, 1882. The prayer was rejected by the Trial Court as also by the High Court on the ground that the proposed amendment, was mutually destructive which, if allowed, would amount to permitting the defendant to withdraw the admission petition allegedly made by him in the main written statement.

**Held:** The appellant-defendant is permitted to amend the written statement to the extent of incorporating the plea of his entitlement to the benefit of **Section 60(b)** of the Indian Easements Act, 1882 only subject to his paying all the arrears on account of licence fee and costs assessed at Rs. 3,000 within a period of one month from the date the parties appear in the Trial Court. The payment and receipt of the arrears of licence fee shall be without a prejudice to the rights of the parties which may be adjudicated by the trial court.

**Subject Matter : REVOCATION AND TRANSFER OF LICENSE**

**Relevant Section : Section 60:** Enumerates the conditions under which a license is irrevocable. Firstly, the license is irrevocable if it is coupled with transfer of property and such right is enforced and secondly, if the licensee acting upon the license executes work of permanent character and incurs expenses in execution.

**Section 61:** The revocation of a licence may be express or implied.

**Section 56:** Unless a different intention is expressed or necessarily implied, a licence to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a licence cannot be transferred by the licensee or exercised by his servants or agents.

**Key Issue : a.** Whether the plaintiffs had right to easement?

**b.** If then the right is not an easement, whether it is a license, and if so, whether it is a revocable license or an irrevocable license?

**Citation Details :** Janardan Mahadeo Bhase vs. Ramchandra Mahadeo Bhase (05.10.1926 - BOMHC): [MANU/MH/0175/1926](#)

**Summary Judgment :**

**Facts:** P-1 and D-1 are brothers. P-2 and D-2 are cousins, being the son of P-1 and the son of D-1 respectively. Originally they formed a joint family, but in 1921 a deed of partition was executed by the parties. Under this deed a certain house with a well at the back fell to the share of the defendants, while the neighbouring house fell to the plaintiffs' share with no Well. The deed of partition provided that the second brother should "out of brotherly affection be allowed to take the water of the well," and recited that he was "asking, not as a matter of right, but simply out of regard." Disputes arose about the use of the water from the well in question, and the defendants built a wall which the plaintiffs contend obstructed their

old passage to the well, and their right to take water from it. Trial Court held that the plaintiffs had no right to ask for the removal of the wall, which the defendants had put up. On appeal, the District Judge has held that what is granted by this clause amounts to an easement to take the water of the well, vesting in the plaintiffs and that the defendants had no right to prevent the plaintiffs from exercising this right of easement and taking water from the well in suit. Hence, present is the second appeal.

**Held:** That the right acquired by the plaintiff under the deed, though not an easement, was a license as defined in Section 52 of the Indian Easements Act 1882. As the license was granted as part of a partition which granted certain property to the plaintiff, it was a license coupled with a transfer of property and irrevocable as such, under **Section 60(a)** of the Act. It is a personal right granted merely to Ramchandra and Gopal. The words "save as aforesaid" in the second part of Section 56 of the Indian Easements Act bring in the words "unless a different intention is expressed or necessarily implied"; and having regard to the nature of the license, namely, a right to go and take water from the well, which would ordinarily be done, if so desired, by servants or agents, I think it must be taken that there is an implied intention in the grant that the right could, to a reasonable extent, be exercised by servants or agents. The words "an interest in the property" in **Section 52** of the Indian Easements Act 1882, are presumably intended to cover cases where there might be a right in the property granted such as a lease or a right of joint possession. **Section 60(a)** of the Act does not necessarily use the words "transfer of property" in the limited sense of a transfer as defined in the Transfer of Property Act 1882, it is fairly clear that it was coupled with a transfer of the property. That transfer is in force, and the plaintiffs have a right to use the water of the well.

**Subject Matter : NATURE OF GRANT**

**Relevant Section : Section 54:** The grant of a licence may be expressed or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a licence.

**Section 53:** A licence may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the licence.

**Key Issue :** Whether status of respondent as licensee of suit property could be implied in view of provision of Section 54 of Act?

**Citation Details :** Surjit Kaur vs. Balwinder Kaur (07.09.2005 - PHHC):

MANU/PH/0492/2005

**Summary Judgment :**

**Facts:** Respondent's husband was appellants' brother. Appellant allowed respondent's husband to live in one room of suit premises as licensee. After death of respondent's husband, appellant served notice upon respondent and terminated her license. Despite of notice, respondent failed to vacate the room. Appellant filed suit for mandatory injunction for direction to respondent to vacate the same. Trial Court decreed suit in favour of appellant. Respondent filed first appeal which was allowed. Hence, this is the second appeal filed by appellant.

**Held: Section 54** of Act provides that grant of license may be expressed or implied from the conduct of grantor. In present case, parties are closely related and it is natural for the close relations to grant permission to one for stay in house owned by the other. As per established facts of present case, husband of the respondent was licensee and after his death, respondent continued living room where her husband used to live. It is also proved that appellant had issued a notice calling upon respondent to vacate the room and hand over possession thereof to her. Although status as licensee enjoyed by husband of respondent may not be inherited by

respondent, yet after his death, she was permitted to continue in possession of the suit property. Thus, conduct of parties is such that it would give rise to legitimate presumption that respondent independently acquired the status of licensee and has been continuing in possession as such. However, as ownership of appellant upon suit premises fully established, licensee hold by respondent by implication, stood terminated when appellant issued notice to her vacate the premises. Accordingly, appeal succeeds and respondent directed to hand over vacant possession of suit property to appellant.

**Subject Matter : LICENSEE'S RIGHTS ON REVOCATION AND EVICTION**

**Relevant Section : Section 63:** Where a licence is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.

**Section 64:** Where a licence has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the licence, the right for which he contracted, he is entitled to recover compensation from the grantor.

**Key Issue :** a. Whether, dispossession of Petitioners was arbitrary and unfair?

b. Whether, Petitioners were entitled for relief?

**Citation Details :** B. Balathamburaj and Ors. vs. Commissioner, Madurai Corporation, Madurai and Ors. (09.12.2011 - MADHC): MANU/TN/5220/2011

**Summary Judgment :**

**Facts:** The petitioners were allotted either vacant space or shops in the Mattuthavani Bus Stand owned by the Corporation of Madurai. The petitioners were evicted. Respondents dispossessed Petitioners from shops on ground that places were intended for public purposes. Apart from 188 shops, there were also rooms intended for public purposes and not intended to be let out for commercial purposes. The petitioners herein, participated in the auction and became the successful bidders. Therefore, they were allotted these shops/vacant space and they have been carrying on business. A couple of fire accidents in the shops located in the Bus Stand, had been reported earlier, due to the unauthorised use of gas cylinders and stoves. Therefore, it is claimed that the Collector orally instructed the officials of the Corporation, during his visit, to take appropriate action. On 7.6.2010, the District Collector appears to have sent a written communication in this regard to the Commissioner of the Corporation. But it is claimed by the Corporation that on 6.6.2011 itself, notices were affixed in the shops of the petitioners. The notices which are identically worded, called upon the petitioners to vacate and hand over possession within 24 hours on the ground that these shops had proven to be a hindrance to the public. After 24 hours, the petitioners were thrown out with police help. Some of them have been evicted on 8.6.2011 and some of them later. Aggrieved by their sudden dispossession, the petitioners have come up with these writ petitions.

**Held:** Respondents were entitled to serve notices personally on Petitioners and obtain their acknowledgements in delivery book but Respondents resorted to affixture even in first instance perhaps with view to pre-empt Petitioners from approaching Court and thwarting their attempts. Therefore when Petitioners had participated in auction conducted in pursuance of advertisements issued in newspapers and had taken shops/vacant space on license, Respondents could not throw them out by adopting dubious methods. Therefore eviction of Petitioners without assailing auction as wholly vitiated was arbitrary especially when Respondents had not followed due process of law. Under **Section 63**, a licensee is entitled to a reasonable time to leave the property and to remove his goods, upon the revocation of the license. The time of 24 hours granted under the notices dated 6.6.2011, assuming that they were duly served on the petitioners, is certainly not a reasonable time within the meaning of Section 63. Therefore, it is clear that the petitioners have been treated unfairly. Under **Section**

**64** of Act where license was granted for consideration and licensee was evicted without any fault of his own before he has fully enjoyed right for which he contracted, he was entitled to recover compensation from grantor. Therefore appropriate remedy for Petitioners was only to seek compensation and not re-possession especially when places granted to them were no more available for private licensing.



## INDIAN STAMP ACT, 1899

**Subject Matter :** Unstamped instruments & Liability to pay & Adjudication & Mode of payment

**Relevant Section : Section 33:** (1) Provides for the examination of documents for impounding them if they are not duly stamped. In addition to public officers it also applies to arbitrators and local Commissioners who are authorised to receive evidence but are not public officers.

(2) Such person should ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed.

**Exception:**

(a) If Magistrate or Judge of a criminal Court does not think fit to examine or impound.

(b) Delegation of duty by Court to other officer appointed.

(3) In cases of doubt, State government may prescribe deemed public offices and in charge of it.

**Section 3:** Prescribes what instruments are chargeable under the Act, with stamp duty.

**Section 10:** (1) All duties (except duties expressly stated in this Act) with which any instruments are chargeable shall be paid by means of stamps.

**Key Issue :** Whether the stamp duty paid on the document was deficient which was impounded by the Deputy Registrar ?

**Citation Details :** Tirupati Developers vs. State of Uttarakhand and Ors. (08.08.2013 - SC):

[MANU/SC/0815/2013](#)

**Summary Judgment :**

**Facts:** Eleven Agreements for sale were executed in favour of the Petitioner herein. In each of these agreements a part of land was sought to be purchased by the Petitioner. The Petitioner had also paid earnest money of varying amounts against the total consideration which are agreed to in each of the agreements and paid a sum of Rs 10,000/- as stamp duty on each of them. The Deputy Registrar impounded all these documents as he felt that the documents were not sufficiently stamped and sent for adjudication. Courts below rightly held that subject-matter of documents fell under **Section 33**. Subsequent conduct of parties in cancelling agreements for sale cannot be reason for not taking action under **Section 33/38**. Action necessitated when documents produced before Deputy Registrar and he found same to be deficient. Subsequent cancellation of agreements for sale would be of no avail. Stamp duty payable reduced by High Court. Even High Court reduced penalty to 15% of deficit stamp

duty, thereby giving sufficient succour to appellant/petitioner. Aggrieved with the aforesaid outcome, present Special Leave Petitions are filed.

**Held:** The stamp duty is payable on 50% of the value of consideration of the sale agreement. It is manifest, therefore, that the stamp duty paid on the document was deficient which was rightly impounded by the Deputy Registrar and sent for adjudication. the subsequent conduct of the parties in cancelling the agreements cannot be a reason for not taking action under Section 33/38 of the Act. That action was necessitated when the documents were produced before the Dy. Registrar and he found the same to be deficient. Therefore, it is rightly held by the Courts below that the subject matter of the documents fell under **Section 33** of the Act. The subsequent cancellation would be of no avail. In any case, keeping in view this aspect the High Court reduced the penalty to 15 percent of the deficit stamp duty, thereby giving sufficient succour to the Appellant. The reference to provisions of Section 2, Section 3 and Section 10 of the Indian Stamp Act ignores that there is a State amendment thereto and applicability of this provision demolishes the aforesaid plea comprehensively.

**Subject Matter :** Unstamped instruments & Liability to pay & Adjudication & Mode of payment

**Relevant Section : Section 35:** Mandates that an instrument chargeable with duty should be stamped so as to make it admissible in evidence.

**Exception:**

- (a) The proviso sets forth the conditions on which a defective document may be admitted.
- (b) The levy of penalty under the section implies a punishment for neglect to affix the proper stamp at the time of execution.

**Key Issue :** Whether facts and circumstances of present case calls for interpretation of Sections 33 and 35 of Indian Stamp Act?

**Citation Details :** Avinash Kumar Chauhan vs. Vijay Krishna Mishra (17.12.2008 - SC):  
[MANU/SC/8502/2008](#)

**Summary Judgment :**

**Facts:** Respondent is said to be a member of the Scheduled Tribe intended to transfer a house and land. A sum fixed by way of consideration towards the aforementioned transfer was paid to the respondent by the appellant. Possession of the said property had also been delivered. Indisputably for the purpose of effecting transfer of the said land, permission of the Collector was required, which was applied for but rejected. Appellant herein filed a suit for recovery. The registered instrument as a sale-deed has been relied upon. Present appeal is filed to challenge judgment of High Court which ultimately calls for interpretation of Sections 33 and 35 of Indian Stamp Act.

**Held: Section 33** of Stamp Act casts statutory obligation on all authorities to impound a document. Court being an authority to receive a document in evidence is bound to give effect thereto. Unregistered deed of sale was an instrument which required payment of stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid in present case. Court was empowered to pass an order in terms of **Section 35** of Stamp Act. Impugned order of High Court does not calls for interference.

**Subject Matter :** Unstamped instruments & Liability to pay & Adjudication & Mode of payment

**Relevant Section : Section 37:** the State Government is authorized to make rules providing therein to impound any instrument which **bears a stamp of sufficient amount but of improper description** and on payment of chargeable duty to certify it to be duly stamped and to treat such document as duly stamped as on the date of its execution.

**Rule 19** of the **Madhya Pradesh Stamp Rules, 1942**, the Collector of Stamp is authorized to receive the proper stamp duty on an instrument which bears a stamp of proper amount but of improper description, and on payment of the adequate duty chargeable under the Act he would certify by endorsement on the instrument that the instrument is duly stamped.

**Key Issue :** Whether the case in hand shall be governed by Section 37 of the Act?

**Citation Details :** Hariom Agrawal vs. Prakash Chand Malviya (08.10.2007 - SC):

[MANU/SC/7993/2007](#)

**Summary Judgment :**

**Facts:** X was tenant of Respondent. Respondent let out the premises to Appellant to carry out the business. Appellant and Respondent executed an agreement whereby landlord tenanted the shop to Appellant on payment of advance amount. Respondent filed suit of eviction on ground of bona fide requirement. Appellant produced a photocopy of agreement which was admitted as secondary evidence in the Trial Court. On appeal High Court held that photocopy of agreement cannot be admitted as evidence and that such a document can neither be impounded nor accepted in secondary evidence . Hence, present appeal

**Held: Section 37** of the Act would be attracted where although the instrument bears a stamp of sufficient amount but such stamp is of improper description, as in the present case where the proper stamp duty of Re.1/- under the Act has not been paid but a notarized stamp of Rs.4/- was affixed on the document. The sufficient amount of the stamp duty has been paid but the duty paid by means of affixture of notarized stamp is of improper description. The power under **Section 37** and Rule 19, even after framing the rules by the State Government, could only be exercised for a document which is an instrument as described under Section 2(14). An instrument is held to be an original instrument and does not include a copy thereof. Therefore, **Section 37 and Rule 19** would not be applicable where a copy of the document is sought to be produced for impounding or for admission as evidence in a case.

**Subject Matter :** Unstamped instruments & Liability to pay & Adjudication & Mode of payment

**Relevant Section : Section 45:** (1) In case of payment of penalty under S.35 or S.40, the Chief Controlling Revenue-authority may refund such penalty wholly or in part, on application in writing made within one year from the date of the payment.

(2) Where, stamp-duty has been charged and paid under section 35 or section 40 in excess of that which is legally chargeable, such authority may, upon application in writing made within three months of the order, refund the excess.

**Section 41:** Instrument chargeable with duty but not duly stamped, not being an instrument chargeable with a duty not exceeding ten naye paise only, is produced by any person before the Collector within one year from the date of its execution and the Collector is satisfied that the omission has been occasioned by accident, mistake or urgent necessity, he may receive such amount and proceed.

**Key Issue :** Whether the order passed by the first respondent dismissing the application of the petitioner as not maintainable under Section 45 of the Act is valid or not?

**Citation Details :** Rama Lace Industries vs. Chief Controlling Revenue Authority and Ors. (15.06.2017 - HYHC): [MANU/AP/0343/2017](#)

**Summary Judgment :**

**Facts:** The petitioner entered into an agreement of sale with R-4 for purchase of a shed. Stamp duty of ` 55,900/- was paid at the time of agreement. Thereafter, R-4 executed a sale deed and an amount of ` 40,000/- was collected towards stamp duty. The petitioner claimed exemption from stamp duty of 50% by relying on Government order in view of the purchase

being for industrial unit. The matter was referred to the District Registrar who clarified that the agreement of sale is not covered by G.O. The petitioner was asked to pay the deficit stamp duty and registration fee within seven days. Accordingly, the petitioner paid the said amount. Thereafter, the petitioner filed an application before the R-1 under **Section 45** of the Indian Stamp Act, 1899 claiming refund of excess amount collected by R-2 on the documents submitted by him. The petitioner placed reliance on the same G.O. The application of the petitioner was dismissed by R-1. Challenging the same, the present Writ Petition was filed.

**Held:** **Section 45** makes it clear that the power can be exercised by the authority only when the excess stamp duty was paid under Sections 35 or 40 of the Act and in the instant case the stamp duty was not paid in the circumstances mentioned in the said sections. Section 35 of the Act deals with the instruments chargeable with duty admitted in evidence. Section 40 of the Act deals with the impounded documents. In the instant case those two situations did not arise. The deficit stamp duty was asked to be paid under Section 41 of the Act. Hence, as rightly pointed out by the first respondent, on intimation of deficit stamp duty the petitioner voluntarily paid the stamp duty under Section 41 of the Act and accordingly it does not come under the ambit of **Section 45(2)** of the Act. If the petitioner was aggrieved of the demand of deficit stamp duty, he should have availed the remedies at that point of time by challenging the order of R-2, but after paying the amount voluntarily he cannot seek refund of the stamp duty under **Section 45(2)** of the Act. In the circumstances, the order of dismissal passed by the first respondent is valid in law.

**Subject Matter :** Unstamped instruments & Liability to pay & Adjudication & Mode of payment

**Relevant Section : Section 31:** Provides for a power of the Collector to determine the duty with which the instrument would be chargeable, if an application in this behalf is made.

**Section 32:** Provides for the consequences flowing from such determination. The Collector, in the event of fulfilling either of the conditions specified is mandated to certify by endorsement on such instrument that the full duty, which is chargeable, has been paid.

**Key Issue :** Whether legal fiction created under Section 32(3) makes the endorsement by original authority binding on the parties?

**Citation Details :** Raymond Ltd. and Ors. vs. State of Chhattisgarh and Ors. (20.02.2007 - SC): [MANU/SC/0972/2007](#)

**Summary Judgment :**

**Facts:** Appellant company intended to sell its cement division on 'slump-sale' basis. Application filed by the Appellants for adjudication of the Collector to pre-assess the stamp duty payable on the instrument of sale in terms of **Section 31** of the Act. Collector formed a Valuation Committee and submitted an independent report. Stamp duty assessed by the Collector paid by the Appellant. An endorsement on the deed of conveyance was made by R-2 by way of a certificate in terms of **Section 32** of the Act whereupon the instrument was duly stamped. State sought revision of the Order before the Board of Revenue. Appellant questioned the jurisdiction of the Board in a Writ Petition, which was dismissed by single judge of the High Court.

**Held:** No, Revisional power is to be exercised by the Board to satisfy itself in regard to the amount with which the instrument is chargeable with duty. In absence of a finality clause in **section 32**, parties have a right to approach the Revisional Authority. Merely because one of the parties accepted the Order, the Revisional Authority would not lose its jurisdiction to revise the stamp duty payable. When Order of statutory authority is capable of being challenged by way of revision, the revised Order shall be final and not the Order of the

original authority. Legal fiction created under Sub-section **(3) of Section 32** of the Act, therefore, does not state that the endorsement by way of a certificate would be final or binding on the parties. The revisional power contemplates a power to give final determination over the order of the Collector, i.e., an order passed in terms of **Section 31** of the Act irrespective of the fact as to whether an endorsement had been made thereupon or not.

**Subject Matter :** Who provides expense of proper stamp in absence of an agreement?

**Relevant Section : Section 29:** In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne,-

- (a) instrument described in Schedule I by the person drawing, making or executing such instrument;
- (b) policy of insurance other than fire-insurance-insurer
- (c) fire-insurance policy- insurer
- (d) conveyance by the grantee: lease by the lessee;
- (e) certificate of sale-by the purchaser
- (f) in the case of sale of security otherwise than through a stock exchange, by the seller of such security;
- (g) instrument not specified in the Act, by the person making, drawing or executing such instrument.

**Key Issue :** Who is liable to pay the stamp duty on a deed of conveyance of immovable property?

**Citation Details :** Kunwarpal Sharma and Ors. vs. State of U.P. and Ors. (04.09.2002 - ALLHC): [MANU/UP/0915/2002](#)

**Summary Judgment :**

**Facts:** A sale deed of agricultural plots owned by the petitioners was executed in favour of vendees and the deed was registered. According to the petitioners, the sale deed had been obtained from them by playing fraud and no consideration was paid to them. They accordingly filed for cancellation of the sale deed. The suit held the sale deed cancelled. Proceedings under Section 47A of the Stamp Act were initiated against the vendees. On the valuation of the property, there was a deficiency in paid stamp duty. The ADM directed for the payment of deficiency in stamp duty by the vendee. The vendees did not deposit the amount. The petitioners came to know about the attachment and proposed auction of their land, they moved an application before the Tehsil authorities. The Naib Tehsildar returned the recovery certificate and submitted that the recovery of the deficiency In stamp duty could not be made by attachment and sale of the property of the petitioners. Some audit objection was raised and the Board of Revenue sent a reminder to recover the deficiency in stamp duty. It is in these circumstances that the petitioners, who are the owners of the property and were vendors of the sale deed have filed the writ petition for quashing of the recovery proceedings initiated against them.

**Held:** The purpose of enacting **Section 29 (c)** is that he may recover the amount from the grantee and not from the grantor. This also appears to be logical as the vendee who acquires title over the property by the deed of conveyance should be held liable to pay the requisite stamp duty. In the case of a sale deed of immovable property, the liability to pay the stamp duty is that of the vendee. Therefore, the proceedings initiated against the petitioners, who are the vendors and not vendees of the sale deed is wholly illegal and has to be set-aside. The proceedings initiated against the petitioners in pursuance of recovery certificate for realisation of deficiency of stamp duty on the sale deed are quashed.

**Subject Matter :** Territorial jurisdiction

**Relevant Section : Section 19:** The first holder in India of any bill of exchange payable otherwise than on demand, or promissory note drawn or made out of India shall, before he presents the same for acceptance or payment, or endorses, transfers or otherwise negotiates the same in India, affix thereto the proper stamp and cancel the same:

**Key Issue :** a. Whether the stamp affixed on the suit promissory note is the proper stamp or not must be- adjudged in accordance with the law now in force?

b. Whether it was necessary under Section 19 for the first holder in India to stamp the note again?

**Citation Details :** Boottam Pitchiah vs. Boyapati Koteswara Rao (29.02.1964 - APHC):

MANU/AP/0173/1964

**Summary Judgment :**

**Facts:** Plaintiff filed the suit for recovery based on two separate promissory notes executed by the defendant in favour of the plaintiff's transferor. Each of those promissory notes bore the Indian Stamp sufficient for validation of the stamp if they were executed In India. The defendant resisted the suit. On the main plea, it was held that the suit promissory note was executed at Katta Kachavaram in the former Hyderabad State and though it was stamped with the requisite Indian Revenue Stamp, it was not executed In conformity with the provisions of the Stamp Act in force in the Hyderabad State" and that It was unenforceable: by reason of non-compliance with the requirements of **Section 19** of the Indian Stamp Act. As a result of this finding, the trial Court dismissed the suit. The conclusion reached by the lower Court has been assailed before this court.

**Held:** The promissory note was executed in Hyderabad and was affixed with the requisite stamp according to the Hyderabad Stamp Act after Hyderabad became part of the Indian Union. The word "India" was substituted in **Section 19** in April 1956. On the date of the transfer in favour of the petitioner in the present cases, the position was that Hyderabad was part of India within the meaning of **Section 19**. On the date of the transfer in favour of the plaintiff, the stamp affixed on the suit promissory note was the proper stamp as per the provisions of the Indian Stamp Act. We are of opinion that the suit promissory note is a foreign bill drawn or made out of India and that it has been affixed with the proper stamp. In this view the suit brought upon the promissory note in question is maintainable. The stamp Act commences to operate on foreign bills and notes when they are brought into India and subsequently sought to be acted upon, and that it was irrelevant, therefore, that the note had already been stamped with an Indian stamp outside India.

**Subject Matter :** Territorial jurisdiction

**Relevant Section : Section 17:** All instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution.

**Key Issue :** Whether the letter of cover can be admitted in evidence?

**Citation Details :** R. Ratilal and Co. vs. National Security Assurance Co. Ltd. (16.12.1963 - SC): MANU/SC/0130/1963

**Summary Judgment :**

**Facts:** The appellant filed a suit on a duly completed policy of fire insurance and an unstamped letter of cover in respect of the same kind of insurance issued by the respondent, to recover from it the loss suffered as a result of the destruction of the insured goods by fire. The respondent admitted liability on policy but with regard to the letter of cover it contended that the letter was not admissible in evidence for want of stamp. The issue depends on some of the provisions of the Stamp Act, 1899. The learned trial Judge held that the instrument was not a letter of cover but it was in reality a policy of insurance because it contained a contract

of insurance. It is not in dispute that if this view is correct, then on payment of the duty and the penalty the instrument would be admissible in evidence under **s. 35**. The Appellate Bench of the High Court, however, was unable to accept the view of the trial court and held such letter of cover is not chargeable with duty as such under the Act. Hence, this appeal.

**Held:** Respondent in respect of same insurance had issued unstamped letter of cover and resisting suit on ground that letter of cover is inadmissible. It is admissible in evidence on payment of requisite duty and penalty under **Section 35**. Appellant already paid duty and penalty as per **Section 35**. The contention that an instrument which is exempted from duty by is not chargeable with duty under **section 3** and a letter of cover is so expressly exempted. No doubt, if an instrument is exempted by the Schedule from duty, then it cannot be chargeable, the exemption is to apply only if the letter of cover is used for compelling the delivery of the policy mentioned in it. It was said that if an instrument is made to bear a stamp, it is not thereby made chargeable to stamp duty. It was only to indicate the amount of the duty. If the letter of cover was not chargeable to duty but has only to bear a stamp as the respondent contends, **section 17** would not apply to it. A letter of cover is an instrument chargeable to duty under the Act and so admissible in evidence on payment of the requisite duty and penalty under **section 35** of the Stamp Act as it is neither an instrument chargeable to duty not exceeding ten naye paise nor a bill of exchange or a promissory note.

**Subject Matter :** Determination of value of securities

**Relevant Section : Section 26:** When the amount or value of the consideration cannot be determined at the time of execution, the executant may affix any stamp he pleases, but in such case nothing shall be claimable beyond the highest amount or value for which the stamp is sufficient

**Exception:** Lease of a mine in which royalty or a share of the produce is received as the rent or part of the rent, it shall be sufficient to have estimated such royalty or the value of such share, for the purpose of stamp duty,-

(a) when the lease has been granted by or on behalf of the Government, at such amount or value as the Collector estimated by way of royalty or share to the Government, or

(b) when the lease has been granted by any other person, at twenty thousand rupees a year;

**Exception:** Proceedings under section 31 or 41

**Key Issue :** Whether can be recovered beyond the value covered by stamp on payment of penalty?

**Citation Details :** Kumar Braj Mohan Singh vs. Lachmi Narain Agarwala (09.08.1920 - PATNAHC): MANU/BH/0285/1920

**Summary Judgment :**

**Facts:** Plaintiff as lessor against the defendants lessees land claiming royalty and commission on coal raised from the land. By the terms of the lease, the commission and royalty is payable. The document was stamped with a revenue stamp. The defendants contended that they were liable only for Bach coal as was raised and actually dispatched by rail or sold or otherwise transferred locally. They further contended that as the stamp on the lease was Rs. 20 only in respect of commission the plaintiff was precluded by section 26 of the Stamp Act from claiming any commission beyond that which was proportionate to the amount of the stamp and could not, core the defeat by payment of a penalty under section 35 of the Act in each a case.

**Held:** The Stamp Act is purely fiscal and insists that certain documents shall pay a contribution to the State according to the purpose for which they were executed. In regard to certain documents which create a right to money it prescribes that unless the stamp is

proportionate to the valuation of the claim the document shall be inadmissible in evidence, and where the intention of the parties is that the valuation shall be unlimited it enacts by **section 26** that the claimant will be entitled to realise a sum proportionate to the stamp fee paid, subject to certain exceptions in the case of royalties on coal. It follows that wherever the claim exceeds the amount proportionate to the stamp the document is not duly stamped for the purpose for which it was executed within the meaning of **section 35** of the Stamp Act, and the provisions of the section would apply thereto. There is nothing in the words of section 35 of the Stamp Act which necessarily excludes its operation from cases covered by **section 26** of the Act. Where a mining lease bears a stamp of a certain value, the lessor's right to recover royalty is not confined to the amount covered by the stamp: if it is found that he is entitled to a greater amount he can be given a decree for the sum to which he is entitled on compliance with the provisions of **section 35** of the Stamp Act.

**Subject Matter :** Power of Collector

**Relevant Section : Section 38:** (1) When the person impounding an instrument under Section 33 has by law or consent of parties authority to receive evidence and admits upon payment of a penalty, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied, and shall send such amount to the Collector.

(2) Otherwise, the person so impounding an instrument shall send it in original to the Collector.

**Section 39:** (1) When a copy of an instrument is sent to the Collector under section 38(1), if he thinks fit may refund any portion of the paid penalty in excess of five rupees.

(2) When such instrument has been impounded only because it has been written in contravention of section 13 or 14, the Collector may refund the whole penalty so paid.

**Section 40(1)(b):** (1) The Collector impounds any instrument under section 33, or receives any instrument sent to him under section 38(2) for unpaid duty, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees ; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees.

**Key Issue :** Whether the order by Collector in the present case is valid?

**Citation Details :** Ajaypal Singh vs. State of U.P. and Ors. (10.09.1979 - ALLHC):

[MANU/UP/0448/1979](#)

**Summary Judgment :**

**Facts:** Petitioners purchased agricultural plots under a sale deed. After the execution of the sale deed, before the Registrar the sale deed was left for necessary formalities. When the Petitioners went to take back the document, they were informed that the same had been forwarded by the sub-Registrar to the Collector for adjudication of the proper stamp duty payable on the same. On the receipt of the document, the Collector directed the Tehsildar concerned to make the necessary enquiries in respect of the correct valuation of the plots mentioned in the document. According to the report, the market value of the land was liable to be determined by multiplying the land revenue by 400 times. On this basis the Tehsildar reported that the market value of the land came to Rs. 82,576/- and, therefore, the market value described in the sale deed i.e. Rs. 6,000/-was too inadequate. This report of the Tehsildar was placed before the Collector, who agreed with the same and made an order under Section 40(1)(b) of the Stamp Act holding that the instrument was chargeable with additional stamp duty and penalty. Against the said order, the present writ petition was filed.

**Held:** The principles of natural justice apply to quasi judicial as well as administrative bodies. From a reading of Sections **38, 39 and 40** of the Stamp Act, it would be found that the power, which is exercised by the Collector in adjudicating upon the stamp duty on a document, is a judicial one. The adjudication involves the determination of rights inasmuch as he determines the liability of the parties to the document to pay the stamp duty. As the rights are involved, it is necessary that before either enhancing the stamp duty or imposing penalty, the person affected must be given an opportunity of being heard. Denial to give opportunity may cause serious prejudice to his interest. It may be true that the principles of natural justice do not apply to a case where the legislature expressly or impliedly excludes the giving of opportunity. But, in the present case, we cannot find any provisions in the Act or the Rules which could justify the exclusion of the opportunity to such a person. In the absence of opportunity having been given to the Petitioners, the order of the Collector was invalid.

**Subject Matter :** Offences and Penalties

**Relevant Section : Section 64(c):** Any person who with intent to defraud the Government does any act to deprive the Government of any duty or penalty under this Act shall be punishable with fine extending to five thousand rupees.

**Section 69:** Deals with the penalty to be imposed for breach of rule relating to sale of stamps and for unauthorised sales; he/she shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

**Key Issue :** Whether Section 69 of the Act is applicable to the case in hand?

**Citation Details :** V.V.S. Rama Sharma and Ors. vs. State of U.P. and Ors. (15.04.2009 - SC): [MANU/SC/0583/2009](#)

**Summary Judgment :**

**Facts:** Appellants were officers of L.I.C. at relevant time. Various branch offices of the LIC in the course of their business have to purchase large quantity of adhesive stamps for affixation on their policies and for issuing receipts etc. The LIC used to purchase the same from the Treasury in any district as well as from authorised licensed stamp vendors. F.I.R was lodged against the appellants alleging that L.I.C. has not purchased insurance stamps from Treasury Offices of U. P. But same was purchased from Stamp Vendors outside State of U. P. causing loss to State exchequer. The appellants herein approached the Allahabad High Court for quashing of the aforesaid FIR. However, the High Court dismissed the petition holding that the FIR prima facie discloses the commission of cognizable offence and there was no ground of interference. Aggrieved by the said orders of the High Court, the appellants have preferred the present appeal.

**Held:** It is the case of the appellant that purchasing of stamps assumes urgency. Said act of appellants cannot be said to be inconsistent with any provisions of Stamp Act or any other Rules. So allegation made in F.I.R., even if proved by prosecution, does not constitute any offence. Registration of F.I.R. shows complete non-application of mind. Act of respondent is nothing but clear case of its mala fide intention to harass appellants. Rule 115A of U. P. Stamp Rules itself declares that stamps are property of Central Government. **Section 69** of Stamp Act has also no application as the appellants are neither the stamp vendors nor doing any unauthorised sale of the insurance stamps. There is no prohibition under the law and in the Stamp Act which mandates that the LIC will purchase the insurance stamps only from a particular district or from a particular State. The State of U.P. has sought to invoke **Section 64(c)** of the Stamp Act to contend that the action of appellants was 'calculated to deprive the Government of any duty or penalty', but there is no denial of the fact that appellants were

indeed paying the duties, and by no means `depriving the government of any duty or penalty'. That being the legal position, it is legally untenable to contend that the insurance stamps must be purchased from the State of U. P. only.

**Subject Matter :** Magistrate's Jurisdiction

**Relevant Section : Section 71:** No Magistrate other than a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class, shall try any offence under this Act.

**Section 62: (1) Any person-**

(a) drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of, or in any manner negotiating, any bill of exchange or promissory note without stamp duty ; or

(b) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped; or

(c) voting or attempting to vote not duly stamped; shall for every such offence be punishable with fine which may extend to five hundred rupees:

**Exception:** When any penalty has been paid shall be allowed in reduction of the fine, (if any) subsequently imposed under this section.

(2) If a share-warrant is issued without being duly stamped, the issuing person or company shall be punishable with fine extending to five hundred rupees.

**Section 70(2):** The Chief Controlling Revenue-authority, or any officer generally or specially authorised by it in this behalf, may stay any such prosecution or compound any such offence.

**Key Issue :** Whether the instrument in question is wholly out of jurisdiction?

**Citation Details :** Ambuja Cement Ltd. vs. Collector of Stamps, Government of NCT of Delhi (30.01.2018 - DELHC): [MANU/DE/5089/2018](#)

**Summary Judgment :**

**Facts:** The petitioner has filed the present petition for impugning an order passed by the respondent (Collector of Stamps) pursuant to a Show Cause Notice calling upon the petitioner as to why proceedings not be initiated against it. It is the petitioner's case that the proceedings are wholly without jurisdiction because the instrument in question (share certificates) was executed/issued in the State of Haryana and in the State of Himachal Pradesh, and the stamp duty as applicable in the aforesaid States was paid by affixing adhesive stamps.

**Held:** The said show cause notice, as and when issued, would be pre-cursor to an opinion that may be formed under Section 70 of the Act. Respondent forms an opinion after considering the petitioner's response to the show cause notice that would be issued pursuant to the impugned order, that the petitioner is liable for penalty and prosecution under **Section 62** of the Act, he would then sanction prosecution under **Section 70** of the Act, which would be subsequently tried. The petitioner would have an opportunity to persuade the respondent not to issue an order sanctioning prosecution pursuant to the show cause notice that may be issued. The petitioner would have a second opportunity to challenge such an order, if passed, by approaching the Chief Controlling Revenue Authority under **Section 70(2)** of the Act for seeking stay of such prosecution. The petitioner would have yet another opportunity to canvass its case in a trial before a Magistrate as contemplated under **Sections 71** and **72** of the Act.

**Subject Matter :** Allowance for spoiled stamps.

**Relevant Section : Section 49(d)(2):** The Collector may, make allowance impressed stamps spoiled in the cases where the stamp used for an instrument executed by any party thereto

which has been afterwards found unfit, by reason of any error or mistake therein, for the purpose originally intended.

**Section 50:** The application for relief under section 49 shall be made within the following periods:

- (1) stamped paper on which no instrument has been executed- **within six months** after the stamp has been spoiled;
- (2) stamped paper in which an instrument has been executed- within six months after the date of the instrument, or, **if it is not dated, within six months after the execution** thereof by the person by whom it was first or alone executed:

**Exception:** (a) Sufficient reasons for sending out of India.

(b) unavoidable circumstances

**Key Issue :** Whether Applicants are entitled to claim refund of entire stamp duty paid towards repudiated contract for sale of properties?

**Citation Details :** The Committee-GFIL vs. Libra Buildtech Private Ltd. and Ors.

(30.09.2015 - SC): [MANU/SC/1108/2015](#)

**Summary Judgment :**

**Facts:** In dealing with litigation arising out of Golden Forest India Limited (GIFL) going into liquidation, the Supreme Court constituted the GFIL Committee (Committee) to take over the assets of GIFL and dispose of the same for paying the debts of various investors and creditors. The Committee published an advertisement for the auction of certain properties of GIFL, in which the Applicant were successful bidders in respect of five properties. Bid amounts were received and the Court confirmed sale of the properties in favour of the then Director of the Applicant, granting time to pay the balance amount of 75 per cent towards the sale price. It also directed that on deposit of the full amount, the Committee would ensure that the properties in question are put in possession of the Applicants. The Committee failed to hand over possession and the High Court directed it to refund the amount deposited by the Applicants, till the Committee was in a position to hand over possession of the properties. Committee's appeal against the same was disposed of, with the direction to refund the entire amount deposited by the Applicants with interest; Applicants would take up matter with State government for refund of stamp duty amount paid. Subsequently, after further legal proceedings, the Committee refunded sale consideration to the Applicants, interest accruing and TDS on the interest. Applicants' claim for refund of stamp duty was rejected by SDM for it being barred by limitation. Hence, the present application for refund of the stamp duty paid by Applicants.

**Held:** Applicants are entitled to claim refund of entire stamp duty amount from the State Exchequer as sale of properties by Committee to Applicants was not accomplished and failed due to reasons beyond the control of the parties; a right to claim refund of amount paid towards the stamp duty accrued to the applicants; the transaction was monitored by Court, so no party was in a position to take any steps without the permission of the Court; Applicants performed their part of the contract and ensured that transaction in question is accomplished as was originally intended but for the reasons to which they were not responsible, the transaction could not be accomplished. It is a settled principle of law based on principle of equity that a person cannot be penalized for no fault of his and the act of the court would cause no prejudice to any of his right. Applicants are entitled to claim refund of entire amount of stamp duty from the State Government spent in purchasing the stamp duty for execution of sale deed in relation to the properties. State has no right to defend the order retaining stamp duty paid by Applicants. The Applicants bona fide genuine claim of refund cannot be denied by SDM on technical grounds. Applicants filed their applications within six months from the

date of this order, as provided in Section 50 of the Act, 1899. In the facts of the case, applications should have been entertained treating the same to have been filed under **Section 49(d)(2)** read with **Section 50** of the Act, 1899 for grant of refund of stamp duty amount claimed by Applicants.

**Subject Matter :** Conveyance

**Relevant Section : Section 2(10):** A “conveyance” is an instrument which transfers property from one person to another. A “conveyance” must convey

- (i) the property,
- (ii) by sale,
- (iii) or it is a document where by a property is transferred inter vivos **and**
- (iv) is not specifically provided for by Schedule I or IA of the Stamp Act.

**Key Issue :** a. Whether the contract of sale for crude resin amounts to 'conveyance' as defined under Section 2(10) of the Indian Stamp Act, 1899?

b. Whether stamp duty is chargeable thereon?

**Citation Details :** State of Uttaranchal and Ors. vs. Khurana Brothers (27.10.2010 - SC):

[MANU/SC/0905/2010](#)

**Summary Judgment :**

**Facts:** The Divisional Forest Officer notified public auction of resin. The respondent participated in that public auction. His bid was accepted and the formal contract of sale for crude resin was entered into between the competent authority of the State Government and the writ petitioner. Subsequently a letter was issued asking the writ petitioner to lift the contracted resin within 60 days there from. Division Bench hold that respondent not liable to pay stamp duty on documents pertaining to contract of sale for crude resin. Hence, the present appeal.

**Held:** a. In contract, all essential conditions of transfer of movable property were satisfied. Hence, right was created in favour of the Petitioner in auctioned lot of crude resin. State Government was under obligation to deliver quantity of crude resin specified in document. Resin sold will remain at purchaser's risk from date of acceptance of its bid and seller will not be responsible for any loss and damage which may occur thereto from any cause whatsoever. Contract of sale amounted to 'conveyance' within meaning of **Section 2(10)**.

b. It was chargeable to stamp duty.



## REAL ESTATE (REGULATION AND DEVELOPMENT) ACT, 2016

**Subject Matter :** One sided Agreements

**Relevant Section : Consumer Protection Act, 1986**

**Section 2(r):** “unfair trade practice” means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice.

**Key Issue :** Are 'One sided agreements' legally valid?

**Citation Details :** Belaire Owner's Association vs. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana (12.08.2011 - CCI): [MANU/CO/0044/2011](#)

**Summary Judgment :**

**Facts:** The informant in this case has alleged unfair conditions meted out by a real estate player. It has been alleged that by abusing its dominant position, DLF Limited has imposed arbitrary, unfair and unreasonable conditions on the apartment. The informant has submitted that as the Apartment Buyer's Agreements were signed months after the booking of the apartment and by that time the allottees having already paid substantial amount, they hardly had any option but to adhere to the dictates of DLF. In this case, DLF had devised a standard form of printed "Apartment Buyer's Agreement" for booking the apartments and a person desirous of booking the apartment was required to accept it in 'toto' and give his assent to the agreement by signing on the dotted lines, even when clauses of the agreement were onerous and one-sided.

**Held:** The Court observed that while heavy penalties were imposed in the agreement for default of allottee, there were insignificant penalties on DLF for its own defaults. A reference was made to clause 35 of the agreement, which shows abuse of dominance. The Commission considers that the defaults can be on the part of the company as well on the part of the allottees and the agreement should provide for defaults of both the parties and the agreement must be equitable in dealing with both the sides and levy of interest/penalty should be equal level on both sides.

The Supreme Court has recently held that one-sided clauses in the Apartment Buyer's Agreement constitutes unfair trade practice and such terms cannot bind in any Act.

**Subject Matter :** Delay in delivery of possession of Flats

**Relevant Section : Section 31:** (1) Any aggrieved person may file a complaint with the Authority or the adjudicating officer, for any violation of this Act against any promoter allottee or real estate agent, as the case may be.

**Explanation:** "person" shall include the association of allottees or any voluntary consumer association registered under any law for the time being in force.

(2) The form, manner and fees for filing complaint under sub-section (1) shall be such as may be specified by regulations.

**Key Issue : a.** Can a builder give alluring advertisement promising delivery of possession of the constructed flat to the consumer within the stipulated time, and, on his failure, contend that the delay in construction due to government procedures should not be the ground for grant of compensation to the consumer?

**b.** Whether the consumer should suffer by paying escalation cost due to such delay?

**Citation Details :** Kamal Sood vs. DLF Universal Ltd. (20.04.2007 - NCDRC):

[MANU/CF/0069/2007](#)

**Summary Judgment :**

**Facts:** Brig. Kamal Sood, who was serving as Commandant 14 Gorkha Training Centre, Himachal Pradesh, approached the State Consumer Disputes Redressal Commission, Haryana, Chandigarh, contending that M/s. DLF Universal Ltd. has indulged in unfair trade practice and there is deficiency in service on its part because there was delay in handing over possession of the flat as well as unjustified recovery of so-called escalation charges from the complainant. He, therefore, sought direction that the DLF pay compensation to him. It was contended that the DLF published an advertisement for booking apartment in DLF Qutab

Enclave. As per the said brochure, the DLF was contemplating construction of apartments known as DLF Hamilton Court and DLF Regency Park. There was a specific statement, "And remember, now all prices are ESCALATION FREE. So, the price you book at is the price you pay, irrespective of what it might cost DLF".

**Held:** **a.** The NCDRC observed that the aforesaid practices were unfair trade practice on the part of the builder to collect money from the prospective buyers without obtaining the required permissions such as zoning plan, layout plan and schematic building plan. NCDRC stated that it was the duty of the builder to obtain the requisite permissions or sanctions such as sanction for construction, etc., in the first instance, and, thereafter, recover the consideration money from the purchaser of the flat/buildings.

**b.** In such a case, if there is any express promise that the premises would be delivered within the stipulated time, and, if not done so, escalation cost is required to be borne by the builder.

**Subject Matter :** Force majeure

**Relevant Section : Section 18:** **(1)** If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

**(a)** in accordance with the terms of the agreement for sale be duly completed by the date specified therein; or

**(b)** due to discontinuance of his business on account of suspension or revocation of the registration, he shall be liable on demand to the allottees, who wish to withdraw from the project, to return the amount received by him in respect of that apartment, plot, building, with interest;

**(2)** The promoter shall compensate the allottees in case of any loss caused to him due to defective title of the land of project; and the **claim for compensation under this subsection shall not be barred by limitation;**

**(3)** If the promoter fails to discharge any other obligations, he shall be liable to pay such compensation to the allottees.

**Key Issue :** Can a condition may be made certain by evidence about a force majeure clause?

**Citation Details :** Chand Rani (Dead) by Lrs. vs. Kamal Rani (Dead) by Lrs. (18.12.1992 - SC): [MANU/SC/0285/1993](#)

**Summary Judgment :**

**Facts:** An agreement for sale was entered into between Kamal Rani and Chand Rani through her husband, Niranjan Nath. Under this, Kamal Rani agreed to sell her house and property in favour of Chand Rani. On the date of execution a sum of Rs. 30,000 was paid by way of earnest money. The agreement stipulated that a further sum of Rs. 98,000 was payable within 10 days of the execution of the agreement. The balance of Rs. 50,000 was to be paid at the time of registration of sale deed. It was agreed between the parties that Kamal Rani, the vendor would redeem the property by paying off a loan of Rs. 25,000 out of a sum of Rs. 30,000 paid at the time of execution. The property was mortgaged with the Life Insurance Corporation of India. The vendor was also to obtain the income-tax clearance certificate. At the time of this agreement the first floor of the house had been let out to tenants. It was stipulated in the agreement that the vendor would hand over documents pertaining to the property in the suit together with vacant possession of the property by 30.9.71. It was further agreed that the amount of Rs. 30,000 would stand forfeited in favour of the vendor should the vendee fail to pay the sale consideration and get the sale deed registered within the agreed time. Based on this agreement Chand Rani and her husband filed for specific performance. It was alleged that Kamal Rani failed to perform her part of the contract. Since the plaintiff had failed to pay the sum within ten days from the date of the agreement, the agreement stood annulled and the sum of Rs. 30,000 stood forfeited. Since the defendant failed to comply with

this demand the suit came to be filed claiming specific performance of the agreement or in the alternative, damages.

**Held:** The Supreme Court elucidated on the concept of “**force majeure**”. Difficulties have arisen in the past as to what could legitimately be included in “force majeure”. **Judges have agreed that strikes, breakdown of machinery, which, though normally not included in “vis major” are included in “force majeure”**. An analysis of rulings on the subject into which it is not necessary in this case to go, shows that **where reference is made to “force majeure”, the intention is to save the performing party from the consequences of anything over which he has no control**. This is the widest meaning that can be given to “force majeure”, and even if this be the meaning, it is obvious that the condition about “force majeure” in the agreement was not vague. The use of the word “usual” makes all the difference, and **the meaning of the condition may be made certain by evidence about a force majeure clause**, which was in contemplation of parties.

**Subject Matter :** Adherence to sanctioned plans and project specifications by the promoter.

**Relevant Section : Section 14:(1)** The proposed project shall be developed and completed by the promoter in accordance with the sanctioned plans, layout plans and specifications as approved by the competent authorities.

**Key Issue :** Can the opposite party also held liable for the alternations in project?

**Citation Details :** Pankaj Aggarwal and Ors. vs. DLF Gurgaon Home Developers Private Limited (12.05.2015 - CCI): [MANU/CO/0038/2015](#)

**Summary Judgment :**

**Facts:** Pankaj Agarwal & Anr. v. DLF Gurgaon Home Developers, the builder had raised floors without any intimation to the home buyers. Held by CCI, on complaint of the alleged act, CCI was of the view that the builder held a position of dominance in the relevant market of services and made a stern advisory remark that it was the duty of DLF Developers to disclose that it proposed to increase the number of floors and apartments, so that the allottees could have taken valid objections to it.

**Held:** The Court in exercise of powers under section 27(a) of the Act, the Commission directs the Opposite Party and its group companies operating in the relevant market to cease and desist from indulging in the conduct which is found to be unfair and abusive in terms of the provisions of section 4 of the Act. With regard to penalty, the Commission is of the view that since a penalty of Rs. 630 crores has already been imposed on the Opposite Party in the Belaire's Case for the same time period to which contravention in the present cases belong, no financial penalty under section 27 of the Act is required to be imposed. In view of the totality and peculiarity of the facts and circumstances, the Commission did'nt deem it necessary to impose any penalty on the Opposite Party in this cases.



## TRANSFER OF PROPERTY ACT, 1882

**Subject Matter :** What forms a part of Immovable Property?

**Relevant Section : Section 3:** States that immovable property does not include standing timber, growing grass or crops.

**Under Section 3 (25) of General Clauses Act:** It is stipulated to land, benefits arising out of land and things attached to the earth or permanently fastened to such things.

**Key Issue :** What are profits pendre and are they part of immovable property?

**Citation Details :** Ananda Behera v States of Orissa (27.10.1955 - SC):

MANU/SC/0018/1955

**Summary Judgment :**

**Facts:** The Appellants had acquired a right through a contract to enter upon fishing lands and this was done before the abolition of estates by the State government. Following its abolition, the Appellants sought to enforce this contract in the new regime to, which the state government denied. The question arose whether fishing on lands constituted profit pendre and if that formed part of immovable property

**Held:** Profits pendre form part of immovable property as benefits arising out of land and are transferred along with immovable property. Though the appeal was dismissed due to it being a matter of contractual dispute and not writ petition.

**Subject Matter :** What forms a part of Immovable Property?

**Relevant Section : Section 3:** States that immovable property does not include standing timber, growing grass or crops.

**Under Section 3 (25) of General Clauses Act:** It is stipulated to land, benefits arising out of land and things attached to the earth or permanently fastened to such things.

**Key Issue :** What are profits pendre and are they part of immovable property?

**Citation Details :** State of Orissa and Ors. vs. Titaghur Paper Mills Company Limited and Ors. (01.03.1985 - SC): MANU/SC/0325/1985

**Summary Judgment :**

**Facts:** The party was given a right of felling, cutting and removing bamboo trees from a forest through the grant of a license. Predominantly it was a tax matter and for its determination the contention of felling bamboo tree being part of immovable property per benefits arising out of land or not.

**Held:** Upholding the ratio of the Ananda Behera case the court held that the felling of bamboo trees in a forest area are profits pendre and a part of immovable property.

**Subject Matter :** Constructive Notice u/s 3, when can it be deemed appropriate?

**Relevant Section : Section 3:** It provides for notice that can be given through an express means or constructive manner.

**Key Issue :** Is constructive notice sufficient for the purposes of transfer of immovable property and what acts amount to constructive notice?

**Citation Details :** Dattatraya Shanker Mote & Ors vs Anand Chintaman Datar & Ors (03.10.1974 - SC): MANU/SC/0334/1974

**Summary Judgment :**

**Facts:** Appellants filed a suit for recovery of debts based on the charge created on the mortgage. The recovery of money was sought through the sale of the items listed specifically in the books. However, the mortgagee objected to such sale, claiming there was no notice of the charge.

**Held:** The proviso to **Explanation 1 to section 3 of the Transfer of Property Act**, provides that in order to amount to constructive notice it is necessary - (i) that the instrument has been registered and its registration completed in the manner required by the Registration Act; (ii) the instrument has been duly entered or filed in books kept under section 51 of the Registration Act; and (iii) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indices kept under section 55 of Registration Act.

**Subject Matter :** Transfer of property and bundle of rights

**Relevant Section : Section 5:** Transfer of property is an act through which a living person transfers property to one or more living persons, which may include himself. Such transfer may be in the present or in future.

**Key Issue :** Does transfer of property connote the absolute transfer of interest?

**Citation Details :** Sunil Siddharthbhai and Ors. vs. Commissioner of Income Tax, Ahmedabad, Gujarat (27.09.1985 - SC): [MANU/SC/0164/1985](#)

**Summary Judgment :**

**Facts:** Assessee was a partner in Messrs Suvas Trading Company, a partnership firm constituted under a deed of partnership dated September 27, 1973. As his contribution to the capital of the partnership firm, the assessee made over certain shares of limited companies which were held by him as his capital assets. Due to the valuation method adopted there was a difference in the amounts reflecting in the book. Income tax officer directing him to make amends, asking him to compute the capital gains arising out of the transfer of shares. The issue pertinently become one of whether there was a transfer of rights and if such transfer was of absolute rights?

**Held:** That in its general sense, the expression transfer of property connotes the passing of rights in the property from one person to another. In one case there may be a passing of the entire bundle of rights from the transferor to the transferee. In another case, the transfer may consist of one of the estates only out of all the estates comprising the totality of rights in the property. In a third case, there may be a reduction of the exclusive interest in the totality of rights of the original owner into a joint or shared interest with other persons. In the instant case the transfer was of the third type and therefore absolute rights were transferred and shared amongst the transferor and transferee.

**Subject Matter :** Persons authorised to dispose of property.

**Relevant Section : Section 7:** Any person that is competent to contract and entitled to transferable property or authorised to dispose of transferable property, is competent to transfer such property either wholly or in part, and either absolutely or conditionally.

**Section 11, Indian Contract Act:** A person who has attained major; person of sound mind and persons not disqualified by law are competent to contract.

**Key Issue :** Is an agent authorised to alienate property and can he do so by virtue of a Power of Attorney?

**Citation Details :** Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Ors. (11.10.2011 - SC): [MANU/SC/1222/2011](#)

**Summary Judgment :**

**Facts:** The petitioner, a company incorporated under the Companies Act, claims that one Ramnath and his family members sold two and half acres of land in Wazirabad village, Gurgaon to them by means of an agreement of sale, General Power of Attorney (for short 'GPA') and a will in the year 1991 for a consideration of Rs.716,695/-. It is further alleged that the petitioner verbally agreed to sell a part of the said property measuring one acre to one Dharamvir Yadav for Rs.60 lakhs in December 1996. It is stated that the said Dharamvir

Yadav, and his son Mohit Yadav (an ex MLA and Minister), instead of proceeding with the transaction with the petitioner, directly got in touch with Ramanath and his family members and in 1997 got a GPA in favour of Dharamvir Yadav in regard to the entire two and half acres executed and registered and illegally cancelled the earlier GPA in favour of petitioner.

**Held:** Immovable property could be legally and lawfully transferred/conveyed only by registered deed of conveyance, Transactions of nature of GPA sales or SA/GPA/WILL transfers did not convey title and did not amount to transfer, nor could they be recognized or valid mode of transfer of immoveable property. SA/GPA/WILL transactions were not transfers or sales and that such transactions could not be treated as completed transfers or conveyances. They could be continue to be treated as existing agreement of sale. However, nothing prevented affected parties from getting registered Deeds of Conveyance to complete their title. SA/GPA/WILL transactions could also be used to obtain specific performance or to defend possession under Section 53A of Act.

**Subject Matter :** Conditions in restraint of alienation.

**Relevant Section : Section 10:** When a transfer of property is effected with conditions that hinder the transferee or any person claiming under him from parting with their interest, such conditions are void, unless with regard to lease agreements.

**Key Issue :** Can Co-operative societies be entitled to effect by-laws that tantamount to conditions in restraint of alienation?

**Citation Details :** Zoroastrian Co-operative Housing Society Limited and Ors. vs. District Registrar Co-operative Societies (Urban) and Ors. (15.04.2005 - SC): [MANU/SC/0290/2005](#)

**Summary Judgment :**

**Facts:** The Zoroastrian Co-operative Housing Society is a society registered on 19.5.1926, under the Bombay Co-operative Societies Act, 1925. As per the bye-laws, the objects of the Society were to carry on the trade of building, and of buying, selling, hiring, letting and developing land in accordance with Co-operative principles and to establish and carry on social, re-creative and educational work in connection with its tenets and the Society was to have full power to do all things it deemed necessary or expedient, for the accomplishment of all objects specified in its bye-laws, including the power to purchase, hold, sell, exchange, mortgage, rent, lease, sub-lease, surrender, accept surrenders of and deal with lands of any tenure and to sell by installments and subject to any terms or conditions and to make and guarantee advances to members for building or purchasing property and to erect, pull down, repair, alter or otherwise deal with any building thereon.

**Held:** That when a person accepts membership in a cooperative society by submitting himself to its bye laws and places on himself a qualified restriction on his right to transfer property by stipulating that same would be transferred with prior consent of society to a person qualified to be a member of society, **it could not be held to be an absolute restraint on alienation offending Section 10 of Transfer of Property Act.** Hence finding of High Court that restriction placed on rights of members of a society to deal with property allotted to him was invalid as an absolute restraint on alienation, held unsustainable and set aside

**Subject Matter :** Rules against perpetuity and making of contracts.

**Relevant Section : Section 14:** If a transfer after the lifetime of one or more persons living at the time of such transfer, and at the expiration of the minority of some person who will be in existence and the interest created would belong to him if he attains full age, such transfer would be void.

**Section 114 (f), the Indian Succession Act, 1925:** No transfer shall be valid that goes

beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period.

**Key Issue :** Does the rule against perpetuity apply to making of contracts?

**Citation Details :** K. Naina Mohamed (Dead) through L.Rs. vs. A.M. Vasudevan Chettiar (Dead) through L.Rs. and Ors. (07.07.2010 - SC): [MANU/SC/0443/2010](#)

**Summary Judgment :**

**Facts:** The suit property belonged to one Smt. Ramakkal Ammal wife of Pattabiraman of Uraiur of Tiruchirapalli. She executed registered Will dated 22.9.1951 in respect of her properties and created life interest in favour of her two sisters, namely, Savithiri Ammal and Rukmani Ammal with a stipulation that after their death their male heirs will acquire absolute right in 'A' and 'B' properties respectively subject to the rider that they shall not sell the property to strangers.

**Held:** That two sisters of the testator, namely, Savithiri Ammal and Rukmani Ammal were to enjoy house properties jointly during their life time without creating any encumbrance and after their death, their male heirs were to get the absolute rights in 'A' and 'B' properties. The male heirs of two sisters could alienate their respective shares to other sharers on prevailing market value. It can thus be said that Smt. Ramakkal Ammal had indirectly conferred a preferential right upon the male heirs of her sisters to purchase the share of the male heir of either sisters. This was in the nature of a right of pre-emption which could be enforced by male heir of either sister in the event of sale of property by the male heir of other sister. If the term 'other sharers' used in Clause 11 is interpreted keeping in view the context in which it was used in the Will, there can be no manner of doubt that it referred to male heirs of other sister. The only restriction contained in Clause 11 was on alienation of property to strangers. In our view, the restriction which was meant to ensure that the property bequeathed by Smt. Ramakkal Ammal does not go into the hands of third party was perfectly valid and did not violate the rule against perpetuity

**Subject Matter :** Rules against perpetuity and making of contracts.

**Relevant Section : Section 14:** If a transfer after the lifetime of one or more persons living at the time of such transfer, and at the expiration of the minority of some person who will be in existence and the interest created would belong to him if he attains full age, such transfer would be void.

**Section 114 (f), the Indian Succession Act, 1925:** No transfer shall be valid that goes beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period.

**Key Issue :** Whether the agreement between parties to give to each other right of pre-emption would bind successors-in-interest and thereby violates of the rule against perpetuities?

**Citation Details :** Rambaran Prosad vs. Ram Mohit Hazra and Ors. (06.09.1966 - SC):

MANU/SC/0212/1966

**Summary Judgment :**

**Facts:** Under the award from an arbitration suit for partition, two of the four blocks, A, B, C & D, into which the properties were divided by the arbitrators, namely, blocks A and C, were allotted to Tulshidas and the remaining two blocks, B and D were allotted to Kishorilal. Two common passages marked as X and Y and a common drain Z were kept joint. The petitioner before us is defendant No. 2. The suit out of which this application arises was one for a declaration that the plaintiffs respondents, were entitled to pre-emption and that defendant No. 2 was bound to convey the disputed property to the plaintiffs on payment of actual

consideration and for a decree for pre-emption against the defendant calling upon him to execute a conveyance in favour of the plaintiffs on payment of consideration.

**Held:** We are accordingly of the opinion that the covenant for pre-emption in this case does not offend the rule against perpetuities and cannot be considered to be void in law. **Reading section 14 along with section 54 of the Transfer of Property Act** its manifest that a mere contract for sale of immovable property does not create any interest in the immovable property and it therefore follows that the rule of perpetuity cannot be applied to a covenant of pre-emption even though there is no time limit to it. For an obligation under a contract which creates no interest in land but which concerns land is made enforceable against an assignee of the land who takes from the promisor either gratuitously or takes for value but with notice.

**Subject Matter :** Transfer of property with vested interests or contingent interest.

**Relevant Section : Section 19:** A transfer is deemed to be vested when without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, unless contrary view can be inferred from the terms of transfer.

**Section 21:** There is a transfer of contingent interest, if the transfer is subject to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen.

**Section 119, Indian Succession Act:** Whereby the terms of a transfer the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, unless a contrary intention appears by the Will.

**Key Issue :** Difference between a vested interest and contingent interest?

**Citation Details :** Usha Subbarao vs. B.E. Vishveswariah and Ors. (08.07.1996 - SC):

[MANU/SC/0581/1996](#)

**Summary Judgment :**

**Facts:** This appeal by the plaintiff arises out of a suit wherein the appellant claimed 1/5 share of her deceased husband in the properties left by her father-in-law, Dr. N.S Nanjundiah, on the basis of a Will executed by Dr.Nanjundiah on March 13, 1935. As indicated earlier, in the Will dated March 13, 1935 the immovable and moveable properties of the testator were specified in four groups specified in Schedules "A", "B", "C" and "D" attached with the Will. Schedule "A" consists of four items of immovable properties. Item No. 1 is house No. 318, 3rd Road, Margosa Avenue, Malleswaram City and items Nos. 2, 3 and 4 are agricultural lands. Schedule "B" consists of shares and securities standing in the name of Smt. Nadiga Nanjamma. Schedule "C" consists of thrift deposit accounts in the Bank of Mysore Limited standing An the names of five sons of the testator. Schedule "D" consists of shares and securities and fixed deposits in banks.

**Held:** An interest is said to be a vested interest when thee is immediate right of present enjoyment or a present right for future enjoyment. An interest is said to be contingent if the right of enjoyment is made dependent upon some event. or condition which may or may not happen. On the happening of the event or condition a contingent interest becomes a vested interest.

**Subject Matter :** Transfer of property with vested interests or contingent interest.

**Relevant Section : Section 19:** A transfer is deemed to be vested when without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, unless contrary view can be inferred from the

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**Key Issue :** Whether the interest in a trust is contingent on the purpose of its creation e.g. payment of monthly dues?

**Citation Details :** Rajes Kanta Roy vs. Santi Debi (19.11.1956 - SC): MANU/SC/0088/1956

**Summary Judgment :**

**Facts:** Ramani created an endowment in respect of some of his properties in favour of his family deity and appointed his three sons as shebaits. After the death of Rabindra his widow Santi Debi, instituted a suit against the other members of the family in 1941 for a declaration that she, as the heir of her deceased husband, was entitled to function as a shebait in the place of her husband. The suit terminated in a compromise recognising the right of Santi Debi as a co-shebait. Ramani and his two sons, Rajes and Ramendra, filed a suit against Santi Debi, for a declaration that the above mentioned compromise decree was null and void as the marriage of Santi Debi with Rabindra was a nullity. During the pendency of that suit, Ramani executed a registered trust deed in respect of his entire properties. The eldest of the sons, Rajes, was appointed thereunder as the sole trustee to hold the properties under trust subject to certain powers and obligations. Ramani died. Some time thereafter the suit was compromised. By the said compromise Santi Debi gave up her rights under the previous compromise decree and agreed to receive for her natural life a monthly allowance of Rs. 475 payable from the month of November, 1946. It was one of terms of the compromise that on default of payment Santi Debi will be entitled to realise the same by means of execution of the decree. The monthly allowance was regularly paid up to the end of February, 1948, and thereafter payment was defaulted. Santi Debi filed an application for execution to realise the arrears of her monthly allowance from March, 1948, to July, 1949, amounting to Rs. 8,075 against both the brothers. Rajes filed an objection to the execution on various grounds. Ramendra has not filed, or joined in, any such application and has apparently not contested the execution. The present contest in both the courts below and here is only between Rajes and Santi Debi. An order was passed by the Subordinate Judge over-ruling the objections raised by Rajes. An appeal was taken therefrom to the High Court at Calcutta which was dismissed by its judgment under appeal. Hence the present appeal in which Rajes is the appellant, while Santi Debi is the first respondent and Ramendra is the second respondent.

**Held:** The appellant had a vested interest but the enjoyment of the properties was restricted so long as the debts were not discharged, and as regards the house, L, enjoyment was further restricted to the extent that it was subject to the right of residence of his brother and his heirs until the obligation to provide alternative accommodation was discharged by the appellant or his heirs. Where a compromise decree provides both for a personal remedy and a charge, the question whether the decree-holder can pursue the personal remedy while reserving the remedy under the charge depends on the intention to be gathered from the terms of the decree.

**Subject Matter :** Transfers conditional upon stipulations precedent.

**Relevant Section : Section 25:** In a conditional transfer, as the very name suggests, certain conditions are attached which are to be fulfilled for the transfer and vesting of interest in the transferee.

**Section 26:** For transfers conditioned on a fulfillment of a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled if it has been substantially complied with.

**Key Issue :** Whether a property, purporting to be a gift made with a condition, can persist if condition is not complied with?

**Citation Details :** State of U.P. vs. Bansi Dhar and Ors. (11.12.1973 - SC):  
MANU/SC/0429/1973

**Summary Judgment :**

**Facts:** The donor (deceased) had made a donation of Rs. 30,000/- for the purpose of building a female hospital. He had conditioned the transfer upon the district collector paying homage to the donor's late wife by laying a foundation stone in her name for sentimental purposes. The gift was accepted by the collector with the condition. However, the hospital was delayed in being built and when it was built, the stone with the wife's name was removed entirely. The donor's sons (legal representatives) brought forth the action for repayment of the 30,000 as the condition was not complied with. The argument presented was that this was a gift and not merely a transfer of property thereby such conditions are not precedent for the property to vest.

**Held:** It was held that as the transfer was conditional and until fulfillment of the condition, the government was a mere custodian of the cash. Thereby such a transfer cannot be deemed to be complete as the condition precedent was not fulfilled and the government is at fault. Thereby liable to repay back to the plaintiffs, the 30,000/-.

**Subject Matter :** Transfer by ostensible owner and conferring a better title than he has.

**Relevant Section : Section 41:** Wherein a transfer is made by an ostensible owner, who has the consent of the actual owners, such transfer is not voidable merely on the claim that he did not have such authority.

**Key Issue :** Whether a transaction done merely in good faith, vitiates the principle that a person cannot confer a better title than he has?

**Citation Details :** Gurbaksh Singh vs. Nikka Singh (14.09.1962 - SC):  
MANU/SC/0331/1962

**Summary Judgment :**

**Facts:** The appellant had the knowledge that the title of his transferor was in dispute and he had taken a risk in purchasing the same. The appellant and Mula Singh belong to the same village Kot Syed Mahmud. Mula Singh sold his property to the appellant on the very date on which he had to appear before the Revenue Authorities. Though the sale deed was executed on October 24, 1934, the consideration was actually paid only three years thereafter i.e., on October 22, 1937. The appellant also took a security bond from Mula Singh to indemnify himself against any loss that might be caused to him in the property in dispute. These facts show that the appellant had knowledge of the defect in the title of Mula Singh.

**Held:** The general rule is that a person cannot confer a better title than he has. This section is an exception to that rule. Being an exception, the onus certainly is on the transferee to show that the transferor was the ostensible owner of the property and that he had after taking reasonable care to ascertain that the transferor had power to make the transfer, acted in good

faith. Thereby based on the facts and rule under section 41, this transaction cannot be one, conducted in good faith.

**Subject Matter :** Transfer of joint property and the exception of dwelling house.

**Relevant Section : Section 44:** This allows for persons to transfer their interest to a third party in a joint property, such transfers are held to be valid, for so long as the share is divisible and the property is not a dwelling house.

**Key Issue :** Whether transfer of interest in a dwelling house can hold as a good transfer?

**Citation Details :** Dorab Cawasji Warden vs. Coomi Sorab Warden and Ors. (13.02.1990 - SC): [MANU/SC/0161/1990](#)

**Summary Judgment :**

**Facts:** The appellant along with his father and mother, were the joint owners of the suit property. After the death of the appellant's mother, he and his father executed an agreement dated 23rd August, 1951 by which they severed their status as joint owners and agreed to hold the property as tenants in common. After Sohrab's death, his widow, the first respondent, and his minor sons, the second and third respondents, sold on 16th April, 1987 their undivided one half share in the property to the fourth respondent and his wife. On 18th April, 1987 the appellant filed a suit under section 44 of the Transfer of Property Act against the respondents inter alia on the ground that the suit property was a dwelling house belonging to an undivided family and strangers cannot be permitted.

**Held:** When a share in a dwelling-house is transferred without partition and the transferee attempted to take the possession of the property without maintaining a suit for partition, the other co-owners may restrain him from taking the possession. That since irreparable injury was likely to be caused by the entry of the transferee, an interim mandatory injunction against vendors and vendees regarding possession could be issued. The respondents in such circumstances cannot be permitted to take advantage of their own acts and defeat the claim of the appellant in the suit by saying that old cause of action under section 44 of the Transfer of Property Act no longer survived in view of their taking possession.

**Subject Matter :** Transfer of lis pendens property and specific share allocation.

**Relevant Section : Section 52:** Except under the authority of a court, the property which is in dispute between two parties in a suit or proceeding, cannot be transferred, wherein the rights to the property are directly in question.

**Key Issue :** Whether a disputed property can be transferred if it is only pertaining to a specific share in the entire property?

**Citation Details :** T. Ravi and Ors. vs. B. Chinna Narasimha and Ors. (21.03.2017 - SC): [MANU/SC/0279/2017](#)

**Summary Judgment :**

**Facts:** The property was matruka property of the deceased. Civil Suit No. 82/1935 was instituted by son of the deceased in Darul Qaza City Court for partition of matruka properties of the deceased comprised in Schedules 'A', 'B' and 'C'. The sale transaction took place during the pendency of the preliminary decree proceedings on 23.11.1959. The Legal Representatives of the Original Purchaser were entitled to the share of Defendant No. 1. On 6.10.1997, pending final decree proceedings, Plaintiff and Defendant Nos. 4 and 14 to 17 i.e. Legal Representatives of Defendant No. 5 assigned their interest in item No. 6 of plaint 'B' Schedule properties in favour of Containers Company. On 16.7.2001, Legal Representatives of the Original Purchaser filed application and sought impleadment to contest the matter in

respect of item No. 6 of plaint 'B' Schedule properties. Vide order dated 14.10.2003, Legal Representatives of the Original Purchaser were impleaded.

**Held:** It was apparent that the sale deed was hit by doctrine of lis pendens and secondly on the basis of the said sale deed, Legal Representatives of the Original Purchaser could have claimed only to the extent of the share of his vendor and not the entire land, i.e. only to the extent of 14/104th share of Defendant No. 1. It was found that the Original Purchaser could have purchased only the share of his vendor and not the entire disputed property and the purchase was affected by lis pendens.

**Subject Matter :** Doctrine of part performance and limitations act.

**Relevant Section : Section 53A:** Whereby, any person based on a contract from the transferor does any act consistent with the purported transfer and the transferee does nothing to stop or in contradiction to it then he cannot later claim that the transferees rights are invalid.

**Key Issue :** Whether the right under section 53A is defeated because the suit to seek specific performance of the agreement of sale has become time- barred?

**Citation Details :** Shrimant Shamrao Suryavanshi Vs. Pralhad Bhairoba Suryavanshi (2002) 2 SCC 676\*

**Summary Judgment :**

**Facts:** The appellants herein were the defendants in the suit brought by the plaintiff-respondents for recovery of the suit property and for mesne profit. On 9th July, 1964, Respondent no. 3 executed an agreement for sale of an agricultural land in favour. After the execution of the said agreement, it came to the notice of the appellant that the transferor is negotiating for sale of the said land in favour of respondent no. 1. Under such circumstances, the appellant brought a suit on 2nd August, 1965 for injunction restraining the transferor from selling the said land in favour of respondent no. 1. On 30th April, 1966 the trial court granted injunction as prayed for. It is the case of the appellants that despite the said injunction order, the transferor sold the said property through a registered sale deed dated 24th May, 1966 in favour of respondent no. 1.

**Held:** In the present case, it is not disputed that the transferee has taken possession over the property in part performance of the contract. It is also not disputed that the transferee has not brought any suit for specific performance of the agreement to sell within the period of limitation. It is also not disputed that the transferee was always and still ready and willing to perform his part of the contract merely because the suit for specific performance at the instance of the vendee has become barred by limitation that by itself is not enough to deny the benefit of the plea of part performance of agreement of sale to the person in possession.

**Subject Matter :** Difference between Sale and Contract for Sale.

**Relevant Section : Section 54:** Sale is transfer of ownership from transferor to the transferee for a consideration paid or promised or part-paid and part-promised.

**Key Issue :** Whether a charge in respect of a property could be created by deposit of an agreement for sale by the agreement holder?

**Citation Details :** Bank of India vs. Abhay D. Narottam & Ors. (2005) 11 SCC 520\*

**Summary Judgment :**

**Facts:** There are two properties in question. Respondent 2 had been granted certain overdraft facilities by the appellant Bank in 1989. In consideration for the grant of such facility, Respondent 2 undertook to create an equitable charge of the flat in favour of the appellant Bank. Undisputedly at that point of time Respondent 2 was not the owner of the flat. All it

had in its possession was an agreement executed by the owner to sell the flat to Respondent 2. This agreement was deposited with the appellant Bank by way of security by Respondent 2. Defaults were committed by Respondent 2 in repayment of moneys under both the accounts. Two separate suits were filed by the appellant Bank for recovery of the amounts from Respondent 2. The suit filed by Respondent 1 against Respondent 2 was compromised and a consent decree was passed by which Respondent 1 became entitled to recover from Respondent 2 a sum of Rs 12,44,59,207 as principal together with interest thereon. After the consent decree was passed the appellant Bank withdrew its earlier notice of motion and filed a fresh notice of motion reiterating its earlier prayer. That application was dismissed by the impugned order. The Court held that so far as the flat was concerned there was no prior charge created in favour of the appellant Bank. As far as the land was concerned it was held that since there was only an undertaking to create a mortgage by Respondent 2, there was no question of the land being a security created in favour of the appellant Bank by Respondent 2.

**Held:** A contract for sale of immovable property does not create an interest or charge over such property. The agreement for sale which was deposited with the bank, was not one through which respondent 2 agreed to sell the flat but was one where it was to sell the flat to respondent 2. Therefore, no interest was created in favour of Respondent 2 through the agreement, that he could transfer to the bank as a security.

**Subject Matter :** Mortgage: Right of mortgagor to redeem.

**Relevant Section : Section 60:** At any time after the principal money has become due, the mortgagor has a right, on payment of the mortgage-money, to require the mortgage

- (a) to deliver to the mortgagor the **mortgage-deed** and all documents relating to the mortgaged property;
- (b) to deliver **possession of the mortgaged-property** to the mortgagor;
- (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct; or to execute and to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgage has been extinguished.

**Key Issue :** Whether High Court was right in granting alternative relief of redemption of mortgage deed on payment of Rs. 11,000 amount mentioned in mortgage deed treating suit as suit simpliciter for redemption of mortgage?

**Citation Details :** Jamila Begum (D) thr. L.Rs. vs. Shami Mohd. (D) thr. L.Rs. and Ors. (14.12.2018 - SC): [MANU/SC/1488/2018](#)

#### **Summary Judgment :**

**Facts:** Present appeal arose out of judgment passed by High Court dismissing Second Appeal thereby upholding oral gift by Wali Mohammed in favour of Respondent No. 1-Plaintiff and Will dated 30th September, 1970 and directing original Plaintiff-deceased Respondent No. 1 to pay mortgage amount and holding that, mortgage dated 21st November, 1967 registered on 12th January, 1968 shall stand redeemed and further directing Appellants-Defendants to handover vacant possession of property.

**Held: Section 60 of Transfer of Property Act, 1882** provided that, at any time after money becomes due, mortgagor had a right, on payment or tender, at a proper time and place, of mortgage-money to require mortgagee to deliver mortgage deed and all documents relating to mortgaged property, and where mortgagee was in possession of mortgaged property, to deliver possession thereof to mortgagor. Right of redemption could be extinguished as provided in proviso to Section 60 of Transfer of Property Act. It could be extinguished either by act of parties or by decree of a court. Expression "**act of parties**" referred to some

transaction subsequent to mortgage, standing barred from mortgage transaction. In this case Jamila Begum-one of mortgagees had purchased property by sale deed dated 21.12.1970 and thus, she purchased entire equity of redemption by execution of sale deed, mortgage qua Appellant had merged with sale.

**Subject Matter :** What is Lease?

**Relevant Section : Section 105:** A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid in a manner as decided by the parties.

**Key Issue :** Whether tenant liable to be evicted after change of ownership.

**Citation Details :** R.S. Grewal and Ors. vs. Chander Parkash Soni and Ors. (16.04.2019 - SC): [MANU/SC/0545/2019](#)

**Summary Judgment :**

**Facts:** The suit for possession was instituted by the Appellants and by proforma Respondent No. 2 against the first Respondent. The suit for possession was decreed and the first appeal was dismissed. On second appeal, the High Court while setting aside the judgment of the first appellate Court held that daughter of testator had created a tenancy in favour of the Defendant and the relationship of landlord and tenant did not cease to exist on her death. The remedy of the Appellants as owners was to seek eviction under prevailing rent control legislation and not by means of a suit for possession, treating the first Respondent as trespasser

**Held:** The Appellant postulates that a life interest was personal to the person who possesses it and the creation of a tenancy which would enure beyond her life amounts to a transfer of the life interest. What the submission overlooks was that the creation of the tenancy was an act of the person enjoying a life interest in the present case and was an incident of the authority of that individual to generate income from the property for her own sustenance. The creation of a tenancy was an incident of the exercise of such an authority. The life estate granted to daughter of testator enabled her to create a tenancy and receive the rent from the tenants on the property. The statutory protection afforded to the tenant did not cease to exist upon the death of daughter of testator. A suit for possession on the basis that the tenant was a trespasser after the death of daughter of testator was not maintainable.

**Subject Matter :** What is Exchange?

**Relevant Section : Section 118:** When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being define money only, the transaction is called an "exchange".

A transfer of property in completion of an exchange can be made by sale.

**Note:** Here, the ownership of one thing is transferred for another, but, neither thing is the price of other.

**Partition between co-owners does not amount to exchange.**

**Key Issue :** Whether High Court had rightly discarded exchange deed and decreed suit filed by Plaintiffs?

**Citation Details :** Shyam Narayan Prasad vs. Krishna Prasad and Ors. (02.07.2018 - SC): [MANU/SC/0665/2018](#)

**Summary Judgment :**

**Facts:** Plaintiffs filed the suit against the Defendants for a declaration that the deed of exchange entered into between Defendant Nos. 1 and 2 in relation to an immovable property was invalid and for certain other relief. The trial court had come to the conclusion that the property in question was an ancestral property and that the Plaintiffs being the sons and

grandson of Defendant No. 2, they had also equal share in the property allotted to him in the partition. The suit was accordingly decreed. The first Defendant challenged the said judgment and decree by filing an Appeal before the District Judge. The District Judge allowed the appeal, set aside the judgment and decree of the trial court and dismissed the suit. The Plaintiffs filed a Second Appeal challenging the judgment and decree of the District Judge before the High Court. The High Court had set aside the judgment and decree of the District Judge and restored the judgment and decree of the trial court.

**Held:** It was clear from **Section 118 of the TP Act** that where either of the properties in exchange are immovable or one of them is immovable and **the value of anyone is hundred rupees or more**, the provision of **Section 54 of the TP Act relating to sale of immovable property would apply**. The mode of transfer in case of exchange is the same as in the case of sale. It was thus clear that in the case of exchange of property of value of hundred rupees and above, it could be made only by a registered instrument. In the instant case, the exchange deed had not been registered.

**Subject Matter :** Transfer by way of gift, validity of conditional gifts.

**Relevant Section : Section 122:** A gift is a transfer from a donor to a donee, made voluntarily and without consideration.

**Key Issue :** Whether a gift deed can be executed when a sum is stated?

**Citation Details :** Jagdish Chander vs. Satish Chander and Ors. (27.02.2019 - SC):

[MANU/SC/0289/2019](#)

**Summary Judgment :**

**Facts:** First Respondent-Plaintiff had filed suit for declaration to effect that, he was joint owner to extent of 435/924 shares i.e. 04-57 hectares in suit scheduled land. Trial Court by judgment had dismissed suit filed by first Respondent. Trial Court held that, donor Smt. Vidya Devi had never challenged gift deed during her lifetime. First Respondent-Plaintiff being a third party to gift deed, it was not open to him to challenge validity of gift on any ground. Further, trial Court had held that, evidence on record was not sufficient to hold that any fraud had been played on Smt. Vidya Devi for execution of gift deed. Plea of Plaintiff that as document of gift was evidenced by consideration of Rs. 5,000 same was in violation of provision under Section 122.

**Held:** A perusal of gift deed made it clear that, what was mentioned on first page of document, was valuation of property for purpose of stamp duty and registration charges which was arrived at Rs. 5,000, but not consideration received by donor for executing gift deed. Gift deed was correctly interpreted by trial Court and First Appellate Court. It is opined therefore, that due to the fact that the consideration in question was not for the property but for effecting the transfer costs, it was held that this was not barred by virtue of section 122.

**Subject Matter :** Transfer of actionable claim.

**Relevant Section : Section 130:** The transfer of an actionable claim, with or without consideration, shall be effected **only** by the execution of an instrument in writing signed by the transferor or his duly authorized agent. On doing so, all the rights and remedies of the transferor, **shall** vest in the transferee. **Section 131:** Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorized in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee.

**Key Issue :** Whether the notice for transfer of actionable claim is necessary u/s.131 of TPA?

**Citation Details :** Mewa Lal and Ors. vs. Tara Rani (21.03.1972 - ALLHC):

[MANU/UP/0057/1973](#)

### **Summary Judgment :**

**Facts:** The defendants are tenants of the disputed property on a monthly rent of Rupees 18/-. The property originally belonged to one Kanhaiyalal who died in the year 1933. Raj Kumar Agrawal is said to be the son of Kanhaiyalal. Smt. Nanhi Bibi is the widow of Kanhaiyalal. According to the plaintiff, Raj Kumar Agrawal was born seven months after the death of Kanhaiyalal and was the natural son of Kanhaiyalal. The property in dispute was sold by Smt. Nanhi Bibi to Smt. Tara Rani, plaintiff-respondent on 7-3-1967. It was then realised that the property belonged to Raj Kumar Agrawal who was the natural son of Kanhaiyalal. Raj Kumar Agrawal then executed another sale-deed on 24-4-1967 in favour of Smt. Tara Rani. Smt. Tara Rani then served a notice on the defendants alleging that they were in arrears of rent and that their tenancy was terminated in accordance to Section 106 of the Transfer of Property Act. After this notice, the suit for ejectment and arrears of rent was filed.

**Held:** The contention of the appellant was that it was a **transferable and actionable claim** and as provided under **Section 131 of the Transfer of Property Act**, there being no notice of transfer of actionable claim in writing, the suit was not maintainable. After an actionable claim is transferred in accordance with **Section 130** of the Transfer of Property Act, the Debtor may have dealing with the original owner and he is estopped from having dealing with the original owner, the moment the transferor has a notice under Section 131 of the Transfer of Property Act. **Actionable claim can be transferred only by execution of an instrument in writing signed by the transferor or his duly authorised agent.** The sale of a property of a value of more than Rs. 100/- has to be compulsorily registered, whereas, **an actionable claim of any amount can be had only by execution of an instrument. Thus the sale of a property and sale of an actionable claim are two different things and one has no relation with the other. As the transfer of an actionable claim is not done by a registered deed, therefore, the notice under Section 131 of the Transfer of Property Act is necessary.** In the instant case, the sale was of the entire property and not only the right of realisation of rent. It was by virtue of the sale-deed that the purchaser i.e., the plaintiff-respondent claimed rent from the defendant-appellants from a date subsequent to the date of the sale.



## **COPYRIGHT ACT, 1957 (INDIA)**

**Subject Matter :** Offence under Section 63 being cognizable

**Relevant Section :** **Section 63:** prescribes the punishment for infringement of copyright.

**Key Issue :** Whether the offence Under Section 63 of the Copyright Act, 1957 is a cognizable offence.

**Citation Details :** Knit Pro International vs. The State of NCT of Delhi and Ors. (20.05.2022 - SC) : [MANU/SC/0708/2022](#)

**Summary Judgment :**

**Facts:** When an FIR was lodged against the accused under Section 63 of the Act, they prayed for quashing of the FIR on the sole ground that the offence under Section 63 is non-cognizable.

**Held:** For the offence Under Section 63 of the Copyright Act, the punishment provided is imprisonment for a term which shall not be less than six months but which may extend to three years and with fine. Only in a case where the offence is punishable for imprisonment for less than three years or with fine only the offence can be said to be non-cognizable.

**Subject Matter :** Copyright infringement of Software

**Relevant Section : Section 14:** explains the meaning of 'Copyright';

**Section 17:** explains who is considered as the 'first owner of copyright';

**Section 51:** provides as to what amounts to infringement of a copyright;

**Section 63B** deals with knowingly using an infringing copy of a computer program;

**Section 65A** deals with protection of technological measures.

**Key Issue :** Does the sale of pirated versions of a software amount to copyright infringement?

**Citation Details :** Knit Pro International vs. The State of NCT of Delhi and Ors. (20.05.2022 - SC) : [MANU/SC/0708/2022](#)

**Summary Judgment :**

**Facts:** When an FIR was lodged against the accused under Section 63 of the Act, they prayed for quashing of the FIR on the sole ground that the offence under Section 63 is non-cognizable.

**Held:** For the offence Under Section 63 of the Copyright Act, the punishment provided is imprisonment for a term which shall not be less than six months but which may extend to three years and with fine. Only in a case where the offence is punishable for imprisonment for less than three years or with fine only the offence can be said to be non-cognizable.

**Subject Matter :** Joint Authorship

**Relevant Section : Section 2(z):** defines works of joint authorship as a work which is collaborated by two or more authors and all their contributions are not distinct from each other;

**Section 17:** explains first owner of copyright as the author of the work himself provided that he did not produce the said work during his course of employment. In case of a photograph/painting/ engraving, the person for whom the work was created for monetary consideration, owns the copyright.

**Key Issue :** Whether Maulana Azad was aided by Prof. Kabir while writing the book and has joint authorship?

**Citation Details :** Najma Heptullah v. M/s Orient Longman Ltd. & Ors. AIR 1989 Del 63; [MANU/DE/0245/1988](#)

**Summary Judgment :**

**Facts:** Najma Heptullah is the granddaughter of Maulana Azad. "India Wins Freedom" is the book written by Maulana Azad. Some chapters were published during his lifetime and some were to be published after 30 years. A professor, Kabir approached Maulana Azad and took notes from him about his life. Maulana Azad then made necessary changes in it.

**Held:** The process by which the book was written by the two was that Azad, during his lifetime, dictated and gave notes to Prof. Kabir and out of that Prof. had composed a book

which was approved by Azad. Hence, both were joint authors because there was joint authoring in furtherance of a common design. There was an evident active and close collaboration between the two. Hence, joint authorship exists.

**Subject Matter :** Bundle of rights- economic+moral rights

**Relevant Section : Section 14:** explains the meaning of copyright as the authorisation of creating any original work in an expressed form.;

**Section 57:** talks about an author's special rights- Right to claim authorship and right to integrity.

**Key Issue :** Whether the plaintiff has any copyrights?

**Citation Details :** Amar Nath Sehgal vs. Union of India (UOI) and Ors. (21.02.2005 - DELHC): [MANU/DE/0216/2005](#)

**Summary Judgment :**

**Facts:** Plaintiff readily agreed to the offer to accomplish the task of research and untiring work, spanning over half a decade producing a piece of art - a bronze mural sculpture - on the entrance wall of Vigyan Bhawan. The wall was no ordinary wall. The mural was a delicate balance between cultural and material aspects in national perspective and science of rural and modern India being its theme. The mural continued to occupy it's place of pride at the lobby of Vigyan Bhawan till it was pulled down and consigned to the store room of the Union of India in the year 1979. This act of destruction of the mural was without the permission, consent or authorization of the plaintiff.

**Held:** Whatever be it's form today is too precious to be reduced to scrap and languish in the warehouse of the Government of India. It is only the plaintiff who has a right to recreate his work and, therefore, has a right to receive that broken down mural. Plaintiff also has a right to be compensated for loss of reputation, honour and mental injury due to the offending acts of the defendants. Damages of sum of Rs.5 lacs are awarded.

**Subject Matter :** Originality v. expression of the idea

**Relevant Section : Section 13(1):** The copyright exists only in original literary work, dramatrical, musical, artistic works, cinematograph films and sound recordings;

**Section 52:** says that any work copied from someone else's work is not copyrightable.

**Key Issue : a.** Are exam papers considered to be 'literary works'?

**b.** Whether they are 'original'?

**c.** Who has the copyright of the papers?

**d.** Whether there is an infringement of copyright?

**Citation Details :** University of London Press Limited v. University Tutorial Press Limited, (1916 U. 119) 2 Ch 601

**Summary Judgment :**

**Facts:** Two examiners were appointed for a matriculation exam of the University of London on the condition that all copyrights of examination papers should be vested in the University. The University assigned the copyright by deed to the plaintiff company. After the Exam the defendant company published the exam question papers and answers with criticisms.

**Held: a.** The papers are indeed literary works as it entailed brain exercise and trained judgement.

**b.** The papers were found to be original as they originated from themselves hence were a proper subject of copyright under the Act.

**c.** The copyright was vested in the examiners but the University was equitably entitled to it

subject to the assignment agreement between the examiner and the University.

d. Based on the facts and circumstances of the case there is an infringement of copyright.

**Subject Matter :** Performer's Rights

**Relevant Section : Section 38:** Whenever someone performs any artistic work, special rights vest in him/her for 50 years starting from the next calendar year of the performance;

**Section 39:** Talks about the acts that do not infringe broadcast or performer's rights. Work used for good teaching purposes, fair use, or any other necessary act do not infringe the rights under this Act.

**Key Issue :** Whether the performance of a cine artiste in a cinematograph film would be "work" protected by the Copyright Act, 1957?

**Citation Details :** Fortune Films International v. Devanand (AIR 1979 Bom 17);

[MANU/MH/0006/1979](#)

**Summary Judgment :**

**Facts:** The plaintiff was a cine artiste of a Hindi motion picture entitled "Darling Darling" produced by the first defendants. In the course of correspondence exchanged between the parties, it was inter alia provided that in consideration of his services to the producers he would be paid remuneration of Rs. 7 lakhs in certain amounts on or before the release of the picture in the territories of Delhi-U. P., Bengal, Nizam, Mysore, C.P.-C I., Tamil-Nadu and Andhra. It was further provided that the copyright in the cine artiste's work in the motion picture was to vest in the cine artiste till full payment of the agreed amount was made to him on which it would automatically vest in the producers. The plaintiff alleged that the producers were releasing the picture in the Bombay and overseas territories without full payment of the remuneration to him, and he sued to restrain the producers from doing so.

**Held:** The Honourable Supreme Court stated that an actor in a film has no rights over his performance in the film. This was before 1994. After the amendment in the Act, Sections 38 and 39 were added.

**Subject Matter :**

**Relevant Section : Section 38:** Whenever someone performs any artistic work, special rights vest in him/her for 50 years starting from the next calendar year of the performance;

**Section 39:** Talks about the acts that do not infringe broadcast or performer's rights. Work used for good teaching purposes, fair use, or any other necessary act do not infringe the rights under this Act.

**Key Issue :** Whether re-recording of traditional music a violation of performer's rights?

**Citation Details :** Super Cassettes Industries v. Bathla Cassette Industries (107 (2003) DLT 91); [MANU/DE/0813/2003](#)

**Summary Judgment :**

**Facts:** The plaintiff company is the manufacturer, producer and marketeer of pre-recorded audio cassettes and other records under the logo T Series. The plaintiff produced a sound recording under its banner T Series which was inter alias based on the song 'Chalo Dildar Chalo' from the film 'Pakeezah' by giving notice to the original producer Mahal Pictures under Section 52(1)(j) & Rule 21(2) (b) of the Copyright Act. Such a recording is known in the music business as a version recording and inter-alia involves the singing of a well-known song by a lesser known singer. The plaintiff gave prescribed royalty of Rs. 400 for producing 10, 000 copies to the original owner. When the defendant attempted to produce a version recording of the version recording of the plaintiff by treading the path carved out by the plaintiff, the plaintiff has come to this Court for an injunction restraining the defendant from what is averred to be a copyright violation of its version recording. The dispute in the present

suit inter-alia pertains to a song "Chalo Dildar Chalo' from the film `Pakeezah', for which the original owners of the musical works were M/s Mahal Pictures Pvt. Limited. This song forms part of two audio cassettes produced by the plaintiff called Yadein Vol. I and Yadein Vol. II. The plaintiff claims to have paid a sum of Rs. 400/- to Mahal Pictures the original owner of the musical work `Chalo Dildaar Chalo' for producing 10, 000 records of Chalo Dildar Chalo.

**Held:** The traditional repertoire of Indian music which may not now enjoy copyright protection due to passage of time and being in the public domain, cannot be appropriated by any individual by virtue of a later and current sound recording by excluding other performers and/or composers. The tradition of Indian classical and folk music is a valuable public heritage common to all adherents and cannot be purloined by a contemporary performer/composer by denying to others the benefit of the same. Performer's rights are different from copyright, held that re-recording of a song without the authorization of original performer constituted an infringement of the performer's rights.

**Subject Matter :**

**Relevant Section : Section 38:** Whenever someone performs any artistic work, special rights vest in him/her for 50 years starting from the next calendar year of the performance;

**Section 39:** Talks about the acts that do not infringe broadcast or performer's rights. Work used for good teaching purposes, fair use, or any other necessary act do not infringe the rights under this Act.

**Key Issue :** Whether this is misrepresentation and violation of performer's rights?

**Citation Details :** Neha Bhasin v. Anand Raj Anand (2006 (32) PTC 779 Del.);

[MANU/DE/1729/2006](#)

**Summary Judgment :**

**Facts:** Plaintiff was a singer who claimed that her voice was used by the defendants for three versions of song in Hindi film produced by defendant No. 2. Plaintiff alleged that defendant no. 2 in connivance with defendant No. 1 (music director) had shown herself to be the singer along with defendant No. 2, whereas plaintiff was shown as backup vocalist in all three versions of song. Plaintiff prayed that instead of defendant No. 2's name, her name should appear as lead singer.

**Held:** Addressing the question of what would constitute a 'live performance', the Court observed that "Every performance has to be live in the first instance whether it is before an audience or in a studio. If this performance is recorded and thereafter exploited without the permission of the performer, then the performer's right is infringed." Court heard all versions of song. It was found that the voice contained in all versions belonged to petitioner. Thus, plaintiff should have been shown as lead singer instead of defendant. Court issued interim order for restraining defendants from in any manner using, selling, distributing, exhibiting, advertising the motion picture as well as cassettes, CDs, promos of the film.

**Subject Matter :** Mere Idea v. Expressed form of the idea

**Relevant Section : Section 2:** Definitions and interpretations establish that the copyright exists only for the work which is in expressed form. Mere idea is not copyrightable.

**Key Issue :** a. Did the Copyright exist for the plaintiff?

b. Is the film 'New Delhi' an infringement of the plaintiff's copyright in the play 'Hum Hindustani' ?

c. Have defendants or any of them infringed the plaintiff's copyright by producing, or distributing or exhibiting the film 'New Delhi' ?

**Citation Details :** R.G. Anand vs. Delux Films and Ors. (18.08.1978 - SC) :

[MANU/SC/0256/1978](#)

### **Summary Judgment :**

**Facts:** Plaintiff developed a play "Hum Hindustani" which was based on the provincialism of new delhi. The defendant produced a film "New Delhi", based on the same theme.

- Held:** a. The plaintiff was the owner of the copyright in the play 'Hum Hindustani'.  
b. There was no violation of the copyright of the plaintiff because there was a vast and substantial difference between the play and the film.  
c. The defendants have not infringed the plaintiff's copyright in any manner what so ever.

**Subject Matter :** Compulsory licencing of the work withheld from public

**Relevant Section : Section 31:** talks about compulsory licencing of the work which is withheld from or not communicated to the public. The access is given to the third party who can make it available to the public at large;

**Section 52 (1) a:** copyrighted work can only be used for personal use and not for monetary profit.

**Key Issue :** Whether there is an infringement of copyright?

**Citation Details :** The Chancellor, Masters & Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services and Ors. (16.09.2016 - DELHC): [MANU/DE/2497/2016](#)

### **Summary Judgment :**

**Facts:** The defendants made profits by photocopying, reproduction and distribution of copies of plaintiffs' publications on a large scale and circulating the same and by sale of unauthorised compilations of substantial extracts from the plaintiffs' publications by compiling them into course packs/anthologies for sale.

**Held:** "It would thus be seen that under the Berne Convention also, the only binding obligation on the privy countries is to in their respective legislations i) not permit reproduction of the work so as to conflict with a normal exploitation of the work and so as to unreasonably prejudice the legitimate interest of the author; and, ii) to while permitting utilization of the literary works including in publications for teaching ensure that such utilization is to the extent justified by the purpose and compatible with fair practice. Similarly, under the TRIPS Agreement also the member countries have agreed to confine the exceptions to the copyright to the extent they do not unreasonably prejudice the legitimate interest of the right holder." The actions of the defendants to be not amounting to infringement of copyright of the plaintiffs. Ratio Decidendi: Reproduction of any copyrighted work by teacher for purpose of imparting instruction to pupil as prescribed in syllabus during academic year would be within meaning of Section 52(1)(i) of Copyright Act, 1957.

**Subject Matter :** Breach of confidentiality/Confidential Information

**Relevant Section :** No Relevant Section

**Key Issue :** Whether there is a disclosure of confidential information?

**Citation Details :** Zee Telefilms Ltd. and Ors. vs. Sundial Communications Pvt. Ltd. and Ors. (27.03.2003 - BOMHC): [MANU/MH/0243/2003](#)

### **Summary Judgment :**

**Facts:** Plaintiff created a show which had a theme of Lord Krishna. He approached a producer and insisted to sign an NDA. Defendant refused to sign it on the grounds of goodwill and reputation. The negotiations failed and the plaintiff approached other producers. He found out that the defendant had created a pilot episode on the same theme.

**Held:** Verbal contracts are binding but hard to prove. Hence, the circumstances are proved to be such which had the quality of confidentiality. Keeping in view numerous striking similarities in two works and in the light of the material produced on record, it is impossible to accept that the similarities in two works were mere coincidence. The inference of unlawful exploitation of plaintiffs' original concept in defendants' T.V. serial is more in consonance with the materials placed on record and all probabilities of the situation therein disclosed. The plaintiffs' business prospect and their goodwill would seriously suffer if the confidential information of this kind was allowed to be used against them in competition with them by the defendants and as observed by Lord Evershed (M.R.) it is not merely of compensation in pounds, shillings or pence. Therefore, the plaintiffs would certainly be entitled to have injunction for breaching confidentiality. Secondly, In view of the foregoing discussion, we have no hesitation in holding that the plaintiffs have established that there has been infringement of their copyright.

**Subject Matter :** Fair use of copyrighted work

**Relevant Section : Section 52(1) a:** Use of copyrighted work for personal research, criticism or review or reporting of current affairs is not considered to be infringement.

- Key Issue :**
- a. Whether new copyright is created in work derived from an existing work?
  - b. Whether by introducing certain inputs in the raw text of the Judgment, it becomes "original copy-edited Judgment" based on which copyright can be claimed by the publisher?

**Citation Details :** Eastern Book Company and Ors. vs. D.B. Modak and Ors. (12.12.2007 - SC): [MANU/SC/4476/2007](#)

**Summary Judgment :**

**Facts:** Appellants were involved in printing and publishing of law books including "Supreme Court Cases" (SCC). Appellants alleged Respondents of lifting sequencing, selection and arrangement of the cases, text of copy-edited Judgments as published in SCC, style and formatting, paragraph and footnote numbers, cross-references, etc. for incorporation in their CD product. Appellants contended that inputs placed in the raw text constitutes 'original literary work' and thus Respondents liable for causing infringement of copyright.

**Held: a.** Copy-edited Judgments in such situation would not satisfy the copyright merely by establishing amount of skill, labour and capital put in the inputs of the copy-edited Judgments and the original or innovative thoughts for the creativity are completely excluded. Creation of paragraphs has a flavour of minimum amount of creativity. The said principle would also apply when the editor has put an input whereby different Judges' opinion has been shown to have been dissenting or partly dissenting or concurring, etc. It also requires reading of the whole judgment and understanding the questions involved and thereafter finding out whether the Judges have disagreed or have the dissenting opinion or they are partially disagreeing and partially agreeing to the view on a particular law point or even on facts. In these inputs put in by the appellants in the judgments reported in SCC, the appellants have a copyright and nobody is permitted to utilize the same.

**b.** Collection of material and addition of inputs in the raw text does not give work a flavour of minimum requirement of creativity, as skill and Judgment required to produce the work trivial - To establish copyright, the creativity standard applied is not that something must be novel or non-obvious, but some amount of creativity in the work to claim a copyright is required. Selection and arrangement can be viewed as typical and at best result of the labour, skill and investment of capital lacking even minimal creativity, which does not as a whole display sufficient originality so as to amount to an original work of the author. To claim copyright, there must be some substantive variation and not just a trivial variation, not the variation of the type where limited ways of expression available and author selects one of

them. Inputs put by the Appellants in the copy-edited Judgments do not touch the standard of creativity required for the copyright. However inputs and task of paragraph numbering and internal referencing requires skill and Judgment in great measure having a flavour of minimum amount of creativity.

**Ratio Decidendi:** "To invoke copyright protection in a derivative work, variation must be substantive in nature then merely trivial". "Judicial pronouncements of the Apex Court being in public domain, its reproduction or publication would not infringe copyright."

## COPYRIGHT ACT, 1976 (UNITED STATES OF AMERICA)

**Subject Matter :** Substantiality

**Relevant Section : Section 107 (3):** Amount and substantiality of the copyrighted work used as a whole is the deciding factor for the infringement.

**Key Issue :** Whether Defendants had substantially copied the serial of the Plaintiff "24"?

**Citation Details :** Twentieth Century Fox Film Corporation vs. Zee Telefilms Ltd. and Ors. (10.07.2012 - DELHC): [MANU/DE/3094/2012](#)

**Summary Judgment :**

**Facts:** The plaintiff's and the defendant's serial had uncanny similarities in terms of the plot and characters as well as the theme of the serial.

**Held:** The alleged similarity given by the plaintiff in the format of his serial "24" and defendant's "Time Bomb", conspicuously ignores various dissimilarity which are apparent on watching the two serials and consequently, on the basis of the just 14 frames of the two serials, it is difficult for this Court to draw inferences that serial "Time Bomb" is a copy of the serial "24". The list of differences rather clearly shows that story line is different and the treatment and expression are also different. Ratio Decidendi: "In considering the question of substantiality, the similarities between the program should be considered individually and then it should be considered whether the entirety of what had been copied represented a substantial part of the Plaintiff's program." "Whether a part was substantial is to be decided by its quality rather than by its quantity."

## CIVIL PROCEDURE RULES, 1998 (ENGLAND & WALES)

**Subject Matter :** Confidential Information

**Relevant Section : Rule 31.12:** Disclosure of copies; only one copy needs to be disclosed in a manner that does not hamper one's own case.

**Key Issue :** Whether there existed confidentiality? If so, has it been violated?

**Citation Details :** Michael Douglas, Catherine Zeta-Jones, Northern & Shell plc v. Hello! Ltd and Ors. [MANU/UKCH/0108/2003](#)

**Summary Judgment :**

**Facts:** The plaintiff had an agreement with OK Magazine for exclusive pictures of their wedding. Due diligence was taken and the guests were told not to take any photographs. A

paparazzi gate crashed the wedding and took photos. He sold the photos to Hello! Magazine. Hello! published them before OK!. Both OK! and the plaintiffs suffered monetary losses. The information was not a commercial secret but confidential information.

**Held:** Since the guests were told not to take photos, circumstances imply confidentiality. Hence, damages were awarded under confidential information.

## UNIFORM TRADE SECRETS ACT

**Subject Matter :** Spring Board Doctrine

**Relevant Section :** No Relevant Section

**Key Issue :** Whether there is misappropriation of confidential information?

**Citation Details :** Cadbury Schweppes Inc. v. FBI Foods Ltd. [MANU/SCCN/0070/1999](#)

**Summary Judgment :**

**Facts:** Duffy Mott (Licencor)-Licenced to- Ceasar Canning (Licencee)- Contract with- FBI Foods; Licencor invented a drink named 'CLAMATO' which had 2 secret ingredients- tomato and clam broth. It was licenced to Canning to manufacture and sell it as it is, hence the recipe was shared. The licensee was not able to meet the demands on his own and hence entered into an agreement with FBI Foods. Later, Duffy was taken over by Ceasar; Ceasar went bankrupt and was taken over by FBI Foods. Then Cadbury decided to cancel the licencing agreement. Therefore, Ceasar and FBI Foods had no authority to use the recipe. There was a clause in the agreement that the licensee cannot make any drink containing tomato and clam broth for 5 years after the licencing agreement is terminated. FBI Foods introduced a new drink containing only clam broth.

**Held:** FBI Foods used only one ingredient. They might have not come up with a similar drink so early if they did not have the said recipe. There was no violation of confidential information directly but indirectly. It was held under the spring board doctrine that FBI Foods had undue advantage and the recipe was similar, therefore they cannot sell the product for 5 years.



## LAW OF GEOGRAPHICAL INDICATORS

## PATENT ACT, 1970

**Subject Matter :** Traditional Knowledge

**Relevant Section : Section 3 (p):** lays down that the traditionally known substances or any of their properties or uses cannot be patented.

**Key Issue :** Whether it is a novel product or part of traditional knowledge and geographical indication?

**Citation Details : Turmeric Case:** Indian Council of Scientific and Industrial Research v. University of Mississippi Medical Centre, 1995 USA

**Summary Judgment :**

**Facts:** 2 Indians went to the USA and developed a turmeric based medicine. They claimed patent on 3 properties of turmeric- healing, surgical wound healing and antiseptic. The patent was granted by the USPTO. It was challenged by India.

**Held:** Since, the patent granted exclusive rights to sell and distribute turmeric, it hampered the economy of India. Moreover, turmeric has been used for thousands of years for medical purposes by Indians as part of their **traditional knowledge**. It was proved by various ancient scriptures and a publication of 1953 by the Indian Medical Research Department. The patent on the anti-inflammatory applications of turmeric was revoked in 1997 on the ground of lack of novelty.

**Subject Matter :** Biopiracy

**Relevant Section : Section 3 (j):** lays down that plants, varieties and seeds and even the biological production of the same cannot be patented.

**Key Issue :** Whether the patent shall be revoked on technical grounds of novelty, usefulness and non-obviousness?

**Citation Details : Basmati Rice Case:** Agricultural and Processed Food Exports Development Authority v. Rice Tec Inc., 1997 USA

**Summary Judgment :**

**Facts:** On September 2, 1997, an American company RiceTec Inc. was granted a patent on Basmati rice lines and grains by the USPTO. RiceTec had got patent mainly for three categories: growing rice plants with certain characteristics identical to Basmati, the grain produced by such plants, and the method of selecting the rice plant based on a starch index (SI) test devised by RiceTec Inc. Out of these three categories, India challenged only the claim on 'grain quality'.

**Held:** Ricetec has been finally granted varietal patents for three strains of superfine rice developed by the company, but it could not obtain patent for the generic and pseudo generic strains of basmati. In the ruling, the USPTO said that RiceTec's grain is equal or superior to good quality Basmati. This would help the company to label its strains as superior Basmati rice. The international community treated this as a blatant case of biopiracy that threatens the genetic material, biological resources and indigenous innovation of farmers around the world. Moreover, Basmati rice is known for the length of the grain and its aroma which comes due to the alluvial soil of the Deccan Plateau of India. Hence, it also becomes a part of geographical indication.

## **GEOGRAPHICAL INDICATIONS OF GOODS (REGISTRATION AND PROTECTION) ACT, 1999**

**Subject Matter :** Use of GI in good faith.

**Relevant Section : Section 26:** The marks with geographical indication which have been applied for in good faith are granted registration.

**Key Issue :** Whether there is a wrongful use of the geographical indication 'DARJEELING'?

**Citation Details : Darjeeling Tea Case:** Tea Board Of India v. ITC Ltd.

[MANU/WB/0277/2019](#)

**Summary Judgment :**

**Facts:** The defendant has wrongfully used the geographical indications in the designation and/or naming of its business premises as 'DARJEELING LOUNGE'. He has wrongfully used the name 'DARJEELING' for the presentation and sale of goods which it sells in such lounge. It has wrongfully suggested that the goods which it sells at the said 'DARJEELING LOUNGE' originate in the said geographical area other than the true place of origin of such goods as are sold which are not originating in Darjeeling at all. He has wrongfully used the geographical indications and other registered rights of the plaintiff in a manner to mislead and continues to mislead all persons frequenting or using the facilities at its said Darjeeling Lounge as regards the geographical origin of the goods which were sold thereat. The use of the name 'DARJEELING' for the purpose of the said lounge and for all purposes connected therewith including the publicity thereof and the selling of goods thereat had constituted acts of unfair competition and/or passing off in respect of the registered geographical indications rights and other registered rights of the plaintiff.

**Held:** The Hon'ble Justice Sahidullah Munshi of Calcutta High Court, opined that the suit by Tea Board was barred by limitation as the hotel lounge was started in January 2003. But the suit was filed only in 2010 which is beyond the limitation provided under Section 26(4) of the GI act which is for 5 years.

The Court went into the merits of the case and Justice Munshi observed that, "It is also not found that there has been any infringement under the Geographical Indications of Goods Act because the defendant's 'Lounge' is not relating to goods. Plaintiff's rights conferred by the registration of the word 'Darjeeling' is only in relation to tea. 'Darjeeling' is not a trade mark. It is only used to indicate geographical indication of a place of origin of tea originating from Darjeeling. The law relates to geographical indication is confined only to goods. The plaintiff does not own any right in the name of 'Darjeeling' for any goods other than tea. The Geographical Indications Act can only extend to goods and admittedly, the defendant's lounge does not fall within the category of 'goods'".

The Hon'ble Court further found that there is no unfair competition under the definitions of Geographical Indications Act as the business area of plaintiff and defendant is totally different and among the 87 tea estates none of them had raised any issue. The Board also claimed that its rights under Trademarks Act 1999 also stood violated by the use of name 'Darjeeling' for the lounge. But the Court noted that the Board only had certification trademark within the meaning of Section 2(e) of the Trademarks Act 1999, which does not amount to a registered trademark. The certification trademark gave the Board only the authority to certify that the concerned tea is connected with Darjeeling region and here the defendant is dealing with service.

The Court stated that there is no relation between the defendants 'DARJEELING LOUNGE' and the plaintiff's rights under Trademark or GI act and the allegations are baseless and the Court dismissed the suit for Rs.10 lakhs

**Subject Matter :** Prohibition on registration of GI as trademark.

**Relevant Section : Section 25:** says that the registrar can deny to register any mark which has any indications of some geographical area for the goods that does originate in that particular area.

**Key Issue :** Whether 'Simla' a geographical indication and eligible to be registered as trademark?

**Citation Details :** The Imperial Tobacco Co. of India Ltd. vs. The Registrar of Trade Marks and Ors.

(14.06.1977 - CALHC) : [MANU/WB/0109/1977](#)

**Summary Judgment :**

**Facts:** The appellant filed for the registration of the trademark 'SIMLA'. The mark was rejected on the grounds that geographical indications cannot be registered as trademark as the GI Act. The appeal was filed challenging the said rejection.

**Held:** Simla was never a tobacco producing centre or likely to be so and there is no chance or occasion for any prejudice being caused to other traders or manufacturers. He also referred to the Trade Marks Journal published by the Government containing advertisements of various geographical names for acceptance: 'Sheemla' for agarbatti, 'Gulmarg' for wire, 'Shalimar' for engineering goods 'Kalighat' for biddies were cited and referred. In all such cases it appears that the names *prima facie* are fanciful without geographical or ordinary signification and at this stage it will not be proper to depend on those marks without further material or evidence. The propositions of law in respect of geographical names have been referred to above and in view of the imprint of snow clad hills in outline in the trade mark 'Simla' the ordinary or geographical signification is obvious and patent even though it has no reference to the quality or place of origin of the goods as at present advised. Further, registration of such trade mark may hamper or embarrass the trade or traders in or around the locality in future as held by judicial authorities cited earlier in similar cases. Also 'Simla' is too prominent a city, the capital of Himachal Pradesh, well known in the country and abroad and in its ordinary or geographical significance it is inherently neither distinctive nor adapted to distinguish also nor capable of distinguishing the goods of the appellant as a particular trader from those of others. and is also hit by the provisions of Section 9.

**Subject Matter :** Objection to registration.

**Relevant Section : Section 14(5):** The Registrar shall, after hearing the parties and considering the evidence, decide whether and subject to what conditions or limitations the registration is to be permitted, and may take into account a ground of objection whether relied upon by the opponent or not.

**Key Issue :** Whether the origin of this famous sweet was in the Jagannath Temple of Puri in Odisha?

**Citation Details :** Banglar Rasogolla v. Odisha Rasagola,

**Summary Judgment :**

**Facts:** In November 2017, West Bengal State Food Processing and Horticulture Development Corporation Limited got the GI registered as 'Banglar Rasogolla'. An objection to the GI Registration was filed citing that the origin of this famous sweet was in the Jagannath Temple of Puri in Odisha. An application for removal of the registration of the GI status was filed in February, 2018. The GI Registry notified that Odisha got the GI registered as 'Odisha Rasagola'.

**Held:** It is very important to note that the GI Registry has not given registration to the term 'Rasogolla/ Rasagola.' It has specifically prefixed two words to the GI tag, one is 'Banglar' and the other one is 'Odisha', thereby, implying that 'Rasogolla/ Rasagola' is a generic word which can be used by anyone in their trade and business. Thus, so far as the law is concerned, neither of the states has got a monopoly on the word 'Rasogolla/ Rasagola'. So, it is free for

anyone in the trade to continue selling the sweet as Rasogolla/ Rasagola or any other synonym. What is prohibited is the usage of the word 'Banglar Rasogolla' and 'Odisha Rasagola' by anyone other than the 'authorised user' under the law.



## PATENT ACT, 1970

**Subject Matter :** Date of Grant of Patent

**Relevant Section : Section 25(1):** Any person can file their objection to a patent at any time before the grant of the patent.

**Section 43:** Provides that the patent shall be granted as expeditiously as possible

**Key Issue :** When can we consider a patent to be granted under the Patents Act, 1970?

**Citation Details :** Snehlata C. Gupte vs. Union of India (UOI) and Ors. (15.07.2010 - DELHC) : [MANU/DE/1637/2010](#)

**Summary Judgment :**

**Facts:** Pre-grant oppositions to the patent were rejected on the ground of being time-barred. Counsel for the party argued that a patent is not considered to be granted until an entry to that effect is made in the Register.

**Held:** The sealing of the patent and the entering of the patent in the Register are intended to be ministerial acts evidencing the grant of patent, which is at a stage anterior to those ministerial acts. Therefore, for the purposes of Section 43(1) of the Act, the patent is "granted" on the date on which the Controller passes a final Order to that effect on the file.

**Subject Matter :** Onus of Proof

**Relevant Section : Section 104A:** lays down who has the burden of proof in cases of Patent Infringement

**Key Issue :** In cases of infringement of Patent, who has the burden of proof?

**Citation Details :** Vringo Infrastructure Inc. vs. Indiamart Intermesh Ltd. (05.08.2014 - DELHC) : [MANU/DE/1828/2014](#)

**Summary Judgment :**

**Facts:** Plaintiffs alleged that a technology that was assigned to them by Nokia in a Confidential Patent Purchase Agreement is being used by the Respondents in manufacturing their devices without proper license.

**Held:** There is no presumption regarding the validity of a patent. The onus of proving the validity and ownership of a patent is on the party which claims that their patent is being infringed.

**Subject Matter :** Simultaneous Suit

**Relevant Section : Section 64(1):** lists the grounds on which a patent can be revoked;

**Section 25(2):** lists the grounds on which a patent can be opposed by any person

**Key Issue :** Can a 'counter-claim' be filed on the same cause of action on which a 'revocation petition' is pending?

**Citation Details :** Aloys Wobben and Ors. vs. Yogesh Mehra and Ors. (02.06.2014 - SC) :  
[MANU/SC/0519/2014](#)

**Summary Judgment :**

**Facts:** The Defendants filed a 'Revocation Petition' against the 'Plaintiff' in front of the Appellate Board. Then, on the same cause of action, also filed 'counter-claim' in the High Court.

**Held:** Since a "counter-claim" is of the nature of an independent suit, a "counter-claim" cannot be allowed to proceed, where the Defendant has already instituted a suit against the Plaintiff, on the same cause of action. If the Respondents in their capacity as "any person interested", had filed a "revocation petition" before the institution of an "infringement suit", they cannot be permitted to file a "counter-claim" on the same cause of action. The natural conclusion in the instant situation would be, the validity of the grant of the patent would have to be determined in the "revocation petition". Therefore, in the above situation, while the "revocation petition" will have to be permitted to be pursued, the "counter-claim" cannot be permitted to be continued.

**Subject Matter :** Trade secret

**Relevant Section :** No Relevant Section

**Key Issue :** Whether the licencor has the right to disclose the said secret?

**Citation Details :** Newbery v. James, 2 Mer. 446 1817; 35 Eng. Rep. 1011, 1013 (Ct. Ch. 1817)

**Cited in:**

OTIS ELEVATOR CO. Vs. PACIFIC FINANCE CORP. (23.01.1934 - 9th Circuit):

MANU/FENT/0140/1934

**Summary Judgment :**

**Facts:** There was a contract between the plaintiff's father (licencee) and the defendant's grandfather (licencor). Licencor invented a medicinal powder, some of which was patented and the rest was kept as a trade secret. Licencor entered into an agreement with the licensee for exclusive right to manufacture and sell. After both died, their legal heirs became their legal representatives. Now the licencor's representative threatened to disclose the secret if the contract is continued. Licencee would suffer a huge loss as he has absolute monopoly in the market.

**Held:** Although the licencor is the owner of the secret, yet the plaintiff has the right against the secret. Inevitable disclosure is a drawback. The court accepted the secret without knowing what it was and only the circumstances proving the existence of such a secret was enough. Temporary injunction and damages were granted.

**Subject Matter :** Trade secret- Patent Interface

**Relevant Section :** No Relevant Section

**Key Issue :** Whether the process was discovered by reverse engineering?

**Citation Details :** Wyeth v. Natural Biologics Inc., MANU/FEVT/0336/2005

**Summary Judgment :**

**Facts:** "Premarin" is a naturally occurring substance found in pregnant mares. It can be extracted by Brandon Process. The drug was patented by the plaintiff and the process was kept as a trade secret for 60 years. The patent expired after 20 years but their monopoly continued because of their trade secret. The defendant was a growing company. Their CEO

made a declaration that they have discovered the Brandon process. Now, that the drug was in public domain, anyone can manufacture and sell it.

**Held:** It was proved by the plaintiffs that the CEO had no Scientific degree; CEO had come into contact with one of the scientists, an ex-employee of the plaintiff. Accomplice could not be proven but communication between them was proven which raised a reasonable doubt. It was held that there was a violation on the grounds of misappropriation of information(acquisition of information without authorisation). CEO was held guilty for misappropriation. Company was held guilty for using the misappropriated information. The Scientist was held guilty for taking advantage of his position and giving away confidential information. **As a result**, the company was shut down, the CEO was blacklisted from the pharmaceutical sector and the plaintiffs were paid millions of dollars as damages.

**Subject Matter :** True and 1st inventor

**Relevant Section : Section 2(1) y:** It lays down that who is **not** a true and first inventor- first importer of the invention in India; person to whom the invention is first communicated; Section 6(1) a: talks about who can apply for patents- any natural person who claims to be the first and true inventor.

- Key Issue :** **a.** Whether the finance partner is eligible to get patent rights?  
**b.** Whether the patent should have been granted in the name of the partnership as it was applied while the partnership still existed?

**Citation Details :** V B Mohammed Ibrahim v. Alfred Schafraner, AIR 1960 Mys. 173; MANU/KA/0061/1960

**Summary Judgment :**

**Facts:** Plaintiff and the 2 defendants had a partnership to sell, manufacture and design wooden furniture. Plaintiff was the finance partner and the defendants were the creative partners. Defendants created a chair with floral design by burning the wood instead of using the chisel. This required expertise and tools. Now the three partners decided to wind up the partnership. During winding up, the defendants applied for the Patent on the chair. The plaintiff was unaware of it. It was granted 2 to 3 days after winding up without including the plaintiff.

**Held: a.** The dispute must have been taken to the appellate board. Firstly, the true and first inventor is the one who applies for the patent first and not invent it first. That being said, the finance partner does not get patent rights because by definition, patent is granted only to the "inventor". Money is immaterial. For the finance partner, to qualify as a partner in patent, needs to qualify as an assignee. Since, in a partnership there exists only agents of each other, plaintiff has no right to be added in the patent application.

**b.** Secondly, as per the provision, "any person" (natural persons only) can apply for the patent. Partnership is not a legal entity, hence cannot own anything in its name.

**Subject Matter :** Compulsory Licencing

**Relevant Section : Section 84 (1) b :** This provision makes available the products which are otherwise not easily accessible to general public, due to unaffordable prices.

**Key Issue :** Whether the requirements for the grant of compulsory licencing are fulfilled?

**Citation Details :** Natco Pharma Limited vs. Bayer Corporation (09.03.2002 - Other):

MANU/OT/0004/2002

**Summary Judgment :**

**Facts:** The respondent developed and patented a drug 'Sorafenib' and sold it under the brand name "NEXAVAR". They launched it in India in 2008. It was useful in treating kidney and

liver cancer. It was not a life saving drug but only a life extending drug. The drug has to be taken by the patient throughout his lifetime and the cost of therapy is Rs. 2,80,428/- per month and Rs. 33,65,136/-per year. The Appellant is a generic drug manufacturer in India and has developed a process for manufacturing the said drug in bulk in the form of tablets. The appellant requested for a voluntary licence and proposed to sell the drug at Rs. 8800/- per month.

**Held:** The reasonable requirements of the public with respect to the patented invention have not been satisfied and this makes out a fit case for the grant of Compulsory License. It stands to common logic that a patented article like the drug in this case was not bought by the public due to only one reason, i.e. its price was not reasonably affordable to them. Hence, I conclude beyond doubt that the patented invention was not available to the public at a reasonably affordably price and that Section 84(1)(b) of the Patents Act, 1970 is invoked in this case. Consequently, a compulsory license be issued to the Applicant under Section 84 of the Act.

**Subject Matter :** Ever greening of patent/ mailbox applications

**Relevant Section :** **Section 2(1)(ja):** defines 'inventive step' as a technical advancement which is not obvious for a man skilled in the same field and which is economically significant also; **Section 3(d):** talks about the difference between a mere discovery and a true invention. It says that a new use of or a derivative of an already existing substance cannot be considered as an invention.

**Key Issue :** Whether the form of drug was new and inventive as per the provisions of the Act?

**Citation Details :** Novartis AG vs. Union of India (UOI) and Ors. (01.04.2013 - SC):  
[MANU/SC/0281/2013](#)

**Summary Judgment :**

**Facts:** The Appellant requested for the patent on the beta crystalline form of Imatinib Mesylate known as Gleevec. The form was claimed to have better thermodynamic stability(can be maintained irrespective of temperature), lower hydroscopicity(absorption of water was more)- it could be made into tablets now and increased bioavailability- could be absorbed by the body more hence the dosage can be lowered. All these factors contribute to improved efficacy of the drug. In 1997, when the appellant filed its application for patent, the law in India with regard to product patent was in a transitional stage and the appellant's application lay dormant under an arrangement called "**the mailbox procedure**". Before the application for patent was taken up for consideration, the appellant made an application on March 27, 2002, for grant of exclusive marketing rights (E.M.R.) for the subject product under Section 24A of the Act, which was at that time on the statute book and which now stands deleted. The Patent Office granted E.M.R. to the appellant on November 10, 2003. The appellant's application for patent was taken out of the "mailbox" for consideration only after amendments were made in the Patents Act, with effect from January 1, 2005. But before it was taken up for consideration, the patent application had attracted five (5) pre-grant oppositions in terms of Section 25(1) of the Act. And it was in response to the pre-grant oppositions that the appellant had filed the affidavits on the issue of bioavailability of Imatinib Mesylate in beta crystalline form.

**Held:** The new form is only a derivative of an existing polymorph and falls u/s.3(d). Gleevec was already discovered in 1993 and hence could be anticipated. The anticipation need not to be exact, the possibilities are also covered. The improved efficacy could not be proved due to lack of documents. The prior effects of the drug has to be shown as magnified. Simple removal of side effects will not be considered as improvements. **Obiter:** If the different

forms of existing polymorphs will be given patents, it will lead to evergreening of patents. It cannot be allowed.

**Subject Matter :** Novelty

**Relevant Section : Section 2(1) l:** defines 'new invention' as something which is not anticipated by postulating of theories or already being used elsewhere in the world.

**Key Issue :** a. Whether it is a new manufacture or only an improvement?

b. Whether it involves an inventive step?

**Citation Details :** Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries (1979) 2 SCC 511; MANU/SC/0255/1978

**Summary Judgment :**

**Facts:** The respondent found out that the petitioner was using the same machine in his unit as him, for manufacturing utensils. The petitioner's machine had clips on the side of the conveyer belt so that the utensils didn't fall down. The respondent challenged the validity of the patent of petitioner's machine.

**Held:** a. Patent was granted incorrectly, hence cannot sue others for patent infringement. "Just because a patent is granted by the Controller, does not mean it is valid absolutely and cannot be challenged." The case was decided u/1911 Act. The patent was held invalid on the grounds of no novelty and obviousness.

b. The clips were just a workshop improvement and lacked inventive step. Doctrine of equivalence was applied and was held that there was no substantial difference between the two devices.

**Subject Matter :** Doctrine of equivalence; Doctrine of Pith & Marrow

**Relevant Section :**

**Key Issue :** Whether the two products similar or had substantial difference?

**Citation Details :** Ravi Kamal Bali vs. Kala Tech and Ors. (03.06.2008 - BOMHC)

[MANU/MH/0549/2008](#)

**Summary Judgment :**

**Facts:** The plaintiff invented a lock which was tamper-proof and was in vertical shape and position. The respondent manufactured the same locks only in horizontal shape and position.

**Held:** Applying the two doctrines, it could be seen that the two products have no substantial difference. They are both based on the same technology and work in the same manner. Hence, there is a violation.

**Subject Matter :** Inventive Step & Traditional Knowledge

**Relevant Section : Section 2(1) ja:** defines 'inventive step' as a technical advancement which is not obvious for a man skilled in the same field and which is economically significant also.

**Key Issue :** Whether there is any infringement?

**Citation Details :** Dhanpat Seth v. Nilkamal Crates Ltd., AIR 2008 HP 23;

[MANU/HP/0206/2007](#)

**Summary Judgment :**

**Facts:** Plaintiff had a patent of a device that carried horticulture products in it. The basket was made of nylon and ropes that of plastic. Respondent was selling almost exactly the same device to the horticulture department.

**Held:** Alleged patent was held invalid on the grounds of prior use. It was said that the locals were already using such a device known as 'KILTA' as part of their traditional knowledge. Hence it lacks inventive step. Therefore, there is an infringement.

**Subject Matter :** Non- obviousness

**Relevant Section : Section 2(1) ja:** defines 'inventive step' as a technical advancement which is not obvious for a man skilled in the same field and which is economically significant also;

**Section 3(d):** talks about the difference between a mere discovery and a true invention. It says that a new use of or a derivative of an already existing substance cannot be considered as an invention.

**Key Issue :** a. Whether Hoffman can sue for infringement of Patent since it is only a Licencee and not the patent owner?

b. Whether the patent was granted incorrectly to CIPLA?

**Citation Details :** F. Hoffmann- La Roche Ltd., Switzerland and OSI Pharmaceuticals, Inc., New York Vs. Cipla Ltd., Mumbai Central, Mumbai (2012) 195 DLT 641; MANU/SCOR/29966/2017

**Summary Judgment :**

**Facts:** "ERLOTINIB" is a drug developed by **Pfizer** which is used for the treatment of Cancer. It is a derivative of "QUINAZOLIN". Hoffman is the sole licensee of the drug. It was found by Hoffman that Cipla was manufacturing the exact same drug and selling it under a different name.

**Held:** Both issues are independent of each other.

a. Since, Pfizer is only the owner and not a party to the suit, the patent cannot be revoked. Hoffman can sue for patent infringement.

b. Secondly, the drug lacks inventive step and non obviousness as it is based on 3 European Union patents. Also, it is a derivative of a known substance which is not new and not patentable. Hence, the patent has been granted incorrectly. Therefore, there is no infringement in this case.

**Subject Matter :** Industrial Application/ Vendability Test

**Relevant Section : Section 2(1) ac:** defines vendability or industrial application as a product which could be manufactured at a large scale and could be sold in the market; **Section 3(b):** talks about the non patentability of an invention on the ground of harm to animal and plant life and health; **Section 3(j):** says that only micro organisms are patentable, plants, seeds, animals and the biological processes for their production are not patentable.

**Key Issue :** Whether the patent granted is against morality?

**Citation Details :** Diminaco AG v. Controller of Patent & Design, 2002 IPLR 235 (Cal HC)

**Summary Judgment :**

**Facts:** The process of Anti Bacteria Vaccine "Vursitis" was patented. Above patent was refused by the Controller on the grounds of morality, natural living organisms cannot be granted patents.

**Held:** The court does not have the power to GRANT the patent. Hence, it was sent back to the Controller for re-evaluation. It was also said that refusal on this ground was not applicable. Secondly, the product merely used in industry cannot be patented. Vendibility needs to be checked. It should be capable of being sold.

**Subject Matter :** Biotechnology Inventions

**Relevant Section : Section 3(j):** says that only micro organisms are patentable, plants, seeds, animals and the biological processes for their production are not patentable.

**Key Issue :** Whether the naturally occurring substances per se are patentable?

**Citation Details :** Diamond v. Chakraborty, 447 US 303 1980; MANU/USSC/0129/1980

**Summary Judgment :**

**Facts:** Chakraborty is a scientist who developed a strand of bacteria which broke crude oil into proteins.

**Held:** "Anything under the sun, made by man can be patented." Sufficient human intervention in a naturally occurring substance is patentable. Hence, naturally occurring substances per se are not patentable.



## TRADEMARKS ACT, 1999

**Subject Matter :** Character Merchandising / Celebrity Merchandising

**Relevant Section :**

**Key Issue :** Does the unauthorized or unlicensed use of the artist's reputation with respect to goods come under the purview of Trademark?

**Citation Details :** D.M. Entertainment Pvt. Ltd. vs. Baby Gift House and Ors. (29.04.2010 - DELHC) : [MANU/DE/2043/2010](#)

**Summary Judgment :**

**Facts:** The Defendants were making huge profits by selling the plaintiff's miniature dolls without any permission or license from his company DM Entertainment which owns the Trademark Daler Mehndi. The plaintiff's contention was that they are cashing on the artist's popularity and passing off the dolls as actually being associated with him.

**Held:** In a passing off action, one has to see as to whether the Defendant is selling goods/service so marked to be designed or calculated to lead purchasers to believe that they are plaintiffs goods. Even if a person uses another's well-known trademark or trade mark similar thereto for goods or services that are not similar to those provided by such other person, although it does not cause confusion among consumers as to the source of goods or services, it may cause damage to the well-known trade mark by reducing or diluting the trademarks power to indicate the source. Further, where a person uses another person's well-known trade mark or trademark similar thereto for the purpose of diluting the trade mark, such use does not cause confusion among consumers but takes advantage of the goodwill of the well-known trade mark, it constitutes an act of unfair competition.

**Subject Matter :** Infringement of a registered Trademark.

**Relevant Section : Section 2(1)(m):** "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.

**Section 9: Absolute grounds for refusal of registration** - A trademark shall not be registered if- (i) it is deceptively similar (ii) it depicts the nature of trade/quality of the product (iii) it causes confusion to the public (iv) it is religiously provocative.

**Section 29(1): Infringement of registered trade marks** - A registered trade mark is infringed by a person who, not being a registered proprietor, uses for his trade, a mark which is identical with, or deceptively similar to, the trade mark registered for the same kind of goods/services.

**Key Issue :** Whether the plaintiff's right under the Trademarks Act is infringed by the defendant?

**Citation Details :** Meher Distilleries Private Limited vs. SG Worldwide Inc. and Ors. (23.08.2021 - BOMHC) : [MANU/MH/2259/2021](#)

**Summary Judgment :**

**Facts:** Plaintiff produces and deals with alcoholic beverages. The distillery of the Plaintiff is in village Aswa. On 11 April 2014, Plaintiff applied for registration of the trademark THE ASWA under the Trade Marks Act, 1999. The application was granted in the year 2016, and Plaintiff got registration of the trademark THE ASWA in Class-33 in respect of whiskey, vodka, brandy, rum, gin, wine, alcoholic coolers, alcoholic mixes, country liquor. Plaintiff sought permission to use the label with trademark THE ASWA as per the State Excise Rules and was granted the same on 18 August 2020. Plaintiff came to know that the Defendant was manufacturing and exporting a single malt whiskey under the trademark ASA VA. The Excise Department approved Defendant's label for the product 3 September 2020. Plaintiff filed Commercial I.P. Suit. The Plaintiff contended that the Defendants trademark ASA VA is identical/deceptively similar to the Plaintiff's trademark THE ASWA, the goods in respect of which the Defendants are using the trademark are identical to the goods in which the Plaintiff has registered the trademark, and it will likely cause confusion on the part of the public or is likely to have an association with the registered trademark. Plaintiff alleging infringement sought prayer for restraining the Defendants from using the mark ASA VA. Plaintiff also sought damages.

**Held:** There is no factual enquiry as to the likelihood of confusion in respect of the rival marks in question. The legal and factual implications if the rival marks are deceptively similar and that the Plaintiff product is not in the market. While we remand the matter, we set aside the finding of the learned Single Judge that RAMPUR ASA VA and not ASA VA alone is the trademark of the Defendant. We also set aside the finding that there is no visual, phonetic or structural similarity between THE ASWA and ASA VA and the similarity/identity will have to be decided as per the settled principles enumerated above.

**Subject Matter :** Limits on effect of registered trademark.

**Relevant Section : Section 30(2)(a):** A registered trade mark is not infringed where the use in relation to goods or services indicates any of the characteristics of goods or services.

**Key Issue : a.** Whether by the virtue of Section 30 Defendants would be saved from the charge of infringement of trade mark?

**b.** Whether Defendants were guilty of infringing the trade mark of Plaintiff by using the mark "MADHUR"?

**c.** Whether the opposition made by the Plaintiff for the registration of the Defendant's label mark was irrelevant?

**Citation Details :** Hem Corporation Pvt. Ltd. and Ors. vs. ITC Limited (11.04.2012 - BOMHC) [MANU/MH/0535/2012](#)

**Summary Judgment :**

**Facts:** The plaintiff claims to be the registered proprietor of the marks "MADHUR GULAB", "MADHUR" and the word "MADHUR" written in devnagiri script. The defendant has

challenged the first plaintiffs proprietorship of the marks as well as its right to maintain this action for infringement.

**Held:** **a.** Section 30 provides for the limits on effect of registered trade mark, but these provisions would come to the Defendant's aid only if the Defendant established that the use of the mark in relation to goods was to indicate their quality or it established that the use of the mark was a bona fide description of the quality of the goods. It was held that the use of the impugned mark was as a trade mark and not as descriptive of the Defendant's products sold under the mark. These provisions, therefore, did not come to the Defendant's aid.

**b.** As per the chronology of the application and registration status the Defendant had knowledge of the Plaintiff's claim, at least from 7th February, 2007. Therefore, the delay in the facts of this case would not disentitle the Plaintiffs to an injunction against infringement. The Defendant's continued use of the mark was at its own peril.

**c.** When he opposes the registration of the mark, he claims the exclusive right to use the mark and thereby opposes the right of the others to use the mark or any mark deceptively similar thereto or to have it registered. A view to the contrary, was not even stable. Hence, Defendant was guilty of infringing the registered trade mark of Plaintiff.

**Subject Matter :** Anti - Dissection rule.

**Relevant Section : Compare composites as a Whole:** This rule mandates that the Courts whilst dealing with cases of trademark infringement involving composite marks, must consider the composite marks in their entirety as an indivisible whole rather than truncating or dissecting them into its component parts and make comparison with the corresponding parts of arrival mark to determine the likelihood of confusion. The *raison d'être* underscoring the said principle is that the commercial impression of a composite trademark on an ordinary prospective buyer is created by the mark as a whole and not by its component parts.

**Key Issue :** Whether the respondent is liable for infringement of the trademark under the concept of deceptively similar marks?

**Citation Details :** South India Beverages Pvt. Ltd. vs. General Mills Marketing Inc.  
(13.10.2014 -DELHC): [MANU/DE/2574/2014](#)

**Summary Judgment :**

**Facts:** Appellant - defendant in the suit, assails the order granting an interim injunction against the appellant restraining the appellant from using the mark 'D'DAAZS' or any other mark deceptively similar to that of the respondent - plaintiff's trade mark 'HAAGEN-DAZS' in relation to ice cream. The respondent - plaintiff company has been incorporated under the laws of Delaware, USA and claims to be marketing, over a hundred consumer brands (processed food and ice cream) , in over a hundred countries across the globe. It claims to be manufacturing desserts such as ice-creams and frozen yogurts under the trademark 'HAAGEN DAZS' which according to it is an arbitrary word having no dictionary meaning. 'HAAGEN DAZS' has been made available in India only since the year 2007, however, the respondent - plaintiff obtained registration for the mark 'HAAGEN DAZS' in India in respect of ice cream, ices, sherbet, sorbet and frozen confections in class 30 with effect from January 21, 1993 and for food products in classes 29, 30 and 42 on January 01, 2008. The appellant - defendant on the other hand, has been manufacturing ice-creams and frozen desserts under the name 'D'DAAZ' since the year 2009. It was stated that the word 'D'DAAZ' is derived from the name of Late Dwarka Das, who was the father of one of the founder directors of the company. It is stated that the appellant - defendant has been supplying ice-creams across South India.

**Held:** Consumers of any product do not deliberately memorize marks. They only retain a general, indefinite, vague, or even hazy impression of a mark and so may be confused upon encountering a similar mark. Consumers may equate a new mark or experience with one that they have long experienced without making an effort to ascertain whether or not they are the same marks. The consideration therefore is whether one mark may trigger a confused recollection of another mark. Thus, if the marks give the same general impression confusion is likely to occur. The 'ordinary observer' test is applied to determine if two works are substantially similar. The Court will look to the response of an 'average lay observer' to ascertain whether a copyright holder's original expression is identifiable in the allegedly infringing work 274 F.2d 487 (2nd Cir. 1960) Peter Pan Fabrics Inc. v. Martin Weiner Corp. Since it is employed to determine qualitative and quantitative similarity in visual copyright work, the said test can also be usefully applied in the domain of trademark law as well. The Courts have reiterated that the test for substantial similarity involves viewing the product in question through the eyes of the layman. A layman is not expected to have the same 'hair-splitting' skills as an expert. A punctilious analysis is not necessary. A layman is presumed to have the cognition and experiences of a reasonable man. Therefore, if a reasonable observer is likely to get confused between the two products then a copyright violation is said to take place. Transposing the said principles in the context of trademark infringement, one may venture to assess similarity and likelihood of confusion between rival marks on the touchstone of the impression gathered by a reasonable observer, who is a layman as opposed to a connoisseur.

**Subject Matter :** Phonetic Similarity & Deceptively similar marks.

**Relevant Section : Section 2(1) h:** if a mark causes confusion or deception due to some similarity with other mark, it is said to be deceptively similar;

**Section 11(1) b:** deceptively similar mark cannot be registered.

**Key Issue :** Whether the two marks are deceptively similar?

**Citation Details :** F Hoffman Laroche v. Geoffrey Manner & Co. PTC (Suppl) (1) 88 (SC): [MANU/SC/0302/1969](#)

**Summary Judgment :**

**Facts:** The two marks 'Dropovit' and 'Protovit' were found to be partially similar.

**Held:** The two marks need to be compared as a whole and not in parts. Last part is common does not clarify if the entire mark is similar or not. The kind of products sold under the two names is also of relevance. The true test is whether the totality of the proposed trademark was such that it was likely to cause deception or confusion or mistakes in the minds of persons accustomed to the earlier trademark.

**Subject Matter :** Phonetic Similarity & Deceptively similar marks.

**Relevant Section : Section 2(1) h:** if a mark causes confusion or deception due to some similarity with other mark, it is said to be deceptively similar;

**Section 11(1) b:** deceptively similar mark cannot be registered.

**Key Issue :** Whether the respondent is liable for infringement of the trademark under the concept of passing off?

**Citation Details :** Encore Electronics Ltd. vs. Anchor Electronics and Electricals Pvt. Ltd. (22.02.2007): [MANU/MH/0069/2007](#)

**Summary Judgment :**

**Facts:** The Respondent before the Court instituted a suit for injunction restraining the Appellant from in any manner using the mark "Encore" or any other deceptively similar mark in relation to electrical or electronic goods including dish antennae. The action was based on

a case of infringement and for passing off. The Plaintiff is a registered proprietor of various trademarks including the word marks Anchor, Ankur, Anchor, Ankar, Anker, Ansor and Ancor. The corporate name, according to the Plaintiff, has acquired a reputation in the market and the Defendant has adopted the corporate name and style of "Encore Electronics Limited" which is deceptively similar, misleading and liable to cause confusion.

**Held:** In the present case, the reliance placed in the course of the submissions on behalf of the Defendant of its mark having an origin in a French word is, as already noted in the earlier part of the judgment neither bonafide nor an honest defence. The Court must have a realistic consciousness of the fact that both the marks are used in the Indian market and it is a consumer in India whose observation and assessment must guide the decision making. The manner in which the rival marks would be ordinarily pronounced and the manner in which the marks would be written in Indian languages constitutes an important indicator of whether a case of deceptive similarity has been established. . The essential requirements in an action for passing off have been duly established. The balance of convenience lies in favour of the Plaintiff. The large turn over of the Plaintiff is borne out by the figures which have been disclosed in the plaint. The Plaintiff has expended extensive sums of money in advertising and publicity. Irreparable harm and prejudice is liable to be caused to the business of the Plaintiff, unless an interlocutory order of injunction were to be passed as prayed. The goodwill and reputation associated with the Plaintiff's mark, cultivated as it has been over a period of three decades when the suit was instituted would be liable to suffer serious damage unless the Defendant was to be injuncted.

**Subject Matter :** Phonetic Similarity & Deceptively similar marks.

**Relevant Section : Section 2(1) h:** if a mark causes confusion or deception due to some similarity with other mark, it is said to be deceptively similar;

**Section 11(1) b:** deceptively similar mark cannot be registered.

**Key Issue :** Whether a trade name is likely to deceive or cause confusion by its resemblance to an already registered mark?

**Citation Details :** Amritdhara Pharmacy vs. Satyadeo Gupta (27.04.1962 - SC):

MANU/SC/0256/1962

**Summary Judgment :**

**Facts:** The application was made by the respondent as the sole proprietor of Rup Bilas Company for the trade name of a biochemical medicinal preparation, commonly known as 'Lakshmandhara' in Kanpur. The said medicinal preparation had been in use by the name of 'Lakshmandhara' since 1923 and was sold throughout the length and breadth of India as also in some foreign markets; the mark or name 'Lakshmandhara' was said to be distinctive to the article. In the opposition application the appellant stated that the word 'Amritdhara' was already registered as a trade name for the medicinal preparation of the appellant, and that medicinal preparation was introduced in the market so far back as in the year 1901. It was averred that the composite word 'Lakshmandhara' was used to denote the same medicine as 'Amritdhara'; and the single word 'dhara', was first used in conjunction with 'Amritdhara' to denote the medicine of the appellant and the medicine 'Lakshmandhara' being of the same nature and to quality could be easily passed off as 'Amritdhara' to the ultimate purchaser. The appellant contended that as 'Amritdhara' was already registered and 'Lakshmandhara' being a similar name was likely to receive the public, registration should be refused.

**Held:** Whether a mark is similar in any way is a matter of first impression and has to be decided by taking an over all view of all the circumstances. The standard of comparison to be adopted in judging the resemblance is from the point of view of a man of average intelligence

and imperfect recollection. It was further held that the two names as a whole should be considered for comparison and not merely the component words thereof separately.

**Subject Matter :** Well Known Trademarks - Power of Court over Registration.

**Relevant Section : Section 2(1) zg:** defines a mark which is not registered but has earned a goodwill in the eyes of the population in a certain territory due to its goods and services;

**Section 11(6):** the registrar of trademark can take into account certain factors in order to determine a mark as a well known trademark-recognition in society and geographical extent and duration of use and its promotion.

**Key Issue :** Whether unregistered trademarks can be protected under well-known trademark?

**Citation Details :** Rolex SA vs. Alex Jewellery Pvt. Ltd. (15.09.2014 - DELHC):

[MANU/DE/2396/2014](#)

**Summary Judgment :**

**Facts:** Rolex is a well known trademark for watches. Alex Jewellery used the name Rolex for their new line of accessories.

**Held:** Rolex is a well known trademark. Although not registered, it will get protection under well known trademarks as it has a reputation and goodwill in the market. It is also a trusted brand.

**Subject Matter :** Well Known Trademarks - Power of Court over Registration.

**Relevant Section : Lanham (Trademark) Act, (15 U.S.C) - §1119 & U.S. Federal**

**Statutes - Section 37:** In any action involving a registered mark the court may determine the right to registration, order the cancellation of registrations, in whole or in part, restore cancelled registrations, and otherwise rectify the register with respect to the registrations of any party to the action. Decrees and orders shall be certified by the court to the Director, who shall make appropriate entry upon the records of the Patent and Trademark Office, and shall be controlled thereby.

**Key Issue :** Whether A&F is entitled to protection under the concept of well-known trademark?

**Citation Details :** ABERCROMBIE and FITCH CO. Vs. HUNTING WORLD (16.01.1976 - 2nd Circuit): MANU/FESC/0340/1976

**Summary Judgment :**

**Facts:** This appeal has been filed by Abercrombie & Fitch Company (A&F), owner of well-known stores at Madison Avenue and 45th Street in New York City and seven places in other states, against Hunting World, Incorporated (HW), operator of a competing store on East 53rd Street, for infringement of some of A&F's registered trademarks using the word 'Safari'. A&F has spent large sums of money in advertising and promoting products identified with its mark 'Safari' and in policing its right in the mark, including the successful conduct of trademark infringement suits. HW, the complaint continued, has engaged in the retail marketing of sporting apparel including hats and shoes, some identified by use of 'Safari' alone or by expressions such as 'Minisafari' and 'Safariland'. Continuation of HW's acts would confuse and deceive the public and impair "the distinct and unique quality of the plaintiff's trademark." A&F sought an injunction against infringement and an accounting for damages and profits.

**Held:** We conclude that cancellation should have been directed only with respect to the New York registration. With respect to the remaining registration A&F will have the benefits accorded by § 7(b) that registration shall be "prima facie evidence of the validity of the

registration and of registrant's exclusive right to use the mark in commerce," 15 U.S.C. § 1057(b). This means not only that the burden of going forward is upon the contestant of the registration but that there is a strong presumption of validity so that the party claiming invalidity has the burden of proof and must put something more into the scales than the registrant.

**Subject Matter :** Passing off

**Relevant Section :** Passing off is the act of misrepresenting one's own goods as someone else's by using their name and goodwill. This is basically for the unregistered marks.

**Section 27 (2):** This section states that no provision of this Act will prevent any person with unregistered goods from exercising his rights against passing off of his goods.

**Key Issue :** Whether the use of words 'DON' conjunctively or disjunctively by defendant No. 1 in respect of some of its hosiery products as its identify mark whether in conjunction with its registered trade mark "RUPA" to be read as "RUPA DON" or the word mark "DON" separately used as feature of identifying the commodity for marketing as one of specific brand of its hosiery products?

**Citation Details :** Rupa & Co. Ltd. v. Dawn Mills Co. Ltd, (AIR 1998 Guj. 247):

[MANU/GJ/0004/1998](#)

**Summary Judgment :**

**Facts:** The plaintiff is a public limited company and is carrying on business of manufacturing, marketing and selling hosiery. The word "DAWN" is a main and essential feature of the plaintiff's trade mark which is registered under Trade Mark Act. The defendant No. 1 is also a company engaged in the business of manufacturing and marketing hosiery products. The registered trade mark for marketing its hosiery products is "RUPA". The plaintiff's trade mark has been registered and in use by it for over 40 years.

**Held:** That the use of the word 'DON' by the Rupa Company was *prima facie* an infringement of the registered trademark 'DAWN' owned by the Dawn Mills 'Ltd under the concept of passing off. The Court held that this was a fit case for grant of an injunction. "I am not inclined to make any modification in the order passed by the trial Court at this stage without expressing any opinion on the question whether the user of the word 'RUPA-DON' as suggested by the defendants at this stage in future would amount to infringement or not, except to that in the circumstances of this pending litigation, if such permission is granted, the apprehension of the plaintiff that it is likely to cause confusion and give wrong signals is justified."

**Subject Matter :** Passing off

**Relevant Section :** Passing off is the act of misrepresenting one's own goods as someone else's by using their name and goodwill. This is basically for the unregistered marks.

**Section 27 (2):** This section states that no provision of this Act will prevent any person with unregistered goods from exercising his rights against passing off of his goods.

**Key Issue :** **a.** Whether the plaintiffs had a locus standi in passing off action against the defendants under the Trade and Merchandise Marks Act, 1958?  
**b.** Whether the plaintiffs were entitled to temporary injunction to prevent the advertisement and sale of the abovementioned product?  
**c.** Whether the delay by plaintiff in passing off action against the defendant could disentitle them to interim relief?

**Citation Details :** Scotch Whisky Association & Anr. v. Pravara Sahakar Shakar Karkhana Ltd. (AIR 1992 Bom 294): MANU/MH/0052/1992

**Summary Judgment :**

**Facts:** The plaintiff was 'The scotch whisky association' a company incorporated in the U.K. for protecting and promoting interest of scotch whisky trade and the co-plaintiff exported on a large scale, scotch whisky to India. The plaintiffs have instituted this passing off action against the defendants for a declaration that by using the device of a Scottish Drummer wearing a kilt or the tartan band or the word 'Scotch' coupled with the description "Blended With Scotch" and by using the impugned label on their Indian whisky marketed under the mark "Drum Beater", the defendant is passing off its whisky as "Scotch Whisky", misleading the other traders and customers and damaging the reputation and goodwill of Scotch Whisky' and its genuine distillers, blenders etc. by suggesting Scottish origin, so as to pass off or enable others to pass off its whisky as "Scotch Whisky." The defendant resorted to unfair device of using the words 'blended with scotch' on their Indian whisky and got indulged in colourable imitation and unfair trading to reap harvest by exploiting the plaintiff's goodwill. They practiced it intentionally and deliberately.

- Held:**
- That the plaintiff had sufficient interest and locus standi to prevent the passing off of Indian whisky manufactured by the defendants as scotch whisky and to prevent the damage to the reputation and goodwill of their trade.
  - That the plaintiffs were entitled to temporary injunction against the defendants, who partly told the truth and then mixed it up with the colourable device, with which product has no natural association.
  - That the delay could not disentitle them to interim injunction by way of injunction.

**Subject Matter :** Passing off

**Relevant Section :** Passing off is the act of misrepresenting one's own goods as someone else's by using their name and goodwill. This is basically for the unregistered marks.

**Section 27 (2):** This section states that no provision of this Act will prevent any person with unregistered goods from exercising his rights against passing off of his goods.

**Key Issue :** Whether Defendant had right to manufacture same shapes of bottle as manufactured by Plaintiff?

**Citation Details :** Gorbatschow Wodka K.G. vs. John Distilleries Limited (02.05.2011 - BOMHC): MANU/MH/0630/2011

**Summary Judgment :**

**Facts:** The shape of a bottle of Vodka gives rise to the controversy in these proceedings. The Plaintiff, in a quia timet action, asserts that the shape of its bottles of Vodka is distinctive and forms an intrinsic part of its goodwill and reputation. The grievance of the Plaintiff is that the Defendant has invaded its intellectual property rights by adopting a deceptive variation of the shape of the bottles of the Plaintiff. The case presents an interesting question, argued with felicity on both sides.

**Held:** The point is that an unwary consumer of low priced, fast moving consumer goods is more likely to be deceived than a purchaser of a premium commodity. The inference sought to be drawn is that passing off is more likely in the former and improbable in the case of the latter. The remedy in passing off would be rendered illusory if such an argument were to be accepted. The law has not restricted the remedy only in relation to goods of a particular nature or quality but across the spectrum of trade and business. As contemporary experience shows goods and services across the spectrum are subject to imitation and piracy. The protection of the remedy in passing off is as much available to a manufacturer who invests capital, time and ingenuity in producing premium goods or services or those styled as fast moving consumer goods. The Court will not readily assume that because consumers of

premium goods and services have higher disposable incomes or, as the Defendant states are educated, that the likelihood of deception is minimal. The class of purchasers is undoubtedly a relevant consideration, but the Court must have due regard to all the relevant circumstances including that. The Plaintiff has, in these circumstances, made out a strong *prima facie* case for the grant of injunction. The balance of convenience must necessarily weigh in favour of the Plaintiff which has an established reputation. Irreparable injury would be caused to the established reputation and goodwill of the Plaintiff if the Defendant is allowed to proceed ahead.

**Subject Matter :** Distinctiveness

**Relevant Section : Section 9 (1) a:** talks about the distinctive character of the mark, that it should be able to differentiate one's goods from another.

**Key Issue :** Whether the mark has acquired distinctiveness to qualify for registration?

**Citation Details :** Sarda Plywood Industries Ltd. V. Deputy Registrar of Trade Marks, 2007 (34) PTC 352 (IPAB): MANU/IC/0042/2006

**Summary Judgment :**

**Facts:** The appellants are engaged in the business of manufacturing and marketing of plywood, decorative and industrial laminates, black boards, shuttering plywood, boards and plywood for marine use and teak ply all being goods included in class 19. The appellants had adopted the trade mark "Duro" and had applied for registration of a label mark consisting of the word "Duro". The second respondent herein had filed their notice of opposition objecting to the said application for registration. The second respondent in their notice of opposition had averred that they are engaged in the business of manufacturing and selling PVC doors and windows, etc. and are the registered proprietors of the trade mark "Duroplast" being used since 1987. They also stated that by extensive use and wide publicity the mark "Duroplast" is exclusively identified and associated with them. They further stated that the registration of the impugned mark which is deceptively similar to their mark was likely to cause confusion and deception.

**Held:** The use of the mark for a period of one year and more prior to the filing of the application for registration of the mark could not have acquired any distinctiveness. On perusal of sales figures and the bills and vouchers, it is seen that the appellant has used since 1964 various marks with Duro as a prefix and "Duro" word per se has been used since 1.10.87 as stated in the application. To qualify for registration under Section 9 of the Act, the mark should have acquired distinctiveness by long user. The mark should be distinctive of the goods of the proprietor or should be capable of distinguishing the goods of the proprietor from the other proprietors. We are of the opinion that the requisites for qualifying for registering under Section 9 of the Act is lacking as the user of the mark is only for a period of one year and more. We, therefore, are of the view that the finding of the Assistant Registrar to this issue sustains.



## ARMY ACT, 1950

**Subject Matter :** Recruitment of “females” into the Army.

**Relevant Section : Section 10:** The President may grant a commission as an officer, or as a junior commissioned officer or appoint any person as a warrant officer of the regular Army, as he thinks fit.

**Section 12:** No female shall be eligible for enrollment or employment in the regular Army, except in such corps, department, branch or other body forming part of, or attached to any portion of, the regular Army as the Central Government may specify.

**Key Issue :** a. Whether women should be granted Permanent Commission in the Indian Army?

b. What are the conditions governing the Women Officers in the Indian Army?

**Citation Details :** The Secretary, Ministry of Defence vs. Babita Puniya and Ors.

(17.02.2020 - SC): [MANU/SC/0194/2020](#)

**Summary Judgment :**

**Facts:** In 1992, the Central government issued a notification allowing females to join certain cadres of the army like induction in Short Service Commission. So in February 2003, Babita Puniya, a practising advocate, filed a writ petition in the nature of public interest litigation at Delhi High Court, seeking permanent commission for female officers recruited through SSC in the army, at par with their male counterparts. Then in 2008, the centre decided to grant permanent commission to SSC women officers in some departments such as the Army Education Corps. Afterwards the appellant approached with other arguments to the court along with the issue that border areas lack very basic and minimal facilities and thus the deployment of women officers in such areas is not advisable because of habitat and hygiene.

**Held: a.** It was held that policy decision taken by the Union allowing the women officers in PCs through SSC are subject to some conditions that all the women officers presently on SSC service are eligible to PCs irrespective of any of them crossed fourteen years of service or, as the case may be, twenty years of service.

**b.** All the choices of specialization shall be available to the women officers at the time of opting for the grant in PCs, on the same terms as their male counterparts and so necessary steps should be taken for the compliance of the court’s decision within three months of the judgment.

**Subject Matter :** Dismissal, removal or reduction by the Chief of the Army Staff and by other officers.

**Relevant Section : Section 20:** The Chief of the Army Staff may dismiss or remove from the service any person subject to this Act, other than an officer; may reduce to a lower grade or rank or the ranks, any warrant officer or any non-commissioned officer.

**Key Issue :** Whether impugned order of dismissal from service was sustainable?

**Citation Details :** Sanjay Marutirao Patil vs. Union of India (UOI) and Ors. (24.01.2020 - SC): [MANU/SC/0080/2020](#)

**Summary Judgment :**

**Facts:** Appellant joined Indian Army as Sepoy and was promoted as Naik. He was served with charge sheet levelling three charges of misconduct. He was called upon to face Summary Court Martial. Summary Court Martial proceedings were completed and Appellant was awarded with punishment of reduction in rank. Thereafter Appellant was served with show cause notice as to why he should not be discharged from Army service under provisions of Section 20 of Act read with Rule 17 of Rules, 1954. He replied to said show cause notice and denied allegations made therein. Thereafter Respondents terminated Appellant's services. Feeling aggrieved, Appellant preferred appeal, which came to be rejected. Thereafter

Appellant approached High Court whereby High Court had dismissed writ petition and had refused to interfere with order of dismissal. Hence, present appeal.

**Held:** While treating and considering the offences as fraudulent in nature and thereafter giving an opportunity to the Appellant and having been satisfied that the Appellant cannot be continued in service, the order of dismissal had been passed by Respondent No. 3 in exercise of powers under **Section 20** of the Army Act read with Rule 17 of the Army Rules. Therefore, the order of dismissal passed could not be said to be violative of the principle of double jeopardy. The order of dismissal in the present case was specifically passed under Section 20 of the Army Act. Therefore, the justification of the order of dismissal which was the subject matter of the present appeal was not sustainable. However, order of dismissal which was the subject matter before the High Court and even before this Court which had been passed under Section 20 of the Army Act read with Rule 17 of the Army Rules was just, proper, legal and valid and the same was rightly not interfered by the High Court.

**Subject Matter :** Immunity from arrest for debt.

**Relevant Section : Section 29:** No person subject to this Act shall, so long as he belongs to the Forces, be liable to be arrested for debt under any process issued by, any civil or revenue court or revenue officer. The judge of any such court may examine into any complaint of the arrest of such person contrary to the provisions of this section and may, by warrant under his hand, discharge the person, and award reasonable costs to the complainant, who may recover those costs in like manner as he might have recovered costs awarded to him by a decree against the person obtaining the process.

**Key Issue :** Whether the petitioner was entitled to the benefit of Section 29 of the Army Act?

**Citation Details :** Chitraketu Singh vs. State of U.P. and Ors. (30.01.1973 - ALLHC):

MANU/UP/0138/1973

**Summary Judgment :**

**Facts:** The honorary rank of 2nd Lieutenant in regular army was conferred on the appellant under the order of the President of India to the petitioner. Certain dues towards Land Revenue and Taqavi etc., were due from him and the State Government took steps to realise them as arrears of land revenue. Not only were steps taken to attach his property but warrant was also issued for his arrest. It was then that he moved the present writ petition asking for the quashing of the warrant of arrest on the ground that he was entitled to the benefit of Section 29 of the Army Act read with Rule 249 of U.P. Zamindari Abolition and Land Reforms Rules.

**Held:** Even though that Army Act has been repealed there is Section 29 in the Army Act, 1950 granting immunity from arrest for debt to persons subject to the Army Act for so long as they belong to the Forces. The term 'Forces' is defined as the regular army. Consequently, **the appellant is entitled to the protection of Section 29 of the Army Act, 1950 for so long as he is an officer of the regular army and in that capacity belongs to the Forces i.e., the regular army.** Nothing has been brought to our notice which may show that the President's order appointing the petitioner to the honorary rank of 2nd Lieutenant in the regular army has been withdrawn. As he holds the rank of 2nd Lieutenant and is attached to 9th Jat Regiment, and also because he is entitled to all the privileges of such 2nd Lieutenant he is entitled to immunity from arrest as laid down in Section 29 of the Army Act, 1950.

**Subject Matter :** Power to modify certain fundamental rights.

**Relevant Section : Section 21:** Subject to the provisions of any law for the time being in force relating to the regular Army or to any branch thereof, the Central Government may make rules restricting to such extent and in such manner as may be necessary the right of any

person subject to this Act--

- (a) to be a member of, or to be associated in any way with, any trade union or labour union;
- (b) to attend or address any meeting or to take part in any demonstration for any political or other purposes;
- (c) to communicate with the press or to publish any book, letter or other document.

**Key Issue :** Whether the use of certain social networking sites by defence personnel enables enemy countries to gain an edge?

**Citation Details :** P.K. Choudhary vs. Union of India and Ors. (05.08.2020 - DELHC):

[MANU/DE/1499/2020](#)

**Summary Judgment :**

**Facts:** The petition has been filed, pleading that the petitioner is currently posted in Jammu & Kashmir and is an active user of Facebook and uses the said platform inter-alia to connect with his friends and family. Hence, the petitioner, a Lieutenant Colonel with the Indian Army, is seeking a writ of mandamus directing the respondents to withdraw their policy to the extent that it bans the petitioner and other members of the Indian Army from using social networking platforms like Facebook and Instagram.

**Held:** The court held that **the warfare and inter-country rivalries and animosities today are not confined to accession of territory and destruction of installations and infrastructure of enemy countries but also extend to influencing and affecting the economies and political stability of enemy country** including by inciting civil unrest and disturbance and influencing the political will of the citizens of the enemy country. In such a scenario, if the government, after complete assessment, has concluded that permitting use of certain social networking websites by personnel of its defence forces is enabling the enemy countries to gain an edge, the Courts would be loath to interfere and the petition is dismissed.

**Subject Matter :** Choice between criminal court and court-martial.

**Relevant Section : Section 69:** Any person subject to this Act who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable under this Act.

**Section 125:** When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the commanding officer to whom the accused person is reporting or such other officer as may be prescribed to decide before which court the proceedings shall be instituted.

**Key Issue :** Whether the fundamental rights of the petitioner are violated under the principles of natural justice?

**Citation Details :** Prithi Pal Singh Bedi and Ors. vs. Union of India (UOI) and Ors.

[MANU/SC/0233/1982](#)

**Summary Judgment :**

**Facts:** The petitioner in each of the three writ petitions who was to be tried by general court martial for breach of army discipline questioned the legality and validity of the order convening the general court martial, more particularly its Composition. It was contended on behalf of the petitioners that to satisfy the requirements there must be a specific law enacted by Parliament imposing restriction or even abrogation of fundamental rights, so that the Army is assured the prized liberty of individual members against unjust encroachment. The court should strike a just balance between military discipline and individual personal liberty;

and principles of natural justice should be observed even in respect of persons tried by the Army Tribunals.

**Held:** The court observed that Courts Martial did not even write a brief reason in those cases in which they impose the death sentence. This must be remedied in order to ensure that a disciplined and dedicated Indian Army may not nurse a grievance that the substance of justice and fair play is denied to it. The constitutional validity of the Army Rule are not violative of the fundamental rights of the petitioner guaranteed under the Constitution .Thus petition is dismissed.

**Subject Matter :** Application of the Act to certain forces under Central Government; Power to modify certain fundamental rights in their application to persons subject of this Act; Violation of good order and discipline.

**Relevant Section : Section 4(1):** The Central Government may, apply all or any of the provisions of this Act to any force raised and maintained in India under the authority of that Government and suspend the operation of any other enactment for the time being applicable to the said force.

**Section 21:** Subject to the provisions of any law for the time being in force relating to the regular Army or to any branch thereof, the Central Government may make rules restricting to such extent and in such manner as may be necessary the right of any person subject to this Act--

- (a) to be a member of, or to be associated in any way with, any trade union or labour union;
- (b) to attend or address any meeting or to take part in any demonstration for any political or other purposes;
- (c) to communicate with the press or to publish any book, letter or other document.

**Section 63:** Any person subject to this Act who is guilty of any act or omission which, though not specified in this Act, is prejudicial to good order and military discipline shall, by court-martial, be liable to suffer imprisonment for a term of upto seven years.

**Key Issue : a.** Whether section 21 of Army Act, 1950 is constitutionally valid and saved by Art. 33?

**b.** Whether GREF is '**force**' within the meaning of sub section (1) and (4) of section 4 of Army Act, 1950?

**c.** Whether members of GREF are members of 'Armed Forces' within the meaning of Article 33 of Constitution?

**Citation Details :** R. Viswan and Ors. v. Union of India (UOI) and Ors.

MANU/SC/0338/1983

**Summary Judgment :**

**Facts:** The petitioners who belonged to the General Reserve Engineering Force (GREF) were charged under section 63 of the Army Act, 1950 on allegations inter-alia that they had assembled in front of the Chief Engineer and demanded release of personnel placed under arrest, participated in a black flag demonstration and associated themselves with an illegal association. They were tried by Court Martial in accordance with the prescribed procedure and, on being convicted, were dismissed from service. The petitioners submitted that their convictions by Court Martial were illegal and raised the contentions in support of their plea that the GREF was a civilian construction agency and not a 'force' raised and maintained under the authority of the Central Government and consequently, the members of GREF were not "members of Armed Forces or the Forces charged with the maintenance of public order" within the meaning of Art. 33 of the Constitution and therefore the application of s. 21 of the Army Act or the Army Rules to them were unconstitutional.

**Held:** a. Section 21 empowers the Central Government by notification to make rules restricting "to such extent and in such manner as may be necessary" three categories of rights of any person subject to the Army Act 1950. These rights which are permitted to be restricted are part of the Fundamental Rights under Clauses (a), (b) and (c) of Article 19(1) and under the constitutional scheme, they cannot be restricted by executive action unsupported by law.

Now here we find that Section 21 does not itself impose any restrictions on the three categories of rights there specified. Section 21 cannot be condemned as invalid on this ground, as it is saved by Article 33 which permits the enactment of such a provision.

b. The word "**force**" is not defined anywhere in the Army Act, 1950. Section 4, Sub-section (2) clearly contemplates that the "**force**" referred to in Sub-section (1) of Section 4 must be a force organised on similar lines as the army with rank structure. So far as GREF is concerned, there can be no doubt that it is a force organised on army pattern with units and sub units and rank structure.

c. The result is that the directly recruited GREF personnel are governed by the provisions of Central Civil Service (Classification, Control and Appeal) Rules 1965 as amended from time to time but for purposes of discipline, they are subject to certain provisions of the Army Act 1950 and the Army Rules 1954. We may make it clear it is only in regard to the members of GREF that we have taken the view that they are members of the Armed Forces within the meaning of Article 33.

## **NAVY ACT, 1957**

**Subject Matter :** Eligibility for appointment or enrollment.

**Relevant Section :** Section 9(2): No woman shall be eligible for appointment or enrollment in the Indian Navy or the Indian Naval Reserve Forces except in such department, branch or other body forming part thereof or attached thereto and subject to such conditions as the Central Government may by notification in the Official Gazette, specify in this behalf.

**Key Issue :** Whether women in Indian Navy are entitled to Permanent Commission?

**Citation Details :** Union of India (UOI) and Ors. vs. Annie Nagaraja and Ors. (17.03.2020 - SC)

**Summary Judgment :**

**Facts:** The Ministry of Defence issued a policy letter granting PCs to SSC officers in all the three branches of the Armed Forces. However, the offer was restricted to certain categories and was to operate prospectively for the benefit of future batches inducted on SSCs. The High Court held that the claim of absorption in areas of operation not open for recruitment of women officers could not be sustained being a policy decision. Thereafter in similar matters, the Armed Forces Tribunal (AFT) disagreed with the direction of the High Court for the grant of PCs and directed the authorities to consider the cases of the SSC officers for the grant of PCs. However, the AFT directed that until such consideration was made and a decision was taken, the applicants before it would be allowed to continue as SSC officers on existing terms and conditions as applicable to them.

**Held:** It was directed that female SSC officers of the ATC cadre in this case are not entitled to consideration for the grant of PCs since neither men nor women SSC officers are considered for the grant of PCs and there is no direct induction of men officers to PCs. In exercise of the power conferred by Article 142 of the Constitution, it is to direct that as a one-time measure, SSC officers in the ATC cadre in this case shall be entitled to pensionary benefits.

## MEDICAL TERMINATION OF PREGNANCY ACT, 1971

**Subject Matter :** When can pregnancies be terminated by registered medical practitioners?

**Relevant Section : Section 3:** The continuance of the pregnancy would involve a risk to the life of the pregnant woman and there would be grave injury to her physical as well as mental health.

**Key Issue :** Whether the High Court justified in dismissing application of Appellant for medical termination?

**Citation Details :** Z vs. The State of Bihar and Ors. (17.08.2017 - SC):

[MANU/SC/1011/2017](#)

**Summary Judgment :**

**Facts:** Appellant was a rape victim and she suffered from mild mental retardation. She was administered psychiatric treatment but she was in a position to express her consent and she did not desire to bear a child and thus the appellant approached High Court for termination of pregnancy. High Court rejected the application of Appellant by stating that medical termination would be harmful and injurious to the victim's life.

**Held:** The court observed that it has to be borne in mind that element of time is extremely significant in a case of pregnancy as every day matters and, therefore, the hospitals should be absolutely careful and treating physicians should be well advised to conduct themselves with accentuated sensitivity so that the rights of a woman is not hindered. The fundamental concept relating to bodily integrity, personal autonomy and sovereignty over her body have to be given requisite respect while taking the decision and the concept of consent by a guardian in the case of major should not be over emphasized and so the appeal for termination of pregnancy was allowed.

**Subject Matter :** Place where pregnancy may be terminated.

**Relevant Section : Section 3:** Where the length of the pregnancy exceeds 12 weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion formed in good faith that the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health.

**Key Issue :** Whether it is legal to terminate 24 weeks pregnancy of Petitioner as shown in Medical Report?

**Citation Details :** X vs. Union of India (UOI) and Ors. (25.07.2016- SC):

[MANU/SC/0834/2016](#)

**Summary Judgment :**

**Facts:** The Petitioner is about 22 years old and has approached this Court seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. According to the petitioner, foetus which is about 22 weeks old on the date of the petition has a condition knowns as bilateral renal agenesis and anhydramnios. She apprehends that the foetus has no chance of survival and the delivery may endanger her life.

**Held:** The court stated that in a given case petitioner may be under some misconception or under coercion. The court do not find that to be the case here because the petitioner has been examined by the Medical Board about her mental condition and has made a psychiatric evaluation of her. The Board has stated that the patient is co-operative and coherent and has no psychiatric or emotional problems. Hence, relief to petitioner must be supported by affidavits of the petitioner herself. Needless to state that the hospital will take her consent before terminating her pregnancy and thus the appeal is allowed.

**Subject Matter :** Place where pregnancy may be terminated.

**Relevant Section : Section 4:** Pregnancy may be terminated at the place for the time being approved by that Government with the Chief Medical Officer or District Health Officer as the Chairperson of the said Committee.

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**Subject Matter :** Place where pregnancy may be terminated.

**Relevant Section : Section 5:** The expression "owner" in relation to a place means any person who is the administrative head and maintenance of a hospital or place where the pregnancy may be terminated.

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**Facts:** Appellant was a rape victim and she suffered from mild mental retardation. She was administered psychiatric treatment but she was in a position to express her consent and she did not desire to bear a child and thus the appellant approached High Court for termination of pregnancy. High Court rejected the application of Appellant by stating that medical termination would be harmful and injurious to the victim's life.

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**Summary Judgment :**

**Facts:** The Petitioner is about 22 years old and has approached this Court seeking directions to the respondents to allow her to undergo medical termination of her pregnancy. According to the petitioner, foetus which is about 22 weeks old on the date of the petition has a condition knowns as bilateral renal agenesis and anhydramnios. She apprehends that the foetus has no chance of survival and the delivery may endanger her life.

**Held:** The court stated that in a given case petitioner may be under some misconception or under coercion. The court do not find that to be the case here because the petitioner has been examined by the Medical Board about her mental condition and has made a psychiatric evaluation of her. The Board has stated that the patient is co-operative and coherent and has no psychiatric or emotional problems. Hence, relief to petitioner must be supported by affidavits of the petitioner herself. Needless to state that the hospital will take her consent before terminating her pregnancy and thus the appeal is allowed.

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## **PRE-CONCEPTION AND PRE-NATAL DIAGNOSTIC TECHNIQUES (PROHIBITION OF SEX SELECTION) ACT, 1994**

**Subject Matter :** Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics & Regulation of pre -natal diagnostic techniques.

**Relevant Section : Section 3:** Regulation of Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics.

**Section 3(2):** No Genetic Counselling Center or Genetic Laboratory or Genetic Clinic shall employ or cause to be employed or take services of any person, whether on honorary basis or on payment who does not possess the qualifications as may be prescribed.

**Section 5:** Written consent of pregnant woman and prohibition of revealing the sex of the foetus.

**Section 29:** Maintenance of Records and all other documents for a period of two years or for such period as may be prescribed.

**Key Issue :** Whether High Court erred in quashing of the petition?

**Citation Details :** State of Orissa vs. Mamata Sahoo and Ors. (16.07.2019 - SC):

[MANU/SC/0927/2019](#)

**Summary Judgment :**

**Facts:** A joint inspection was conducted by the State and District team, Dhenkanal, in Ultrasound Unit of Shri Jagannath Hospital where it was found that the Respondents had violated the provisions Under Sections 3(2), 5 and 29 of the PC and PNDT Act which is punishable u/s 23 and 25 of the said Act. For such violation the authorized officer of the Collector-cum-District Appropriate Authority seized the ultrasound machine and other equipments from the said clinic and suspended the registration license. A complaint was filed against the Accused under the PC and PNDT Act. The Trial Court took cognizance of offences alleged and issued summons to the Respondents. Against such summons being

served the respondents appealed to High Court for quashing of such proceedings where the High Court gave order in respondent's favour. Hence, this appeal.

**Held:** The court held that the Collector-District Magistrate-cum-District Appropriate Authority is said to have authorised the Tehsildar/Executive Magistrate, Dhenkanal, to inspect the clinic of the Respondents on 28.05.2014 and to take appropriate legal action. It was submitted that the High Court did not keep in view this authorisation dated 27.05.2014 authorising the Tehsildar to make the inspection of the Respondents' hospital on 28.05.2014. Therefore, the impugned order of High Court is set aside and appeal is allowed thereby stating that High court erred in quashing the petition without taking into consideration of the order dated 27.05.2014.

**Subject Matter :** Prohibition of sex selection & offences and penalties.

**Relevant Section : Section 3A:** No person shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, fluid or gametes derived from either or both of them.

**Section 23:** Any medical practitioner who renders his professional or technical services shall be punishable with imprisonment for a term which may extend to three years and with fine which may extend to ten thousand rupees and on any subsequent conviction, with imprisonment upto five years and with fine upto fifty thousand rupees.

**Key Issue :** Whether any direction could be issued in present matter?

**Citation Details :** Voluntary Health Association of Punjab vs. Union of India (UOI) and Ors. (08.11.2016 - SC): [MANU/SC/1433/2016](#)

**Summary Judgment :**

**Facts:** The grievance agitated in the present petition dealt with the increase of female foeticide, resultant imbalance of sex ratio and the indifference in the implementation of the stringent law in force. The fulcrum of the anguished grievance laid stress on the non-implementation of the provisions of the Act, 1994 and the Rules, 1996. The Petitioner contended that the sex ratio in most of the States had decreased and in certain States, there had been a minor increase, but the same was not likely to subserve the aims and objects of the Act. The Petitioner had submitted that certain directions are required to be issued.

**Held:** An offence punishable under **Section 23(1)** of the said Act and further all offences under the Act have been made non-bailable and non-compoundable and the misuse of the same can only be taken care of by ensuring that the Appropriate Authority applies its mind to the fact of each case/complaint and only on satisfaction of a *prima facie* case, a complaint be filed rather than launching prosecution mechanically in each case. Decrease in the sex ratio is a sign of colossal calamity and it cannot be allowed to happen. Concrete steps have to be taken to increase the same so that invited social disasters do not befall on the society. The present generation is expected to be responsible to the posterity and not to take such steps to sterilize the birth rate in violation of law. The societal perception has to be metamorphosed having respect to legal postulates. Ver there is an abuse of the process of the law, the individual can always avail the legal remedy. Neither the validity of the Act nor the Rules has been specifically assailed in the other petition. What had been prayed was to read out certain provisions and to add certain exceptions. The averments of the present nature with such prayers could not be entertained.

**Subject Matter :** Prohibition on determination of sex and power to make rules and regulations.

**Relevant Section : Section 3B :** No person shall sell any ultrasound machine or imaging machine or scanner or any other equipment capable of detecting sex of foetus to any Genetic

Counselling Center, Genetic Laboratory, Genetic Clinic or any other person not registered under the Act. **Section 6:** No Genetic Counselling Center or Genetic Laboratory or Genetic Clinic shall conduct or cause to be conducted in its Center, Laboratory or Clinic, pre-natal diagnostic techniques including ultrasonography, for the purpose of determining the sex of a foetus. **Section 32:** The Central government may make rules for carrying out provisions of this act. Section 33: The Board may, with the previous sanction of the Central Government, by notification in the Official Gazette, make regulations not inconsistent with the provisions of this Act

**Key Issue :** Whether the circular issued by the competent authority suffer from the vice of arbitrariness being beyond the competence and does it over-ride any rule or regulation or provision of the PCPNDT Act?

**Citation Details :** Naresh Gupta vs. State of NCT of Delhi and Ors. (12.10.2018 - DELHC):

[MANU/DE/3767/2018](#)

**Summary Judgment :**

**Facts:** Petitioner is the owner of a MRI Equipment Service and Repair Centre. The petitioner filled up all the forms for registration, however after the submission of such forms the workshop of the petitioner was raided by the officials of R3 claiming that the petitioner has violated the provisions of the PCPNDT Act. An FIR was also registered against the petitioner alleging that the workshop had not been registered under the Act. The petitioner contended that Rule 18A Sub-Rule 7 provides only in respect of ultrasound machines and the competent authority by way of a Circular cannot override the Rules and apply the same to other imaging machines. Also, the power to make Rules under S. 32 vests in the Central Government and the power to make Regulation as per S. 33 of the PCPNDT Act vests with the Board. Thus, no power has been vested in the appropriate authority to issue Circulars beyond the Rules and Regulations and add up imaging machines.

**Held:** After taking into consideration of the various provisions of the Act , the Court held that **Section 3B** of the PCPNDT Act prohibits sale of ultrasound machine or imaging machine or scanner or any other equipment capable of detecting the sex of the foetus to any Genetic Counselling Centre, Laboratory, Clinic or any other person not registered under the Act and from the material placed on record by the competent authority it is evident that though the petitioner has not installed any imaging machine in his office but is dealing in the sale of equipments of the imaging machine. The term 'ultrasound equipment' appearing in Sub-Rule 7 of Rule 18A cannot be given a restricted meaning and confined the same to an ultrasound machine but has to be applied to all allied machines which can serve the purpose of an ultrasound machine and would thus include an imaging machine as well. Hence, the circular issued by the competent authority does not suffer from the vice of arbitrariness being beyond the competence nor does it over-ride any rule or regulation or provision of the PCPNDT Act.

**Subject Matter :** Appropriate authority and cognizance of offences.

**Relevant Section : Section 17:** The Central and State government is the appropriate authority and Advisory Committee. **Section 28(1)(a) :** No court shall take cognizance of an offence under this Act except on a complaint made by the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or State Government, as the case may be, or the Appropriate Authority.

**Key Issue :** Whether the complaint is maintainable if not made by the appropriate authority?

**Citation Details :** State of M.P. vs. Manvinder Singh Gill and Ors. (03.08.2015 - SC):

[MANU/SC/1636/2015](#)

**Summary Judgment :**

**Facts:** The High Court after noticing that the person who prosecuted the Respondent did not come within the definition of "Appropriate Authority" as stipulated under Section 17(3) of the PCPNDT Act, 1994, held that the complaint was not maintainable. Hence, the present Appeal.

**Held:** The Court after taking into account **Section 28(1)(a)** of the Act held that the Authority is vested in three officers, namely, the Appropriate Authority, i.e. the authority as notified Under **Section 17(3)** of the Act apart from any officer authorised in that behalf either by the Central Government or the State Government or by the concerned Appropriate Authority notified Under S. 17(3) itself. The High Court has noted that the officers who were authorised by the concerned appropriate authorities to help the Appropriate Authority to monitor and have effective implementation of the Act cannot be construed as officers authorised in that behalf as provided Under S. 28(1)(a) of the Act. The High Court had, therefore, no other option except to set aside the proceedings initiated at the instance of the Petitioner and while setting aside the same gave liberty to the Petitioner to take appropriate recourse under the provisions of the Act and High Courts order was upheld by this court.



## **CABLE TELEVISION REGULATION ACT, 1995**

**Subject Matter :** Registration

**Relevant Section : Section 3:** No person shall operate a cable television network unless he is registered as a cable operator under this Act.

**Section 4:** Any person who is desirous of operating or is operating a cable television network may apply for registration or renewal of registration, as a cable operator to the registering authority after fulfilling such eligibility criteria and conditions as may be prescribed and different eligibility criteria may be prescribed for different categories of cable operators.

**Key Issue : a.** Whether the petitioner can voluntarily provide services through DAS (Digital Addressable System) mode in areas which are not yet notified for providing DAS service?

**b.** If so, whether the Digital Addressable System installed by the petitioner has any shortcomings?

**c.** Whether it is entitled to receive the signals from the respondents?

**Citation Details :** Wiretel Digital Networks Pvt. Ltd. vs. ESPN Software India Pvt. Ltd.  
(22.04.2014 - TDSAT): MANU/TD/0012/2014

**Summary Judgment :**

**Facts:** The petitioner expressed its desire to obtain signals of the respondent. Some correspondence was exchanged between the parties with regard to the time line for implementation of DAS. Subsequently, when the petitioner approached the Tribunal, it ordered to settle the dispute and differences amongst themselves. The respondent contended that the permission granted to petitioner by the Ministry of Information & Broadcasting to the

petitioner is for operating as a Multi System Operator in the DAS in the notified cities/towns/areas of Andhra Pradesh and not anywhere else.

**Held:** The Tribunal held that otherwise also the petitioner was registered by the postal authorities at Mangalagiri for running a cable television network in the State of Andhra Pradesh. The permission, which provides that no Multi System Operator shall provide cable television network services with Addressable Systems in any one or more notified areas without a valid permission from the Central Government, is required only for operating in DAS notified areas. For **areas other than DAS areas, the cable operator has to be registered under Section 3 of The Cable Television Networks (Regulation) Act, 1995.** Since the petitioner in this case had valid registration as a cable operator as well as permission to operate in DAS notified areas from the Ministry of Information & Broadcasting when it applied for signals of the respondents, the respondents could not have denied its signals to the petitioner on this ground.

**Subject Matter :** Compulsory transmission of Doordarshan channels.

**Relevant Section : Section 8:** The Central Government may, by notification in the Official Gazette, specify the names of Doordarshan channels or the channels operated by or on behalf of Parliament, to be mandatorily carried by the cable operators in their cable service and the manner of reception and re-transmission of such channels.

**Key Issue :** Whether it is mandatory to transmit the Doordarshan channels?

**Citation Details :** Union of India (UOI) and Ors. vs. Board of Control for Cricket in India and Ors. (22.08.2017 - SC): [MANU/SC/1041/2017](#)

**Summary Judgment :**

**Facts:** The Respondents and its original assignee had moved the High Court of Delhi by way of petition seeking directions to the Prasar Bharati Broadcasting Corporation to encrypt Doordarshan's Satellite Transportation Feed of live broadcasting signals of cricket matches organized by the Respondent to the Doordarshan Kendras and transmission towers throughout Country for subsequent broadcasts on Doordarshan's terrestrial and DTH networks. The validity of S.3 of the Sports Act, 2007 & S.8 of Cable Act, 1995 was also challenged. The aforesaid appeal and petition were allowed by the Division Bench by holding that on an interpretation of the said provisions, the signals received by Prasar Bharati from the Respondents should not be placed in the designated Doordarshan channels which were to be compulsorily carried by the Cable Operators. Hence, present appeal.

**Held:** It was held that S. 8 of the Cable Act imposes an obligation on the Cable Operators to carry/transmit such Doordarshan channels or the channels operated by or on behalf of Parliament, as may be, notified in the Official Gazette. **The legislature has not specified any particular channel which must be mandatorily carried by Cable Operators. The task has been left to the Central Government. It will, therefore, be not wrong to understand the obligation cast on Cable Operators to transmit the DD1 (National) channel and the transmission of Live feed of major sports events of national importance on the said channel by the Doordarshan as a matter of mere coincidence instead of a legislative mandate.** Surely, the effect and operation of Section 3 of the Sports Act cannot be left to be decided on the basis of the discretion of the Central Government to include and subsequently exclude DD1 (National) channel in a notification to be published Under Section 8 of the Cable Act, 1995.

**Subject Matter :** Offences and Penalties

**Relevant Section : Section 5:** No person shall transmit or re-transmit through a cable service any programme unless such programme is in conformity with the prescribed programme

code.

**Section 16(1)(b):** Whoever contravenes any of the provisions of this Act shall be punishable for every subsequent offence, with imprisonment for a term which may extend to five years and with fine which may extend to Rs. 5, 000.

**Section 18:** No Court shall take cognizance of any offence punishable under this Act except upon a complaint in writing made by any authorised officer.

**Key Issue :** Whether offence complained of against the Petitioner punishable under Section 5 read with Section 16(1)(b) of the Cable Television Networks (Regulation) Act, 1995 is a cognizable offence?

**Citation Details :** U.S.A. Cable Networks and Ors. vs. State of Maharashtra and Ors.  
(01.03.2011 - BOMHC): [MANU/MH/0239/2011](#)

**Summary Judgment :**

**Facts:** In the present case, F.I.R. was registered on the basis of complaint which discloses that the Petitioners had transmitted promos which were not in conformity with the prescribed programme code. Inspite of directions Petitioners had continued to transmit the offending promos on their cable television network unabated. Therefore, Authorities was within their powers to order seizure of equipment used for operating the cable television network.

**Held:** The court held that Going by Section 16(1)(b), as is applicable to the present case, it will have to be treated as a cognizable offence as it is punishable by sentence up to five years as except Section 16, there is no other provision which would throw light on this aspect. The court held that when the act does not tell us about the type of offence then help of criminal procedure code should be take and after reading the said code and definitions of cognizable and non-cognizable offence. **In the present case, the complaint is in respect of contravention of Section 5 read with Section 16(1)(b) of the Act. Thus, it would be a case of cognizable offence.**

**Subject Matter :** Power to prohibit operation of cable television network in public interest

**Relevant Section :** Section 20: Where the Central Government thinks it necessary or expedient so to do in public interest, it may prohibit the operation of any cable television network in such areas as it may, by notification in the Official Gazette.

**Key Issue :** Whether the present petition is maintainable?

**Citation Details :** Syed Mujtaba Athar and Ors. vs. The Union of India and Ors. (29.08.2020 - DELHC): [MANU/DE/1687/2020](#)

**Summary Judgment :**

**Facts:** The present application has been filed seeking vacation of the interim order passed by this Court on 28.08.2020 restraining the telecast of the programme titled 'Bindas Bol' which was scheduled to be telecast on 28.08.2020 at 8.00 p.m. by the respondent. The Central Government has already issued a Notice to the respondent nos. 3 and 4 seeking clarification on the program in the context of the Programme Code.

**Held:** The Supreme Court held that that under the statutory provisions, competent authorities are vested with powers to ensure compliance with law. **S 20(2) of the Act empowers the Central Government to prohibit the transmission or re-transmission of any channel or programme**, if it thinks it necessary or expedient to do so, in the interest of 'public order, decency or morality'. Also, **S. 20(3) of the Act empowers the Central Government to prohibit the transmission or re-transmission of any programme, which is not in conformity with the prescribed Programme Code referred to in Section 5 of the Act.** Hence, the present petition was disposed off on directions.

**Subject Matter :** Application of other laws not barred.

**Relevant Section : Section 2(aa) of UTTAR PRADESH CINEMAS (REGULATION)**

**ACT, 1955:** exhibition by means of video ; means an exhibition in public on payment for admission of moving pictures or series of pictures by playing or replaying and pre-recorded cassette by means of video cassette player whether on the screen of a television set or video scope or otherwise.

**Section 21:** The provisions of this Act shall be in addition to, and not in derogation of other laws for the time being in force.

**Key Issue :** Whether Section 2(aa) of UP Cinemas Regulation Act, 1955 would apply to Respondent who was cable operator?

**Citation Details :** District Magistrate vs. Harish Malhotra (09.12.2014 - SC):

[MANU/SC/1162/2014](#)

**Summary Judgment :**

**Facts:** The Respondent is a Cable Television Network Operator in Haridwar as per the Cable Television Networks (Regulation) Act, 1995. He obtained necessary Licence to run the Cable Network. He is entitled to transmit and retransmit broadcasts and is bound by the liabilities and obligations pertaining to and including the Cinematography Act. The Respondent started two private channels with effect from April 1, 2009 and thereby he started transmitting live programmes of Haridwar and other programmes of interest, including Hindi songs and movies, with the assistance of a video recorder. On being informed that a separate license was required to run these channels, he approached the District Magistrate, Haridwar for obtaining the necessary license. The District Magistrate rejected his application in view of the restrictions imposed under the Uttarakhand Video Rules, 1988.

**Held:** It was held that in pursuance of Section 21 of the Cable Television Network Act, 1995, the provisions of the Cinematograph Act, including the programme code, are fully applicable to the Cable operator. The Respondent got himself registered Under Section 3 by depositing Rs. 500/- as registration fee. The Notification No. 145/XXVII (5) Entertainment Tax/2005 dated 17.8.2005 doesn't apply to the Respondent as it seeks to tax "Exhibition by means of Video". The Respondent's activities are not covered by the aforementioned expression. The expression can be said to be in pari materia and definition of a term under one Act, can be used to interpret provisions of rules under the other Act. **The provisions of the U.P.**

**(Cinemas) Regulation Act, 1955 do not apply to the Respondent and for the reason the expression "Exhibition by means of Video" within the meaning of 2(aa) of the said Regulation is not applicable to the Respondent.**



## **CINEMATOGRAPH ACT, 1952**

**Subject Matter :** Certification of films.

**Relevant Section : Section 5A:** The applicant for the certificate to whom the rights in the film have passed shall not be liable for punishment under any law relating to obscenity in respect of any matter contained in the film for which certificate has been granted.

**Key Issue :** Whether certificate issued would amount to justification for public exhibition?

**Citation Details :** Raj Kapoor vs. Laxman (14.12.1979 - SC): MANU/SC/0211/1979

**Summary Judgment :**

**Facts:** The complainant alleged that the film Satyam Shivam Sundaram was by its fascinating title misleadingly foul and beguiled the guideless into degeneracy and that obscenity, indecency and vice were writ large on the picture, constituting an offence. The Magistrate after examining some witnesses took cognizance of the offence and issued notice to the appellant-producer of the film. Thereupon the appellant moved the High Court on the score that the criminal proceeding was an abuse of the judicial process and that no prosecution could be legally sustained as the film had been duly certified for public show by the Central Board of Film Censors. The High Court however dismissed the petition and so appeal present.

**Held:** The Supreme Court held that a certificate issued under Section 5A of the Cinematograph Act amounts to a justification in law for public exhibition of a film and the initiation of criminal processes for obscenity is not sustainable if the film has been passed by the censor board. However, the court also maintained that the bar is not absolute, and the filmmaker has to participate in the legal proceedings and claim the safeguard.

**Subject Matter :** Certification of films.

**Relevant Section : Section 5B:** A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the public interests.

**Key Issue :** Whether certificate issued would amount to justification for public exhibition?

**Citation Details :** Raj Kapoor vs. Laxman (14.12.1979 - SC): MANU/SC/0211/1979

**Summary Judgment :**

**Facts:** The complainant alleged that the film Satyam Shivam Sundaram was by its fascinating title misleadingly foul and beguiled the guideless into degeneracy and that obscenity, indecency and vice were writ large on the picture, constituting an offence. The Magistrate after examining some witnesses took cognizance of the offence and issued notice to the appellant-producer of the film. Thereupon the appellant moved the High Court on the score that the criminal proceeding was an abuse of the judicial process and that no prosecution could be legally sustained as the film had been duly certified for public show by the Central Board of Film Censors. The High Court however dismissed the petition and so appeal present.

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**Subject Matter :** Revisional powers of the Central Government.

**Relevant Section : Section 5E:** The Central Government may, by notification in the Official Gazette suspend a certificate granted to the film if it was being exhibited in a form other than the one in which it was certified.

**Key Issue :** Whether the suit filed against the Defendant for breach of contract, invasion to right of privacy, tort of defamation and malicious falsehood is justified?

**Citation Details :** Manisha Koirala-II vs. Shashilal Nair and Ors. (17.10.2002 - BOMHC): MANU/MH/1184/2002

### **Summary Judgment :**

**Facts:** A film, titled 'Ek Chhoti Si Love Story' was the subject matter of dispute. The story of the film was about an adolescent boy who was obsessed with a girl who was 26 years old and shared an intimate relationship with a man Plaintiff, an actress, played a central character in the film. The Defendant was the Director of the film. The film had been cleared by the Censor Board with 'A' certificate. Plaintiff had acted throughout the movie except for the four scenes, which were enacted by a double and to which the Plaintiff has objected as being vulgar and obscene. Thereafter a letter was addressed by Defendant to the Plaintiff in regards to the film, informing, that portions of the film has been shot by a duplicate, which involves a certain level of physical exposure, stating that If she has any objection to any particular section, they stand to replace it with alternate shots. Therefore Plaintiff filed this suit against the Defendant for breach of contract, invasion to right of privacy, tort of defamation and malicious falsehood.

**Held:** Firstly, it is apparent that there was a story board and the Plaintiff was aware that the film was sensitive and would require certain degree of exposure. There is no material before the court to establish as a term of contract and the letter does not amount to a binding contract and only serves as intimation that the scenes shot with the double, if objected to would be replaced by alternate shots, which has been done with Defendant and on other hand the fact that the Plaintiff has agreed to act in the film after being aware of the theme, the same would not amount to a case of defamation. In the same what is sought to be contended is that the scenes involving the film artist would result in an action of malicious injurious falsehood by associating the Plaintiff with the scenes which she had not enacted. It is difficult for this court to appreciate on the facts of this case that the Defendant is liable for malicious falsehood. However, the scenes of which objection is taken do not involve the Plaintiff's presence, therefore the court came to the conclusion that the tort of defamation is not proved, it will be difficult to hold that there is an invasion of the Plaintiff's right to privacy.

**Subject Matter :** Revisional powers of the Central Government.

**Relevant Section : Section 6:** No such order shall be made prejudicially affecting any person applying for a certificate or to whom a certificate has been granted, as the case may be, except after giving him an opportunity for representing his views in the matter and nothing shall require the Central Government to disclose any fact which it considers to be against public interest to disclose.

**Key Issue :** Whether the suit filed against the Defendant for breach of contract, invasion to right of privacy, tort of defamation and malicious falsehood is justified?

**Citation Details :** Manisha Koirala-II vs. Shashilal Nair and Ors. (17.10.2002 - BOMHC): MANU/MH/1184/2002

### **Summary Judgment :**

**Facts:** A film, titled 'Ek Chhoti Si Love Story' was the subject matter of dispute. The story of the film was about an adolescent boy who was obsessed with a girl who was 26 years old and shared an intimate relationship with a man Plaintiff, an actress, played a central character in the film. The Defendant was the Director of the film. The film had been cleared by the Censor Board with 'A' certificate. Plaintiff had acted throughout the movie except for the four scenes, which were enacted by a double and to which the Plaintiff has objected as being vulgar and obscene. Thereafter a letter was addressed by Defendant to the Plaintiff in regards to the film, informing, that portions of the film has been shot by a duplicate, which involves a certain level of physical exposure, stating that If she has any objection to any particular section, they stand to replace it with alternate shots. Therefore Plaintiff filed this suit against

the Defendant for breach of contract, invasion to right of privacy, tort of defamation and malicious falsehood.

**Held:** Firstly, it is apparent that there was a story board and the Plaintiff was aware that the film was sensitive and would require certain degree of exposure. There is no material before the court to establish as a term of contract and the letter does not amount to a binding contract and only serves as intimation that the scenes shot with the double, if objected to would be replaced by alternate shots, which has been done with Defendant and on other hand the fact that the Plaintiff has agreed to act in the film after being aware of the theme, the same would not amount to a case of defamation. In the same what is sought to be contended is that the scenes involving the film artist would result in an action of malicious injurious falsehood by associating the Plaintiff with the scenes which she had not enacted. It is difficult for this court to appreciate on the facts of this case that the Defendant is liable for malicious falsehood. However, the scenes of which objection is taken do not involve the Plaintiff's presence, therefore the court came to the conclusion that the tort of defamation is not proved, it will be difficult to hold that there is an invasion of the Plaintiff's right to privacy.

**Subject Matter :** Forfeiture of film by direction of Government order.

**Relevant Section : Section 7:** If any person is convicted of an offence punishable under this section committed by him in respect of any film, the convicting court may further direct that the film shall be forfeited to the Government.

**Key Issue :** Whether Petitioner was entitled to seek relief's?

**Citation Details :** Manohar Lal Sharma vs. Sanjay Leela Bhansali and Ors. (28.11.2017 - SC): [MANU/SC/1508/2017](#)

**Summary Judgment :**

**Facts:** Present petition filed seeking reliefs that film should not be exhibited in other countries without obtaining the requisite certificate from the Central Board of Film Certification under Act and the Rules and guidelines framed thereunder and further to issue a writ to the Central Bureau of Investigation (CBI) to register an FIR against First and Second Respondent and their team members and to investigate and prosecute them in accordance with law.

**Held:** First Respondent had no intention to exhibit the film in question in certain countries pending consideration of the application by the CBFC under the Act. Concern expressed by Counsel for the Respondents was appreciated because the scrutiny of the film was still pending for consideration before the CBFC. Further prayer was for issuance of direction to CBI to register an FIR against Respondents and their team members. As far as other offences were concerned, it was unfathomable how any offence was made out. There was no basis to direct registration of an FIR and the prayer was absolutely misconceived and so that was most unfortunate situation showing how public interest litigation could be abused and the petition was not to be filed to abuse others. Thus pleadings were absolutely scurrilous, vexatious and untenable in law.

**Subject Matter :** Restrictions on powers of licensing authority.

**Relevant Section : Section 12:** The Central Government may issue directions to licensees for the purpose of regulating the exhibition of any film, so that scientific films, films intended for educational purposes, secure an adequate opportunity of being exhibited, and where any such directions have been issued those directions shall be deemed to be additional conditions and restrictions subject to which the licence has been granted.

**Key Issue :** Whether the mandatory provisions requiring the Licensee to display particular kinds of Govt. approved short films which they are exhibiting, violates the constitutional rights?

**Citation Details :** Union of India (UOI) and Ors. vs. The Motion Picture Association and Ors. (15.07.1999 - SC): [MANU/SC/0404/1999](#)

**Summary Judgment :**

**Facts:** In this case, several laws mandating the cinema owners to show the government approved documentary films came under consideration in the Supreme Court of India through appeals filed by the Motion Pictures association ltd and others. The provisions mandated the licensee of the cinema that scientific films, films intended for educational purposes, dealing with news and current events, documentaries or indigenous films have to be exhibited by the licensee along with the other films, which the licensee is exhibiting. The length and duration of such films are regulated by different provisions under the parent state acts. The short films of this category are produced by the Film Division of the Government of India only. The exhibitors were required to enter into an agreement with the film division of India for the supply of such films to be exhibited and pay in return for such supply, a rental amounting to 1% of their net weekly collection. These impugned provisions have been in force for several decades until challenged by the Motion pictures association as unconstitutional.

**Held:** The case does not hinder the freedom of speech and expression because it is not forcing the Respondents to spread any propaganda or biased information. The Respondents also contended that the payment of rental and the procedure of collecting the films from the Film Division of India is an onerous process. Where the appellants successfully showed that the revenue earned as a payment of 1% rental fees is far less than the expenditure they incur in producing those films, the respondents couldn't provide any satisfactory data.

**Subject Matter :** The owner or occupier of any place permits the place to be used in contravention.

**Relevant Section : Section 14:** If the owner or person in charge of a cinematograph permits that place to be used in contravention then such person shall be punishable with fine as mentioned under this section.

**Key Issue :** Whether sentence could not be directed to be reduced on payment of fine when Court had expressed view that sentence was required to be enhanced?

**Citation Details :** Association of Victims of Uphaar Tragedy vs. Sushil Ansal and Ors. (09.02.2017 - SC): [MANU/SC/0142/2017](#)

**Summary Judgment :**

**Facts:** An incident of fire occurred at Uphaar Cinema Theatre in Green Park, South Delhi wherein 59 persons lost their life and about 100 persons were injured. On charge of criminal negligence, apart from others, Respondent the licensee for running the cinema and his brother who was conducting the business of cinema, were convicted by the Trial Court. The High Court upheld the conviction but reduced the sentence to one year rigorous imprisonment. A two Judge bench of the present Court upheld the conviction but differed on the quantum of sentence. In view of difference of opinion the matter was referred to the three Judge Bench "to the extent that the said appeals involve the question of quantum of sentence to be awarded". The Three Judge Bench held that the sentence awarded by the High Court needs to be enhanced to the maximum period of two years but in lieu of additional period of sentence of one year, the substantial amount of fine needs to be imposed.

**Held:** It was held that in case the said amount of fine is paid, the sentence should be reduced to the period already undergone. On the principle of parity, the case would stand on the same footing. A fine was imposed on each Appellant and if the said fine is paid, the sentence of the Appellants be reduced to the sentence already undergone. The review was sought mainly on the ground that once the Court expressed the view that sentence was required to be enhanced, the same could not be directed to be reduced on payment of fine.



## INDIAN TELEGRAPH ACT, 1885

**Subject Matter :** Exclusive privilege in respect of telegraphs, and power to grant licenses.

**Relevant Section : Section 4:** The section deals with exclusive privilege of the government to establish, maintain and use telegraphs. It also provides for the government to grant licence to establish, maintain or work a telegraph. The government may grant such licence on certain conditions and for a licence fee.

**Key Issue :** Whether the grant of the licence has been made strictly in terms of the proviso complying and fulfilling the conditions prescribed?

**Citation Details :** Delhi Science Forum and Ors. vs. Union of India (UOI) and Ors.

(19.02.1996 - SC): [MANU/SC/0360/1996](#)

**Summary Judgment :**

**Facts:** N.P Singh had questioned the power of the Central Government to grant licences to different non-government companies to establish and maintain Telecommunications System in the country and the validity of the procedure adopted by the Central Government. Pursuant to the notice inviting tenders, tenders were submitted for different Circles, but before licences could be granted by the Central Government, writ petitions were filed in different High Courts as well as before this Court. Where the learned counsel appearing in different writ petitions have attacked this policy of capping. In the Tender Documents as quoted above it had been clearly stated that "Telecom Authority is free to restrict the number of the Service Areas for which one company can be licensed to provide the service". The counsel for writ petitioners did not allege any bias against the Tender Evaluation Committee suggesting that it has favoured the said petitioner so far as the grant of licence in the three Circles mentioned above are concerned. It can be said that the petitioners in different writ petitions have primarily questioned the right and propriety of the Central Government to grant licences to non-government companies.

**Held:** It was held that, the Authority may from time to time by order notify the rates at which telecommunication services within India and outside India shall be provided. The Central Government and the Telecom Regulatory Authority have to function as active trustees for the public good.

**Subject Matter :** Exclusive privilege in respect of telegraphs, and power to grant licenses.

**Relevant Section : Section 7:** The Central Government may also revoke any licence granted under the Act, in case of breach of any condition or default of payment with respect to the licence.

**Key Issue :** Whether the grant of the licence has been made strictly in terms of the proviso complying and fulfilling the conditions prescribed?

**Citation Details :** Delhi Science Forum and Ors. vs. Union of India (UOI) and Ors.  
(19.02.1996 - SC): [MANU/SC/0360/1996](#)

**Summary Judgment :**

**Facts:** N.P Singh had questioned the power of the Central Government to grant licences to different non-government companies to establish and maintain Telecommunications System in the country and the validity of the procedure adopted by the Central Government. Pursuant to the notice inviting tenders, tenders were submitted for different Circles, but before licences could be granted by the Central Government, writ petitions were filed in different High Courts as well as before this Court. Where the learned counsel appearing in different writ petitions have attacked this policy of capping. In the Tender Documents as quoted above it had been clearly stated that "Telecom Authority is free to restrict the number of the Service Areas for which one company can be licensed to provide the service". The counsel for writ petitioners did not allege any bias against the Tender Evaluation Committee suggesting that it has favoured the said petitioner so far as the grant of licence in the three Circles mentioned above are concerned. It can be said that the petitioners in different writ petitions have primarily questioned the right and propriety of the Central Government to grant licences to non-government companies.

**Held:** It was held that, the Authority may from time to time by order notify the rates at which telecommunication services within India and outside India shall be provided. The Central Government and the Telecom Regulatory Authority have to function as active trustees for the public good.

**Subject Matter :** Exclusive privilege of the Central Government.

**Relevant Section : Section 8:** The Central Government have the exclusive privilege of establishing, maintaining and working telegraphs which may grant a licence on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India.

**Key Issue :** Whether in exercise of the power vested in it under Section 14(b) of the Act, TDSAT has the jurisdiction to entertain challenge to the regulations framed by the Authority under Section 36 of the Act?

**Citation Details :** Bharat Sanchar Nigam Limited vs. Telecom Regulatory Authority of India and Ors. (06.12.2013 - SC): [MANU/SC/1264/2013](#)

**Summary Judgment :**

**Facts:** MTNL challenged the 1999 Regulations before the Delhi High Court which was allowed by the Division Bench of the High Court. It was held that the Regulations framed under Section 36 of the Act could not be given overriding effect. TDSAT allowed the appeal and held that TRAI did not have the jurisdiction to entertain dispute between the service providers. On other hand Bharti Televentures Ltd. made representation to BSNL to extend the benefit of the Tribunal's order after that the learned Senior Counsel appearing for BSNL argued that sub-section (1) of Section 36 should not be construed as conferring unbridled power upon TRAI to make regulations, else other provisions like Sections 12(4) and 13, which empower TRAI to issue directions on certain matters would become redundant. Hence the appeal present.

**Held:** It was observed that in exercise of the power vested in it under Section 14(b) of the TRAI Act, TDSAT does not have the jurisdiction to entertain the challenge to the regulations

framed by TRAI under Section 36 of the TRAI Act and it is clear that the aggrieved person shall be free to challenge the validity of the Regulations framed under Section 36 of the TRAI Act by filing appropriate petition before the High Court.

**Subject Matter :** Exclusive privilege of the Central Government.

**Relevant Section : Section 14:** A local authority or person receiving notice may send a person to superintend the work and the telegraph authority shall execute the work to the reasonable satisfaction of the person so sent.

**Key Issue :** Whether in exercise of the power vested in it under Section 14(b) of the Act, TDSAT has the jurisdiction to entertain challenge to the regulations framed by the Authority under Section 36 of the Act?

**Citation Details :** Bharat Sanchar Nigam Limited vs. Telecom Regulatory Authority of India and Ors. (06.12.2013 - SC): [MANU/SC/1264/2013](#)

**Summary Judgment :**

**Facts:** MTNL challenged the 1999 Regulations before the Delhi High Court which was allowed by the Division Bench of the High Court. It was held that the Regulations framed under Section 36 of the Act could not be given overriding effect. TDSAT allowed the appeal and held that TRAI did not have the jurisdiction to entertain dispute between the service providers. On other hand Bharti Televentures Ltd. made representation to BSNL to extend the benefit of the Tribunal's order after that the learned Senior Counsel appearing for BSNL argued that sub-section (1) of Section 36 should not be construed as conferring unbridled power upon TRAI to make regulations, else other provisions like Sections 12(4) and 13, which empower TRAI to issue directions on certain matters would become redundant. Hence the appeal present.

**Held:** It was observed that in exercise of the power vested in it under Section 14(b) of the TRAI Act, TDSAT does not have the jurisdiction to entertain the challenge to the regulations framed by TRAI under Section 36 of the TRAI Act and it is clear that the aggrieved person shall be free to challenge the validity of the Regulations framed under Section 36 of the TRAI Act by filing appropriate petition before the High Court.

**Subject Matter :** Power for telegraph authority to place and maintain telegraph lines and posts.

**Relevant Section : Section 10:** The telegraph authority has limited powers with respect to installation of telegraph lines and posts. The telegraph authority while installing communication equipment should try to do minimum damage to the property. It will be liable to pay adequate compensation to all the persons who have a stake in such property.

**Key Issue :** Whether impugned order of restraining Appellant and second Respondent by way of temporary injunction from making holes for erecting poles was sustainable?

**Citation Details :** Century Rayon Limited vs. IVP Limited and Ors. (27.11.2019 - SC):

[MANU/SC/1639/2019](#)

**Summary Judgment :**

**Facts:** The Respondent had filed a suit for permanent injunction with a grievance that the other Respondent had appointed contractors who were excavating its land for construction of the electricity transmission towers without any prior approval. The said electricity transmission towers were being constructed on the application made by the Appellant. The trial court and the first appellate court restraining the Appellant and the second Respondent by way of temporary injunction from making holes for erecting poles on any part of the suit lands without following due process of law.

**Held:** It was inclined to set aside the impugned order as also the injunction order subject to the Appellant making an ad hoc payment. In addition to the payments already made to the Respondent, the MSEDC and their contractors would be entitled to continue and complete the work of erection of the electricity transmission towers on the land of the other Respondent. The payment made would be subject to the outcome of the proceedings under the Telegraph Act for quantifying the compensation payable to the Respondent.

**Subject Matter :** Power for telegraph authority to place and maintain telegraph lines and posts.

**Relevant Section : Section 16:** This section is applicable to any property owned, controlled or managed by any local authority.

**Key Issue :** Whether impugned order of restraining Appellant and second Respondent by way of temporary injunction from making holes for erecting poles was sustainable?

**Citation Details :** Century Rayon Limited vs. IVP Limited and Ors. (27.11.2019 - SC):

[MANU/SC/1639/2019](#)

**Summary Judgment :**

**Facts:** The Respondent had filed a suit for permanent injunction with a grievance that the other Respondent had appointed contractors who were excavating its land for construction of the electricity transmission towers without any prior approval. The said electricity transmission towers were being constructed on the application made by the Appellant. The trial court and the first appellate court restraining the Appellant and the second Respondent by way of temporary injunction from making holes for erecting poles on any part of the suit lands without following due process of law.

**Held:** It was inclined to set aside the impugned order as also the injunction order subject to the Appellant making an ad hoc payment. In addition to the payments already made to the Respondent, the MSEDC and their contractors would be entitled to continue and complete the work of erection of the electricity transmission towers on the land of the other Respondent. The payment made would be subject to the outcome of the proceedings under the Telegraph Act for quantifying the compensation payable to the Respondent.

**Subject Matter :** Telegraph officer making unlawfully intercepting or disclosing, messages or divulging purport of signals.

**Relevant Section : Section 26:** Any telegraph officer omits to transmit, intercepts, detains, any message, discloses any part the contents of any message, to any person not entitled to receive the same shall be held liable for punishable offence.

**Key Issue :** Whether the act of the telegraph officer was lawful?

**Citation Details :** The State of Maharashtra and Ors. vs. Tasneem Rizwan Siddiquee (05.09.2018 - SC): [MANU/SC/0940/2018](#)

**Summary Judgment :**

**Facts:** A secret information was received by the local police that one private detective, was obtaining call detail records of different people. The police caused the arrest of said detective and sought call details Company. FIR was registered against said person. The chat record collected by the police during the investigation, between husband of Respondent and one arrested person, disclosed that husband of Respondent had asked for call details record of the wife of one person, indicative of involvement in the commission of offence. On that basis, police arrested husband of Respondent and jurisdictional Magistrate gave the police custody after recording his satisfaction for such police remand. The Respondent, rushed to the High Court and filed a writ petition for a direction to the Appellants to produce her husband before

the Court and to justify his detention in accordance with procedure established by law. The High Court allowed writ petition filed by Respondent.

**Held:** It is directed that, after holding that the petitioner's husband was unlawfully detained, his release from the custody forthwith and the superior police officials, particularly the functionary in the Department of Home, Government of India to launch disciplinary proceedings and the petitioner and her husband may initiate or file civil suit and criminal prosecution against this police officer for taking the law in his hands.

**Subject Matter :** Power for Government to take possession of licensed telegraphs and to order interception of messages.

**Relevant Section : Section 5:** This act is commonly known as the wire-tapping clause. It gives power to the government to take possession of any licensed telegraphs in case of a public emergency or in the interest of public safety and It can also order interception of communication.

**Key Issue :** Whether orders for interception were unconstitutional?

**Citation Details :** Amar Singh vs. Union of India (UOI) and Ors. (11.05.2011 - SC):

[MANU/SC/0596/2011](#)

**Summary Judgment :**

**Facts:** The petitioner had been availing of the telephone services of M/s Reliance Infocom Ltd., he submitted that the interception of phone conversations of him is happening. Therefore, the petitioner sought to protect his fundamental right to privacy under Article 21 of the Constitution of India. It was on the basis of his information from various sources, he had learnt that the Government of India and the Government of National Capital Region of Delhi, being pressurised by the Indian National Congress, had been intercepting the petitioner's conversation on phone, monitoring them and recording them.

**Held:** It held that the instant writ petition was an attempt by the petitioner to mislead the Court on the basis of frivolous allegations and by suppression of material facts, thus no case of tapping of telephone had been made out against the statutory authorities in view of the criminal case which was going on and especially in view of the petitioner's stand that he was satisfied with the investigation in that case.

**Subject Matter :** Power for Government to take possession of licensed telegraphs and to order interception of messages.

**Relevant Section : Section 20:** Any person who establishes, maintains or works a telegraph within India, without proper licence or authorization from the government shall be punishable for the offence.

**Key Issue :** Whether orders for interception were unconstitutional?

**Citation Details :** Amar Singh vs. Union of India (UOI) and Ors. (11.05.2011 - SC):

[MANU/SC/0596/2011](#)

**Summary Judgment :**

**Facts:** The petitioner had been availing of the telephone services of M/s Reliance Infocom Ltd., he submitted that the interception of phone conversations of him is happening. Therefore, the petitioner sought to protect his fundamental right to privacy under Article 21 of the Constitution of India. It was on the basis of his information from various sources, he had learnt that the Government of India and the Government of National Capital Region of Delhi, being pressurised by the Indian National Congress, had been intercepting the petitioner's conversation on phone, monitoring them and recording them.

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## **INFORMATION AND TECHNOLOGY ACT, 2000**

**Subject Matter :** Legal recognition of electronic records.

**Relevant Section : Section 4:** Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, not contrary to law such requirement shall be deemed to have been satisfied if such information or matter is rendered or made available in an electronic form; **and** accessible so as to be usable for a subsequent reference.

**Section 18 of Limitation Act:** Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

**Key Issue :** Whether e-mails acknowledging debt would constitute a valid and legal acknowledgement of debt though not signed as required under section 18 of the Limitation Act, 1963?

**Citation Details :** Sudarshan Cargo Pvt. Ltd. vs. Techvac Engineering Pvt. Ltd. (25.06.2013 - KARHC): [MANU/KA/1605/2013](#)

### **Summary Judgment :**

**Facts:** The petitioner is a licensed custom agent house and respondent is a company engaged in the manufacture, sales and distribution of scrubbing or drying machines and all kinds of industrial or domestic vacuum pumps at the request of respondent, petitioner had carried four consignments by shipment which were covered by four Bills of Lading. the dispute arose as to the non-payment of Bills from respondent. The respondent contended that the acknowledgement of debt via mail by him is not valid in the eye of law since it is not duly signed by the respondent.

**Held:** The court held that an email communication is legally recognized by S. 4 of the IT Act, 2000. The court further held that section 18 does not provide that acknowledgement has to be in any particular form or to be express. According to the court, even a statement which amounts to an acknowledgement may be sufficient, if it implies an admission of liability and it can be made by an email. It held that **an acknowledgement of debt by e-mail originating from a person who intends to send or transmit such electronic message to any other**

**person who would be the 'addressee' would constitute a valid acknowledgment of debt and it would satisfy the requirement of Section 18 of the Limitation Act, 1963 when the originator disputes having sent the e-mail to the recipient.**

**Subject Matter : Jurisdiction**

**Relevant Section : Section 48:** The Telecom Disputes Settlement and Appellate Tribunal established shall, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017, be the Appellate Tribunal for the purposes of this Act and it shall exercise the jurisdiction, powers and authority conferred on it by or under this Act.

**Section 57: Appeal to Cyber Appellate Tribunal** - Any person aggrieved by an order made by controller or an adjudicating officer under this Act may prefer an appeal to a Cyber Appellate Tribunal having jurisdiction in the matter.

**Also** no appeal shall lie to the Cyber Appellate Tribunal from an order made by an adjudicating officer with the consent of the parties.

**Section 61:** Civil court not to have jurisdiction.

**Key Issue :** Whether the present appeal is maintainable without exhausting the alternative remedy of approaching the Controller of Certifying Authorities or the Adjudicating Officer appointed under the IT Act, 2000?

**Citation Details :** Mascon Global Limited vs. Controller of Certifying Authorities, Electronic Niketan, Lodhi Road, New Delhi and Ors. (28.05.2010 - CYAT): MANU/CY/0013/2010

**Summary Judgment :**

**Facts:** The appellant is a company managed by its Chairman and CEO some defamatory, derogatory, humiliative, abusive and obnoxious e-mails from Aruna Kashinath and Avinash Agnihotry from the e-mail IDs kashinath.aruna@gmail.com and avinash.agnihotry@gmail.com respectively. It is pertinent to point out that both Aruna Kashnath and Avinash Agnihotry are part of the top management team of the appellant company. It is further submitted that the appellant has made enquiries from both Aruna Kashinath and Avinash Agnihotry who had flatly refused and denied connection with the aforesaid email accounts or their creation maintenance or with the sending of the aforementioned emails. The Respondent contended that appeal is void ab initio as the appeal can be filed under Section 57 of the Information Technology Act only against an order of the Controller that too as per the Chapter relating to Digital signature. In the instant case since no order has been passed by the Controller, no appeal can be filed.

**Held:** The Court held that Act provides for adjudicating the offences i.e. Certifying Authority and Adjudicating Officer in respect of the different offences. After taking into account definitions of S.48,57,58 (Procedure to be followed by Cyber Appellate Tribunal) the statute provides that the appeal can be filed only against the orders passed by the Adjudicating Officer. **It is held that without exhausting alternative remedy of approaching the Adjudicating Officer appointed under the Information Technology Act, 2000, no appeal is maintainable under Section 57 of the Information Technology Act.**

**Subject Matter :** Punishment for sending offensive messages through communication service, etc.

**Relevant Section : Section 66A:** Any person who sends, by means of a computer resource or a communication device,

- (a) any information that is grossly offensive or has menacing character; or
- (b) any information which he knows to be false, or
- (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such

messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.

**Key Issue :** Whether Sections 66A of IT Act required to be declared unconstitutional for being in violation of Article 19(1)(a) and not saved by Article 19(2)?

**Citation Details :** Shreya Singhal vs. Union of India (UOI) (24.03.2015 - SC):

[MANU/SC/0329/2015](#)

**Summary Judgment :**

**Facts:** The Maharashtra Police arrested two women for posting a post on Facebook regarding Maharashtra bandh on account of death of a political leader u/s-66A of the IT Act,2000.

Their arrest led to an outrage amongst the citizens. Although both the girls were released from prison but they challenged the constitutional validity of S.66A of the IT Act,2000.

**Held:** The Court discussed three fundamental concepts in understanding the freedom of expression: discussion, advocacy, and incitement. Further it held that S.66A is restrictive in the sense as it restricts all forms of internet communications as it makes no distinction “between mere discussion or advocacy of a particular point of view, which may be annoying or inconvenient or grossly offensive to some and incitement by which such words lead to an imminent causal connection with public disorder, security of State etc. The Court also held that the government failed to show that the law intends to prevent communications that incite the commission of an offense because “the mere causing of annoyance, inconvenience, danger etc., or being grossly offensive or having a menacing character are not offences under the Penal Code at all.” **It held that because the provision fails to define terms, such as inconvenience or annoyance, “a very large amount of protected and innocent speech” could be curtailed.** The Court invalidated Section **66A** of ITA in its entirety as **it violated the right to freedom of expression guaranteed under Article 19(1)(a) of the Constitution of India.**

**Subject Matter :** Punishment for violation of privacy.

**Relevant Section : Section 66E:** Any person who intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment.

**Key Issue :** Whether the trial court erred while giving judgment?

**Citation Details :** Rajesh and Ors. vs. The State of Rajasthan (25.07.2017 - RAJHC):

[MANU/RH/0809/2017](#)

**Summary Judgment :**

**Facts:** The facts of the case are that the prosecutrix was forcibly dragged into the jeep by the said respondents and was taken to a place where she was raped by them. They also made a video of the whole barbaric act in the mobile thereby threatenend her of uploading it on the internet if she told anyone about the same. On refusing to being exploited by the respondents again and again the respondents in turn uploaded the video of the rape on the internet.

**Held:** The court while perusing the facts of the case and the evidence produced held the respondents **liable under various sections including Sections 366, 366-A, 367, 292, 120-B IPC and under Sections 66-E, 67, 67-A, 67-B of IT Act along with fine as imposed by the trial court .**

**Subject Matter :** Punishment for cyber terrorism.

**Relevant Section : Section 66F:** Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by denying access to computer resource to the authorized person, attempting to penetrate or access a computer resource without authorisation or exceeding authorised access, causing to introduce any computer contaminant, shall be punishable with life imprisonment.

**Key Issue :** Whether the offence under Section 66F of the Information Technology Act, 2000, can be applied in the present case?

**Citation Details :** K. Divya vs. Inspector of Police, Othakadai and Ors. (20.09.2019 - MADHC): MANU/TN/9923/2019

**Summary Judgment :**

**Facts:** The petitioner is a social activist and she is involved in various social issues including abolition of manual scavenging. In pursuance of her mission of creating awareness for abolition of manual scavenging, she has taken a documentary film, namely, "Kakoos". This was also widely viewed in the you-tube. The second respondent has given a complaint to the first respondent police to the effect that he saw the documentary taken by the petitioner, in the you-tube and the documentary proceeds as if this work is done by a particular community called Thevendra Kula Vellalar. By projecting this work to be performed by persons belonging only to this community, the second respondent alleges that the petitioner has taken the documentary with malafide intention and has thereby defamed and brought a very bad name to the concerned community. As a result of this documentary, the petitioner is attempting to create a caste conflict and promoting enmity and thereby is disturbing the public tranquility. An FIR came to be registered by the first respondent police against the petitioner for an offence under Section 153(A) and 505 (1)(b) of IPC r/w 66F of the Information Technology Act, 2000.

**Held:** **In order to commit cyber terrorism, it must be shown that the act must be done to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of people.** The complaint given by the second respondent **does not in any way attract the provisions of Section 66F of the Information Technology Act, 2000.**

The documentary that has been produced by the petitioner cannot be termed as a cyber terrorism. In the considered view of this Court, the FIR that has been registered against the petitioner is clearly an abuse of process of law, which requires the interference of this Court in exercise of its jurisdiction under Section 482 of Cr.P.C. The complaint given by the second respondent and the FIR registered by the police clearly amounts to interfering with the fundamental right of speech and expression guaranteed to the petitioner. In the result, the FIR in Crime No. 469 of 2017 on the file of the first respondent is hereby quashed.

**Subject Matter :** Punishment for publishing or transmitting obscene material in electronic form.

**Relevant Section : Section 292 of IPC:** Sale of a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest.

**Section 67:** Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished.

**Section 67A:** Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form.

**Section 67B:** Punishment for publishing or transmitting of material depicting children in

sexually explicit act, etc., in electronic form.

**Section 81:** Act to have over riding effect not inconsistent with any other law for the time being in force.

**Key Issue :** Whether the accused who was discharged under Section 67 of IT Act could be prosecuted under Section 292 of IPC?

**Citation Details :** Sharat Babu Digumarti vs. Govt. of NCT of Delhi (14.12.2016 - SC):

[MANU/SC/1592/2016](#)

**Summary Judgment :**

**Facts:** The Appellant along with co-Accused and others was arrayed as an Accused. When the co-accused filed a appeal he was acquitted on S.67 charges but not on charges of S.292 of IPC. On preferring appeal, it was allowed and the proceeding against the co-Accused was quashed. After the judgment was delivered, the Appellant filed an application before the Trial Court to drop the proceedings against him. The trial court dropped the proceedings under S.67 of IT Act,2000 but not under S.292 of IPC. Hence, the present appeal was filed.

**Held:** **It was held that the charge under Section 292 could not survive.** The decision was on the basis that Sections 67, 67A and 67B was a complete code regarding offence concerning publishing and transmitting obscene material in electronic form and **non-obstante provision under Section 81 makes IT Act a special law which will prevail over the general law, IPC.**

**Subject Matter :** Penalty for Breach of confidentiality and privacy.

**Relevant Section : Section 72:** If any person has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment of upto 2 years and/or fine of upto 1 lakh rupees.

**Key Issue :** Whether the arrest made by the police on the basis of secret information was valid?

**Citation Details :** The State of Maharashtra and Ors. vs. Tasneem Rizwan Siddiquee (05.09.2018 - SC): [MANU/SC/0940/2018](#)

**Summary Judgment :**

**Facts:** A secret information was received by the local police that one private detective was obtaining call records of different people. The police caused the arrest of said detective and sought call details . FIR, was registered against said person. The chat record collected by the police during the investigation indicated accused's involvement in the commission of offence. On that basis, police arrested husband of Respondent and jurisdictional Magistrate gave the police custody after recording his satisfaction for such police remand. The Respondent filed a writ petition for a direction to the Appellants to produce her husband before the Court and to justify his detention in accordance with procedure established by law.

**Held:** The court held that the appellant should have challenged the order passed by the magistrate for passing an order of judicial remand before filing this writ. The High Court should have been loath to enter upon the merits of the arrest in absence of any challenge to the judicial order passed by the Magistrate granting police custody and more particularly for reasons mentioned in that order of the Magistrate. **Since the Respondent's husband had already been released after the impugned judgment, the Investigating Officer may proceed against him in connection with the stated crime registered as FIR strictly in accordance with law and not merely because the impugned order had been set aside.**



## **PRESS COUNCIL ACT, 1978**

**Subject Matter :** Composition of Council and Term and Retirement of Members & Conditions of service of members.

**Relevant Section : Section 5:** The Council shall consist of a Chairman and twenty-eight other members.

**Section 6(7):** A retiring member shall be eligible for re-nomination for not more than one term.

**Section 7:** The Chairman shall be a whole-time officer and shall be paid such salary as the Central Government may think fit; and the other members shall receive such allowances of fees for attending the meetings of the Council, as may be prescribed.

**Key Issue :** Whether a person who had already been a member of the Council for two terms earlier is eligible for being nominated, though such nomination did not amount to re-nomination?

**Citation Details :** Harbhajan Singh vs. Press Council of India and Ors. (11.03.2002 - SC):  
[MANU/SC/0181/2002](#)

**Summary Judgment :**

**Facts:** Harbhajan Singh, the appellant, is an editor of Indian Observer. All India Small and Medium Newspapers Federation, the respondent No. 2 is an 'association of persons' within the meaning of Clause (b) of Sub-section (4) of S. 5 of the Act. The appellant had been a member of the Council for two terms of three years each sought for a clarification-cum-opinion from the Chairman of the Press Council of India as to whether a person who had already been a member of the Council for two terms earlier is eligible for being nominated though such nomination did not amount to re-nomination, that is to say, at the time of being nominated he was not a retiring member. In response the Chairman stated that Section 6(7) debars the same person from holding the office as a member of the Council for more than two terms in his life. On filing appeal the single judge gave judgment in appellants favor.

Aggrieved by the same the council approached the SC by way of writ petition.

**Held:** We are clearly of the opinion that **Sub-section (7) of Section 6 of the Press Council Act must be assigned its ordinary, grammatical and natural meaning as the language is plain and simple.** There is no evidence available, either intrinsic or external, to read the word 'retiring' as 'retired'. Nor can the word 're-nomination' be read as nomination for an independent term detached from the previous term of membership or otherwise than in succession. The provision on its plain reading does not disqualify or make ineligible a person from holding the office of a member of the Council for more than two terms in his life. Hence, judgment by single judge was restored.

**Subject Matter :** Power to Censure.

**Relevant Section : Section 14:** Where the Council has reason to believe, based on a complaint or otherwise, that a newspaper or news agency has offended against the standards or has committed any professional misconduct, the Council may, after giving an opportunity

of being heard, hold an inquiry. If it is satisfied that it is necessary so to do, it may, warn, admonish or censure the newspaper, the news agency, the editor or the journalist or disapprove the conduct as the case may be.

**Key Issue :** Whether Respondent's misleading impression to public by publishing advertisement by using photographs of high constitutional functionaries is against the law?

**Citation Details :** Ajay Gautam vs. Press Council of India (26.02.2018 - DELHC):

[MANU/DE/0822/2018](#)

**Summary Judgment :**

**Facts:** A Writ Petition has been filed impugning practice being followed by Respondents Hindustan and by RIL of displaying names, images and photographs of high constitutional functionaries in private advertisements and thereby conveying a misleading impression to public. The Press Council of India has also issued a Show Cause Notice to the Editor, "Hindustan", to show cause as to why action not be initiated against it under Section 14 of the Press Council of India Act, 1978.

**Held:** The court held that the Press Council of India has been specifically conferred with the authority, both by the "Norms of Journalists" as well as by the PTI Act, to take appropriate action in cases of infraction of Section 14 of the Press Council Act, 1978. The Press Council (Procedure of Enquiry) Rules, 1979, provides a detailed procedure, for enquiry, on receipt of any complaint, which would lead the Press Council of India to believe that a newspaper or news agency has offended the standard of journalists' ethics of public taste, or otherwise infracted the provisions of the Press Council Act, 1978, or any Norms issued by the Press Council of India thereunder. The said course of action, qua the complaint received from the petitioner against the "Hindustan", has already been set in motion in by the Press Council of India by issuance, to the "Hindustan", of the Show Cause Notice. therefore the writ was dismissed.

**Subject Matter :** General powers of the Council

**Relevant Section : Section 15(2):** Nothing in sub-section (1) shall be deemed to compel any newspaper, news agency, editor or journalist to disclose the source of any news or information published by that newspaper or received or reported by that news agency, editor or journalist.

**Key Issue :** Whether the news paper editor can be directed in interest of justice to disclose the source of information, especially when the proceedings are for contempt?

**Citation Details :** Court on its own motion vs. The Pioneer (06.03.1997 - DELHC):

[MANU/DE/0609/1997](#)

**Summary Judgment :**

**Facts:** a newspaper report appeared in the daily newspaper "The Pioneer" under the caption "Court hampering drive against construction mafia". It also carried a photograph of the then Lt. Governor with the notation under it as "Drive will continue: P.K. Dave". The said report was authored by correspondent Rahul Pandey. Upon perusal of the aforesaid news report, this Court on 18.10.1996, suo moto, Issued notice to the correspondent, Mr. Rahul Pandey, and the Editor of the newspaper 'The Pioneer', Mr. Chandan Mitra, to show cause as to why proceedings for contempt of court should not be initiated against them for publication of the aforesaid news report. The Court, however, required him to file an additional affidavit and furnish the basis for the newspaper report. He was also required to produce his notes of interview, if any. The respondent/contemnor sought to be permitted, non-disclosure of his source of information, on the ground that without such protection, the said sources would be deterred in future in providing information to the press. Reliance was also placed on Section

15(2) of the Press Council Act, as an additional reason for not compelling a journalist to disclose his sources of information.

**Held:** There may be exceptional cases in which on balancing the various interest, the Court decides that the source should be disclosed. In order to be deserving of freedom, the Press must show itself worthwhile of it. A free Press must be a responsible Press. If a newspaper should act irresponsibly then it forfeits its claim to protect its source of information.

The principle that emerges is that the Courts ought not to compel confidences bona fide given to be breached unless necessary in the interest of justice. In the instant case, it is not necessary to direct disclosure of source as we have concluded that the news report was written without requisite material or factual foundation. There was no verification of facts or research and analysis. It is a case of the author acting irresponsibly and accepting whatever is told to him in an alleged interview. Besides, the respondents as noticed earlier initially were not willing to disclose the source or the name of person interviewed. However, soon thereafter in view of the legal position and the "altered circumstances" the counsel indicated their willingness to disclose the name of person interviewed. Later on, at the third stage, the respondents/ contemnor did a voile face and declined to disclose the person interviewed or the source of information, on the ground that it would adversely affect their information gathering capacity in future. In these circumstances, we have justifiably and legitimately drawn an adverse inference that there is no factual foundation or requisite material available with the respondents/ contemnor, for publication of News port. No useful purpose would be served by insisting on the disclosure of the person interviewed or the source of information.

**Subject Matter :** Power to make rules

**Relevant Section : Section 25(2):** In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, like the procedure for nomination of members of the council under clauses (a), (b) and (c) of sub-section (3) of section 5.

**Section 5(3):** 28 Nominated members shall constitute the following:

- (a) 13 members: 6 editors + 7 working journalists (not editors);
- (b) 6 - business owners in the newspapers industry;
- (c) 1 - news agencies manager
- (d) 3: 1 by BCI; 1 by UGC; 1 by Sahitya Academy; Each of these shall be an expert (education wise) their respective fields;
- (e) 5: 3 by Lok Sabha Speaker from among the members; 2 by Rajya Sabha Chairman from among the members.

**Key Issue :** Which method and procedure is to be followed for the nomination of the members of the Press Council?

**Citation Details :** Suraj Prakash vs. Union of India and Ors. (15.11.1990 - DELHC):

[MANU/DE/0298/1990](#)

**Summary Judgment :**

**Facts:** In this petition under Article 226 of the Constitution the challenge was to the nomination of Respondent No. 3 as a member of the Press Council of India. The contention of the petitioners was mainly that respondent No. 3 was an employee of one of the petitioners and to avoid the rigours of sub-section (3) of section 5, the respondent No. 3 had suppressed this fact and mis-represented that he was an employee of another newspaper.

**Held:** In the ordinary course, one association may not be aware of the names recommended by the other's. This may result in the recommendation of common names, or names of more

than one person under clause (a) and clause (b) interested in any newspaper or group of newspapers under the same control of management. In the very nature of things, this function would have to be performed by the Chairman after he receives panels of names recommended by the various associations. The Rules do not specifically prescribe the manner in which this duty coupled with power has to be performed. In the affidavit filed on behalf of the Council, it has been stated that in such cases also, names are picked up by draw of lots from among the concerned persons. A recommendation for nomination of one person cannot be said to be vitiated merely because a recommendation may also have been made of the name of another person interested in the same establishment. It cannot be anticipated in such a case as to who would be nominated or excluded by the operation of the second proviso. The Council as a body, has not been assigned any role to play in the process of making nominations of members under Section 5. The appointing authority, in respect of the category referred to in clause (a), clause (b) or clause (c) is the retiring Chairman, who alone is the nominating authority. There is no machinery provided in the statute for investigation into any objection with regard to the nomination of any person.



## **TELECOM REGULATORY AUTHORITY OF INDIA ACT, 1997**

**Subject Matter :** Functions of the Authority

**Relevant Section : Section 11:** This section talks about the various functions to be performed by TRAI such as giving recommendations, setting terms and conditions for telecom service providers, their license, competition and other related functions.

**Key Issue :** Whether TRAI can ask for information about the segmented offers even after confidentiality clause?

**Citation Details :** Telecom Regulatory Authority of India vs. Bharti Airtel Ltd. and Ors. (06.11.2020 - SC): [MANU/SC/0848/2020](#)

**Summary Judgment :**

**Facts:** TRAI has given an order in exercise of powers conferred under Section 11 of TRAI Act, 1997 stating that the telecom service providers now have to disclose information regarding segmented offers and discounts, reporting requirements to be met and Significant Market Power. This order was challenged by Bharti Airtel, Idea Cellular and Vodafone Mobile Services. On appeals being pending the telecom service providers filed interim application to put a Interim stay on the order given by TRAI, to which the TDSAT set aside the Telecom Tariff 63rd Amendment Order in so far as it changes the concepts of SMP, Non-predation and the related provisions. Aggrieved by the said order TRAI has filed the following appeal.

**Held:** The court held that the definition of "Reporting Requirement" was substantially modified, so as to include the principles of non-discrimination and non-predation. This was amended by the 42nd Amendment order. The amended definition of Reporting Requirement

makes it clear that the Reporting Requirement is for the information and record of the TRAI. By allowing the appeal it held that the information required by the TRAI cannot be said illegal or unjustified and telecom service provider has to give information to TRAI regarding segmented offer. But at the same time **it is the duty and responsibility of TRAI to ensure that such information is kept confidential and is not made available to the competitors or to any other person.**

**Subject Matter :** Establishment and Jurisdiction of Authority & Appellate Tribunal

**Relevant Section : Section 3:** The central government by notification will appoint an authority to be named as Telecom Regulatory Authority which will be a body corporate, having perpetual succession and a common seal and can acquire, hold and dispose of property, both movable and immovable and can contract and can sue or be sued.

**Section 14:** The Central Government shall by notification may establish an Appellate Tribunal to adjudicate any dispute between a licensor and a licensee or between two or more service providers or between a service provider and a group of consumers.

**Section 2(1)(j):** "Service Provider" means the Government as a service provider and includes a licensee.

**Section 18:** Appeals to Supreme Court shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of the Civil procedure Code.

**Key Issue :** Whether the petition is maintainable before TDSAT?

**Citation Details :** Bennett Coleman and Co. Ltd. and Ors. vs. Broadcast Audience Research Council India (29.09.2020 - DELHC): [MANU/DE/1795/2020](#)

**Summary Judgment :**

**Facts:** The respondent is a not-for-profit Company registered as a television rating agency by the Government of India, it introduced algorithms into its data validation method purported to mitigate the impact of 'Landing Page' on viewership data across all genres of television channels. The petitioner contended that it had restrained placing of television channels on the Landing Page on the ground that the same leads to false viewership data and creates market distortions. On the same being challenged before TDSAT by the petitioners and thereby obtaining order in their favour TRAI appealed to SC where it was held that the appellant shall not enforce Landing Page Regulations/directions against the respondents and other similarly situated members of the Association. The respondent contended that the petition before the TDSAT would not be maintainable as, as per S. 14 of the Act, only the disputes between licensor or licensee; between two or more service providers; or between a service provider and a group of consumers, is maintainable and the respondent in present case is neither the licensee nor the service provider. Its functions are merely that of a rating agency.

**Held:** It was held that **Dispute between the Central Government and the respondent can lay before the learned TDSAT only if the Central Government is treated as a 'licensor' and the respondent as a 'licensee'. It would also simply that the respondent would be a "Service Provider" as defined in Section 2(1)(j) of the Act.** The petitioner no. 1 is a service provider and therefore, the dispute between them would fall within the scope of Section 14(a)(ii) of the Act as a dispute between two or more service providers. Once it is held that the learned TDSAT would have jurisdiction under S. 14 of the Act, the same cannot be diversified through an Agreement between the parties. Hence, the present petition is maintainable before TDSAT.

**Subject Matter :** Jurisdiction, Civil court not to have jurisdiction

**Relevant Section : Section 15:** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Appellate Tribunal is empowered by or under

this Act to determine.

**Section 27:** Bar of jurisdiction on civil court in respect of any matter which the Authority is empowered by or under this Act to determine.

**Key Issue :** Whether a counter claim at the instance of the Union of India in a proceeding initiated before the TDSAT by a licensee or service provider is maintainable?

**Citation Details :** Union of India (UOI) vs. Tata Tele-services (Maharashtra) Ltd.

(23.08.2007 - SC): [MANU/SC/3396/2007](#)

**Summary Judgment :**

**Facts:** The order passed by TDSAT where the appellant was ordered to return the set off claimed with interest thereon is challenged in the present appeal. Also the TDSAT has held that it has no jurisdiction to entertain a counter claim at the instance of the appellant.

**Held:** It was held that after a plain reading of the provisions of the act in the light of the preamble to the Act and the Objects and Reasons for enacting the Act, this indicates that disputes between the concerned parties, are to be determined by a specialised tribunal constituted for that purpose. There is also an **ouster of jurisdiction of the civil court to entertain any suit or proceeding in respect of any matter which the TDSAT is empowered by or under the Act to determine. It was held that the counter claim was maintainable and it requires to be investigated.**

**Subject Matter :** Application of certain laws

**Relevant Section : Section 38:** The provisions of this Act shall be in addition to the provisions of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 and nothing in this act shall affect any jurisdiction, powers and functions required to be exercised or performed by the Telegraph Authority in relation to any area falling within the jurisdiction of such Authority.

**Section 11(1):** It talks about the functions of the TRAI.

**Key Issue :** Whether the Government is bound to seek recommendation of the TRAI before exercising its licensing power?

**Citation Details :** Microwave Communication Ltd. vs. Union of India and Ors. (12.10.1999 - DELHC): [MANU/DE/1299/1999](#)

**Summary Judgment :**

**Facts:** License was granted to MTNL by the government which was challenged by other cellular mobile telephone services provider. These operators approached the TRAI challenging the grant of licence in favour of the MTNL and succeeded. The TRAI held that in view of provisions of section 11 of the TRAI Act it was necessary for the Government, i.e. the licensor to have recommendation of the TRAI before a new service provider like the MTNL could be granted a licence. This order of the TRAI was challenged by the Government in this court.

**Held:** It was held that If seeking of recommendation of the TRAI by the Central Government was meant to be mandatory, there was noting to prevent the Legislature from saying so. **It appears that the Legislature intentionally used the word 'recommend'.** This is in consonance with S. 38 of the TRAI Act. Further, S. 38 provides that nothing in the TRAI Act shall affect any jurisdiction, powers and functions required to be exercised or performed by the Telegraph Authority in relation to any area falling within the jurisdiction of such Authority. Thus, S. 38 leaves no scope for an argument suggesting conflict between TRAI Act and the IT Act. **Both the provisions have to coexist** and to bench it appears that it is for this reason that the non-obstante clause has been used in sub-section (1) of S. 11 TRAI Act

only by way of abundant caution. **It was held that the TRAI has no power to issue directions to the Government as a licensor.**



## **CENTRAL GOODS AND SERVICES TAX ACT, 2017**

**Subject Matter :** Settling virtual currencies regulated by RBI

**Relevant Section : Section 2(75):** “Money” means the Indian legal tender or any foreign currency or any other instrument recognised by the Reserve Bank of India when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value.

**Key Issue :** Whether circular directing entities regulated by RBI not to settling virtual currencies liable to be set aside on ground of proportionality?

**Citation Details :** Internet and Mobile Association of India vs. Reserve Bank of India (04.03.2020 - SC): [MANU/SC/0264/2020](#)

**Summary Judgment :**

**Facts:** The Respondent Bank issued a Statement on Developmental and Regulatory Policies which directed the entities regulated by RBI not to deal with settling virtual currencies and to exit the relationship, if they already have one, with such settling virtual currencies. same to the said Statement, RBI again issued a circular directing the entities regulated by RBI not to deal in virtual currencies nor to provide services for facilitating any person or entity in settling virtual currencies and to exit the relationship with such persons or entities, if they were already providing such services to them. The Petitioner challenging the said Statement and Circular and seeking a direction to the Respondents not to restrict banks and financial institutions regulated by RBI, from providing access to the banking services, to those engaged in transactions in crypto assets.

**Held:** The activities carried on by the Petitioner were not declared **as unlawful thus RBI is obliged to direct the Central Bank of India to defreeze the account to release the funds** lying in the account to the company together with interest at the rate applicable.

**Subject Matter :** Levy and collection

**Relevant Section : Section 9:** Where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax.

**Key Issue :** Whether Compensation was beyond legislative competence of Parliament?

**Citation Details :** Union of India (UOI) and Ors. vs. Hind Energy and Coal Beneficition (India) Ltd. (03.10.2018 - SC): [MANU/SC/1118/2018](#)

**Summary Judgment :**

**Facts:** The High Court filed a writ petition challenging validity of the Goods and Services Tax for compensation to States, after that the Division Bench passed a partial ad interim order

providing that additional levy on the stocks of coal on which writ Petitioner had already paid Clean Energy Cess and so he shall not be required to make any further payment. However, on stocks of coal on which no Clean Energy Cess was paid any payment in terms of the impugned Act would be subject to the result of the writ petition.

**Held:** The claim of the Petitioner that he is entitled for set off in payment of Compensation to States Cess to the extent he had already paid Clean Energy Cess cannot be accepted. The Petitioner is not entitled for any set off of payments made towards Clean Energy Cess in payment of Compensations to States Cess.

**Subject Matter :** Appeal to Supreme Court

**Relevant Section : Section 118:** Where the judgment of the High Court is varied or reversed in the appeal, effect shall be given to the order of the Supreme Court in the manner provided in section 117 in the case of a judgment of the High Court.

**Key Issue :** Whether there was a need for amalgamation of existing Tribunals and setting up of benches?

**Citation Details :** Rojer Mathew vs. South Indian Bank Ltd. and Ors. (13.11.2019)

[MANU/SC/1563/2019](#)

**Summary Judgment :**

**Facts:** Rojer Mathew filed petition assailing the final judgment and order of the High Court of Kerala. The Petitioner had originally approached the High Court challenging the constitutional validity of act which permits secured creditors to participate in auction of immoveable property if it remained unsold for want of reserve bid in an earlier auction. Rojer Mathew claimed that the aforementioned provision violated his rights, besides being in contravention of the Code of Civil Procedure which prohibits mortgagees from participating in auction of immovable property without prior Court permission.

**Held:** It is necessary to have such a Commission which is itself an independent body manned by honest and competent persons. This body is required to select those persons who specialised tribunals in terms of the law laid down in judgment of the High Court. It need persons who have grassroot experience and a judicious mix of judicial members and those with an independent outlook, integrity, character and good reputation and those who are totally free from the influence or pressure from the Government so that the people will have faith in the adjudicating mechanism of the tribunals.

**Subject Matter :** Offences and penalties on goods and services.

**Relevant Section : Section 132:** Whoever commits and retains the benefits arising out of, any of the offences for supplies of any goods or services without issuing any invoice or bill in violation of the provisions of this Act, or the rules made thereunder leading to wrongful availment or utilisation of input tax credit or refund of tax, shall liable for punishment.

**Key Issue :** Whether the petitioner is liable to pay credit to the Commissioner of GST & Central Excise, Salem, Tamil Nadu?

**Citation Details :** C. Pradeep vs. Commissioner of GST and Central Excise, Selam (06.08.2019 - SC): [MANU/SC/1921/2019](#)

**Summary Judgment :**

**Facts:** The Maintainability of appeal exists for the compliance with the pre-deposit and non-prosecution of the case. thus it was held that Issuing notice on condition that the petitioner shall deposit the credit on the file of the Commissioner of GST & Central Excise, Salem,

Tamil Nadu and failing which the special leave petition shall stand dismissed for non-prosecution without further reference to the Court.

**Held:** For a period of one week, **no coercive action be taken against the Petitioner in connection with the alleged offence and the interim protection will continue upon production** of receipt in the Registry about the deposit made with the Department within one week from the date of order until the disposal of this Special Leave Petition.

**Subject Matter :** Damning verdict on GST's anti-profiteering rulings

**Relevant Section : Section 171:** No penalty shall be leviable if the profiteered amount is deposited within thirty days of the date of passing of the order by the Authority.

**Key Issue :** Whether the petitioner challenging constitutional validity of Section 171 of the Central Goods and Services Tax Act 2017 is appropriate?

**Citation Details :** National Anti-Profiteering Authority vs. Hardcastle Restaurants (P.) Ltd. (19.02.2020 - SC): [MANU/SC/0627/2020](#)

**Summary Judgment :**

**Facts:** The Petitioner Hardcastle Restaurants who serves various types of food and beverages items from its restaurants. The Petitioner is registered under the Goods and Services Tax Act, 2017 in ten States. After the commencement of GST Act till 14 November 2017, the services rendered by the Petitioner were subjected to 18% of GST. A notification was issued on 14 November 2017 reducing the rate of GST to 5% with effect from 15 November 2017. As a result, the Petitioner had to charge GST at 5% on the services rendered without availing impugned tax credit of the taxes paid on input services and capital goods. after that the complaint made on restaurant for charging the rate of GST on restaurant services was reduced from 18% to 5%, the Petitioner had increased the prices of product sold, which was an act of illegal profiteering. The Standing Committee on Anti Profiteering examined the complaints. Thereafter as concerned to the Anti-profiteering measure the question of Constitutional validity of Section 171 of the Central Goods and Services Tax Act 2017 exists for time limitation.

**Held:** The Act and Rules provide no appeal and the Authority can impose a penalty and can cancel the registration. In the event, the **court remanded the case back to NAA while saying “the Authority is newly established,” and “as a guidance to this Authority, highlighting the importance of fair decision-making is necessary”**. Therefore in the interests of a uniform and consistent view on the law, all the writ petitions should be transferred to the High Court of Delhi where earlier writ petitions are already pending.



## INCOME TAX ACT, 1961

**Subject Matter :** Imposition of Penalty under Section 271(1)(C)

**Relevant Section : Section 271(1)(C):** Failure to furnish returns, comply with notices, concealment of income, etc If the Assessing Officer or the Principal Commissioner or Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of

any proceedings under this Act, is satisfied that any person has concealed the particulars of his income or furnished inaccurate particulars of such income.

**Key Issue :** Whether penalty under Section 271(1)(c) has been correctly levied by the AO?

**Citation Details :** Malook Nagar, New Delhi vs. Acit (13.05.2022 - ITAT Delhi)

[MANU/ID/0674/2022](#)

**Summary Judgment :**

**Facts:** The present appeals have been filed by the assessee against the orders of the learned CIT(A). The Assessing Officer made addition on account of agricultural income to the total income. Subsequently, the Tribunal determined agricultural income Rs.10,000 per acre. Consequent to the addition, penalty under Section 271(1)(c) of the Income Tax Act, 1961 (IT Act) has been levied by the AO.

**Held:** In CIT vs. Manjunatha Cotton and Ginning Factory, High Court held that notice under section 274 of IT Act should specifically state the grounds mentioned in section 271(1)(c) of the IT Act, i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income. Sending printed form where all the grounds mentioned in Section 271 of IT Act are mentioned would not satisfy requirement of law. The Hon'ble jurisdictional Delhi High Court in the case of PCIT vs. Sahara India Life Insurance Co. Ltd. reiterated that notice under Section 274 of the IT Act should specifically state the grounds on which penalty was sought to be imposed as the assessee should know the grounds which he has to meet specifically. In present case, since the AO has not been specified under Section 274 as to whether penalty is proposed for alleged 'concealment of income' OR 'furnishing of inaccurate particulars of such income', the penalty levied is obliterated. The appeals of the assessee are allowed.

**Subject Matter :** Validity and allowance of expenditure incurred.

**Relevant Section : Section 37(1):** Any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business and no allowance shall be made in respect of such expenditure.

**Key Issue :** Whether lower authorities erred in disallowing losses as capital expenditure?

**Citation Details :** Flipkart India Private Limited vs. Assistant Commissioner of Income Tax, Circle -3(1)(1) (25.04.2018 - ITAT Bangalore) MANU/IL/0065/2018

**Summary Judgment :**

**Facts:** The assessee, a wholesale dealer, acquired goods from various persons and immediately sold them to WS Retail Services Pvt. Ltd. The retail seller ultimately sold those goods from e-commerce platform '**Flipkart.Com**'. To increase the volume of sale, assessee was purchasing goods at low cost and was selling them to the retailers at discount. The strategy to forego the profit had resulted in assessee-co. became a loss making company. The Assessing Officer held that the profits foregone by selling goods at less than cost price were to be regarded as expenditure incurred in creating intangibles. Thus, only depreciation claim could be allowed on it. The Tribunal held in favour of assessee, thus appeal exists.

**Held:** The court held that the loss as declared by the **Assessee in the return of income should be accepted by the AO and his action in disallowing expenses and arriving at a positive total income by assuming that there was an expenditure of a capital nature incurred by the Assessee** in arriving at a loss as declared in the return of income and further disallowing such expenditure and consequently arriving at a positive total income chargeable to tax is without any basis and not in accordance with law and the said manner of determination of total income is deleted.

**Subject Matter :** Income which do not form part of total income; Income from other sources.

**Relevant Section : Section 10(2):** In computing the total income of a previous year of any person shall not include any sum received by an individual as a member of a Hindu undivided family, where such sum has been paid out of the income of the family.

**Key Issue :** Whether the assessee's plea of having received a valid gift from his HUF was rightly declined?

**Citation Details :** Gyanchand M. Bardia vs. The Income Tax Officer (21.02.2018 - ITAT Ahmedabad) MANU/IB/0085/2018

**Summary Judgment :**

**Facts:** The assessee claimed that gift of certain amount received from his Hindu undivided family was exempt from tax under section 56(2)(vii). However, the Assessing Officer held that the term 'relative' does not include as donor and, therefore, added the impugned amount to assessee's income under Section 68.

On further appeal, the Tribunal held in favour of revenue that as per Explanation to **Section 56(2)(vii)** members of an HUF are its relatives.

**Held:** The court held that when member receives any sum from the HUF, same would be chargeable to tax as the term 'relatives' defined under said Explanation does not include HUF as a relative of such individual. The legislative intent is very clear that an HUF is not to be taken as a donor in case of an individual recipient. Thus, **the assessee's plea of having received a valid gift from his HUF was rightly declined.**

**Subject Matter :** Income which do not form part of total income; Income from other sources.

**Relevant Section : Section 56(2)(vii):** That gifts received are taxable in the hands of recipient under the head of other sources and there is no taxation for the donor; where an individual or a Hindu undivided family receives any sum of money which exceeds fifty thousand rupees; any immovable property or any other property, without consideration, it will not be taxable.

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**Subject Matter :** Income which do not form part of total income; Income from other sources.

**Relevant Section : Section 68:** Where any sum is found credited in the books of an assessee maintained for any previous year, and the explanation offered by him is not satisfactory in the

opinion of A.O., the sum so credited may be charged to income tax as the income of the assessee of that previous year.

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**Subject Matter :** Chargeable tax to NRI's

**Relevant Section : Section 133(6):** The Assessing Officer may for the purposes of this Act require any person to furnish information in relation to the statements of accounts and affairs verified in the manner specified which will be useful for any enquiry proceeding under this Act

**Key Issue :** Whether tax rate amount attributed to the PE sunjeted to NRI in India is fully applicable tax rate?

**Citation Details :** In Re: MasterCard Asia Pacific Pte. Ltd. (06.06.2018 - Authority For Advance Rulings) MANU/AR/0105/2018

**Summary Judgment :**

**Facts:** The Applicant, MasterCard Asia Pacific, is a Singaporean company engaged in processing of electronic payments, where the customers are provided with a MasterCard Interface Processor that connects to card's Network and processing centres and Indian subsidiary owns and maintains MIPs placed at Customers' locations in India. The applicant approached the AAR to decide if it had a PE in India.

**Held:** The Authority for Advance Rulings **held that MasterCard has a PE in India under provisions of Article 5 of India-Singapore DTAA** in respect of services rendered with regard to use of a global network and infrastructure to process card payment for Customers in India. It was held that the applicant has fixed place PE, service PE and dependent agency PE in India and is **required to withhold tax at source on amount attributed to the PE in India at the full applicable rate at which the non-resident is subjected to tax in India.**

**Subject Matter :** Chargeable tax to NRI's

**Relevant Section : Section 5(2):** Scope of total Income in case of of person who is a resident or a person not ordinarily resident in India may included for Income where it can be Income from any source which is received in India in such year by or accrues or is deemed to accrue or arise to him in India during in or outside of India.

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**Subject Matter :** Chargeable tax to NRI's

**Relevant Section : Section 9(1):** The business income of a foreign company or non- resident person is chargeable to tax to the extent it accrues or arises through a business connection in India or from any asset or source of income located in or India.

**Key Issue :** Whether tax rate amount attributed to the PE sunjeted to NRI in India is fully applicable tax rate?

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**Subject Matter :** Capital 'gains' in Tax.

**Relevant Section : Section 28:** Any compensation received or receivable by any person whether revenue or capital in connection with the termination or the modification of the terms and conditions of any contract relating to his business shall also be taxable under the head Profits and gains of business.

**Key Issue :** Whether addition made on account of long-term capital gain liable to be deleted?

**Citation Details :** Bhojison Infrastructure (P) Ltd. vs. Income Tax Officer (17.09.2018 - ITAT Ahmedabad) MANU/IB/0242/2018

**Summary Judgment :**

**Facts:** The assessee submitted that the limited controversy on the issue pertains to denial of indexation benefits on the cost of acquisition of land under sale giving rise of the long-term

capital gains. The Assessee pointed out the fact that documents in respect of land acquired certain years back could not be produced, the land was duly reflected in the balance sheet for last many years. It was thereafter contended that the AO had duly accepted the long-term capital gain on sale of such land parcels. The AO had granted long-term capital gain based on the said amount of cost of acquisition but however had denied indexation benefit which is inexplicable and the Department relied upon the orders of the AO and Commissioner. Hence, present appeal.

**Held:** The court held that assessee has not received this amount under an agreement for not carrying out activity in relation to any business **or not to share in know-how, patent, copyright, trade mark, license, etc. as specified u/s 28(va) of the Act** for its taxability under the head of business income. Thus **the compensation received in lieu of 'right to sue' could not be regarded as revenue receipt and appeal allowed.**

**Subject Matter :** Capital 'gains' in Tax.

**Relevant Section : Section 45:** Any profits or gains arising from the transfer of a capital asset effected in the previous year will be chargeable to income-tax.

**Key Issue :** Whether addition made on account of long-term capital gain liable to be deleted?

**Citation Details :** Bhojison Infrastructure (P) Ltd. vs. Income Tax Officer (17.09.2018 - ITAT Ahmedabad) MANU/IB/0242/2018

**Summary Judgment :**

**Facts:** The assessee submitted that the limited controversy on the issue pertains to denial of indexation benefits on the cost of acquisition of land under sale giving rise of the long-term capital gains. The Assessee pointed out the fact that documents in respect of land acquired certain years back could not be produced, the land was duly reflected in the balance sheet for last many years. It was thereafter contended that the AO had duly accepted the long-term capital gain on sale of such land parcels. The AO had granted long-term capital gain based on the said amount of cost of acquisition but however had denied indexation benefit which is inexplicable and the Department relied upon the orders of the AO and Commissioner. Hence, present appeal.

**Held:** The court held that assessee has not received this amount under an agreement for not carrying out activity in relation to any business **or not to share in know-how, patent, copyright, trade mark, license, etc. as specified u/s 28(va) of the Act** for its taxability under the head of business income. Thus **the compensation received in lieu of 'right to sue' could not be regarded as revenue receipt and appeal allowed.**

**Subject Matter :** Tax payable by assessee.

**Relevant Section : Section 112:** An assessee is required to pay a tax at the rate of 20% or 10% after and before indexation respectively on the capital gained by him on long term capital assets.

**Key Issue :** Whether the penalty for concealment of income be validly imposed on the assessee?

**Citation Details :** Dy. Commissioner of Income Tax, Central Circle-4(2) vs. Shah Rukh Khan (21.05.2018 - ITAT Mumbai) MANU/IU/0357/2018

**Summary Judgment :**

**Facts:** Mr. Shah Rukh Khan, had received a villa at Dubai as gift and offered an amount of Rs. 14 lakhs as the notional income of the villa for tax in his return of income for the year under consideration. During the course of assessment proceedings, assessee claimed that Article 6 of India-UAE tax treaty doesn't expressly recognize the right of the resident State to

tax the income from immovable property situated in the source State. Therefore, the notional income of the villa owned by him in Dubai could not be subjected to tax in India.

**Held:** It was held that claim raised by the assessee being clearly backed up by a bonafide belief on his part that the notional income of the villa was not liable to be taxed in India, **no penalty for concealment of income could be validly imposed on the assessee.**

**Subject Matter :** Tax payable by assessee.

**Relevant Section : Section 27:** The person is deemed to be owner of the property even if they are not the legal owners of the property.

**Key Issue :** Whether the penalty for concealment of income be validly imposed on the assessee?

**Citation Details :** Dy. Commissioner of Income Tax, Central Circle-4(2) vs. Shah Rukh Khan (21.05.2018 - ITAT Mumbai) MANU/IU/0357/2018

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**Held:** It was held that claim raised by the assessee being clearly backed up by a bonafide belief on his part that the notional income of the villa was not liable to be taxed in India, **no penalty for concealment of income could be validly imposed on the assessee.**

**Subject Matter :** Determination of the Annual Value.

**Relevant Section : Section 23:** The taxes levied by any local authority in respect of the property shall be deducted irrespective of the previous year in which the liability to pay such taxes was incurred by the owner according to the method of accounting regularly employed by him in determining the annual value of the property of that previous year in which such taxes are actually paid by him.

**Key Issue :** Whether the use of section 23 of the Act is fit in merits?

**Citation Details :** Sachin R. Tendulkar vs. DCIT-23(3) (10.08.2018 - ITAT Mumbai):  
MANU/IU/0696/2018

**Summary Judgment :**

**Facts:** Mr. Sachin Tendulkar, owned two properties in Pune, Flat S and Flat T. Flat T was let out, however, Flat S was vacant for the whole year as suitable tenant couldn't be found. He claimed that the said flat had remained vacant throughout the year despite his reasonable effort to let out the same. In this regard, he submitted three letters written to the builder. In first letter, he thanked the builder for identifying the tenant for the flat at Flat T and also requested to identify tenant for Flat S. Subsequently, the assessee had written second letter and after that third letter being reminders for identifying the tenant to let out Flat S. Therefore, he claimed vacancy allowance for Flat S and declared nil income. During the course of assessment proceedings, the Assessing Officer made additions for the notional rental income from Flat S, which was also upheld by the CIT(A).

**Held:** The ITAT held in favour of assessee when same builder had helped the assessee to find tenant for another flat, it couldn't be said that these letters to the same builder to help him identify one more tenant, to be considered as fake, defied logic. **Therefore, if a property**

**was held with an intention to let out in the relevant year coupled with efforts made for letting it out, the same would fall within the purview of section 23(1)(c).**

**Subject Matter :** Meaning of associated enterprise.

**Relevant Section : Section 92A:** When two enterprises shall be deemed to be associated enterprises. It is proposed to amend sub-section (2) of the said section to clarify that the mere fact of participation by one enterprise in the management shall not make them associated enterprises, unless the criteria specified in sub-section (2) are fulfilled.

**Key Issue : a.** Whether there was an 'international transaction' by assessee?

**b.** Whether adjustment should be made in assessee's income on basis of ALP?

**Citation Details :** Shilpa Shetty vs. ACIT, CC-13 (21.08.2018 - ITAT Mumbai):

MANU/IU/0710/2018

**Summary Judgment :**

**Facts:** Mrs. Shilpa Shetty, was resident of India and a share purchase agreement (SPA) was signed by the shareholders of EMSHL, a Mauritian company, to transfer a portion of the shareholding to Kuki Investments Ltd. Assessee was neither a buyer nor a seller of shares of EMSHL in SPA. However, under SPA, she undertook to provide brand ambassadorship services without charges to Jaipur IPL Cricket Private Limited (JICPL), an Indian Company that was a 100 per cent subsidiary of EMSHL, in relation to promotional activities of 'Rajasthan Royals', an IPL cricket team owned by JICPL. The AO held that there was a deemed 'international transaction' between assessee and JICPL, therefore, adjustment should be made in assessee's income on basis of ALP.

**Held: a.** The ITAT held in favour of assessee that **Section 92B(2) deems a transaction between two non-AEs as 'international transaction' if there exists a prior agreement in relation to the relevant transaction between one of the non-AE's and AE of an assessee** and couldn't be applied to hold that transaction between assessee and JICPL was an 'International transaction' as neither of the parties to the SPA was an AE of the assessee nor JICPL had entered into a prior agreement with AE of assessee (JICPL was not a party to SPA).

**b.** Thus, in absence of a prior agreement between non-AE and AE of an assessee, no adjustments could be made.

**Subject Matter :** Charge of income-tax.

**Relevant Section : Section 2(24):** The income includes profits and gains, dividend and voluntary contributions received by a trust created wholly or partly for charitable. The trust" includes any other legal obligation.

**Key Issue :** Whether the compensation received by assessee for withdrawing criminal complaint was a capital receipt?

**Citation Details :** Assistant Commissioner of Income Tax vs. Jackie Shroff (23.05.2018 - ITAT Mumbai): MANU/IU/0681/2018

**Summary Judgment :**

**Facts:** Shares held by Mr. Jackie Shroff, in a company were sold due to forged signature by another person. Assessee filed a criminal complaint before the Economic Offences Wing. After filing of complaint, the accused came forward for amicable settlement of dispute and a settlement deed was executed in order to settle the dispute. As per the terms of settlement deed, assessee received Rs. 6.97 crores as compensation in lieu of withdrawing the criminal complaint. Assessee treated said compensation as capital in nature and did not offer it for

taxation at the time of filing of return. However, during assessment proceedings, the Assessing Officer treated the compensation as income and added it to income of assessee.

**Held:** The compensation received by the assessee was not for his professional activities but for settlement of dispute between him and some other party resulting in filing of a criminal complaint. The amount received towards compensation could not fit in to the definition of income as per section 2(24), read with section 4 of the act. Thus, compensation received by assessee for withdrawing criminal complaint was a capital receipt and couldn't be treated as income.

**Subject Matter :** Charge of income-tax.

**Relevant Section : Section 4:** Where by virtue of any provision the income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

**Key Issue :** Whether the compensation received by assessee for withdrawing criminal complaint was a capital receipt?

**Citation Details :** Assistant Commissioner of Income Tax vs. Jackie Shroff (23.05.2018 - ITAT Mumbai): MANU/IU/0681/2018

**Summary Judgment :**

**Facts:** Shares held by Mr. Jackie Shroff, in a company were sold due to forged signature by another person. Assessee filed a criminal complaint before the Economic Offences Wing. After filing of complaint, the accused came forward for amicable settlement of dispute and a settlement deed was executed in order to settle the dispute. As per the terms of settlement deed, assessee received Rs. 6.97 crores as compensation in lieu of withdrawing the criminal complaint. Assessee treated said compensation as capital in nature and did not offer it for taxation at the time of filing of return. However, during assessment proceedings, the Assessing Officer treated the compensation as income and added it to income of assessee.

**Held:** The compensation received by the assessee was not for his professional activities but for settlement of dispute between him and some other party resulting in filing of a criminal complaint. The amount received towards compensation could not fit in to the definition of income as per section 2(24), read with section 4 of the act. Thus, compensation received by assessee for withdrawing criminal complaint was a capital receipt and couldn't be treated as income.

**Subject Matter :** Assessment of tax on income.

**Relevant Section : Section 143:** The intimation has to be sent by the Income Tax Department within a year from the end of the financial year in which the taxpayer filed the return and If there is no intimation received by the taxpayer within the stipulated period it means there are no adjustments required to be carried out.

**Key Issue :** Whether the allotment of shares trigger any taxing event and whether they were under obligation to disclose the value of shares?

**Citation Details :** Sonia Gandhi and Ors. vs. Assistant Commissioner of Income Tax, Circle 52(1) and Ors. (10.09.2018 - DELHC): MANU/DE/3234/2018

**Summary Judgment :**

**Facts:** Mr. Rahul Gandhi and Mrs. Sonia Gandhi, extended a loan to the National Herald to write off the accumulated debts and recommence the newspaper publication. The said loan was assigned by the assessee to a newly incorporated non-profit company 'Young India' (YI) and in lieu of that they were allotted shares of YI. However, in Income-tax returns, they failed to pay tax on the shares allotted by Young India. The assessee argued that the

allotment of shares did not trigger any taxing event. It was also argued that since they were shareholders of a non-profit and charitable company, they were under no obligation to disclose the value of shares.

**Held:** The High Court held in favour of revenue that **if certain shares or property are acquired at a price which is less than its aggregate fair market value by an amount exceeding Rs. 50,000, the fair market value as reduced** by the considered paid shall be charged to tax. In the instant case, the assessee bought the shares at Rs. 100 per share which could not be deemed as its fair market value. **The assessee had nowhere disclosed the fair market value of such shares and had not recorded the facts relating to above taxing event.** Therefore, the AO was justified in reopening the cases.

**Subject Matter :** Applicability to deduct TDS.

**Relevant Section : Section 194C:** Any individual making a fee to a residential individual, who carries out 'work' as a contract between the 'specified individual' and the 'resident contractor,' is obliged and required to deduct TDS.

**Key Issue :** Whether the facts of the case were properly examined by the lower authorities for liability of assessee?

**Citation Details :** Uber India Systems Pvt. Ltd. vs. JCIT(TDS)(OSD)-(2)(3) (28.09.2018 - ITAT Mumbai): MANU/IU/0891/2018

**Summary Judgment :**

**Facts:** UBER India, was providing marketing and support services to a Dutch company, Uber BV. It was collecting payments on behalf of said company and making disbursements to driver-partners as per directions of Uber BV. A survey was conducted at the registered office of assessee-co. and it was observed that assessee had not complied with provisions of section 194C on pay-outs to Driver-Partners. Accordingly, the assessee was treated in-default and a demand notice of Rs. 24.92 crores and Rs. 84.13 crores for assessment years 2016-17 and 2017-18 were raised and penalty proceedings initiated. The assessee denied his liability to deduct TDS under section 194C on ground that it was not a 'person responsible for making payment' to Driver-Partners as contract was between Uber B.V. and Driver-Partners. It filed an application before ITAT for stay of demand.

**Held:** The ITAT referred to the submission made by **the assessee as to its modus operandi of collecting the payments on behalf of the Dutch company, which were made by way of debit or credit cards** or collected by the Driver-Partners directly from the customers. It was stated that there were practical difficulties as it was not possible for the assessee to collect TDS on the cash payments received by the Driver-Partners directly. Since the assessee had proved that **the facts of the case were not properly and thoroughly examined and verified by the lower authorities**, demand raised by the revenue had to be stayed subject to deposit of Rs. 20 Crore till the disposal of appeal by the Tribunal so that the business of the assessee was not adversely impacted.

**Subject Matter :** Profits and gains of business or profession

**Relevant Section : Section 2(24):** The income includes profits and gains, dividend and voluntary contributions received by a trust created wholly or partly for charitable. The "trust" includes any other legal obligation.

**Section 28:** Any compensation received or receivable by any person whether revenue or capital in connection with the termination or the modification of the terms and conditions of any contract relating to his business shall also be taxable under the head Profits and gains of business.

**Key Issue :** Whether the compensation received by the assessee for being sexually harassed was liable to tax?

**Citation Details :** Sushmita Sen vs. Assistant Commissioner of Income Tax-11(1) (14.11.2018 - ITAT Mumbai): MANU/IU/1111/2018

**Summary Judgment :**

**Facts:** Sushmita Sen, received a sum of Rs. 145 lakhs from Coca Cola India Limited. Out of total sum, she offered to pay tax only on Rs. 50 Lacs and claimed that balance Rs. 95 lakhs was capital receipt. She claimed that Rs. 95 lakhs represented the compensation received towards damages caused to her reputation.

**Held:** The Mumbai ITAT held that compensation received by the assessee was not income liable to tax. Though she had received total amount of Rs. 145 lacs in lieu of settlement for breach of terms of celebrity engagement contract, yet only an amount of Rs. 50 lakhs was due to assessee under the contractual terms, and additional amount of Rs. 95 lakhs did not arise out of exercise of profession. **Rs. 95 lacs was received towards damages arising out of her being sexually harassed by CCIL employee, disparaging her professional reputation by false allegations and for the repudiatory breach of contract by CCIL. Such compensation could not be termed as any benefit, perquisite arising to assessee.**

**Subject Matter :** Profits and gains of business or profession

**Relevant Section : Section 2(24):** The income includes profits and gains, dividend and voluntary contributions received by a trust created wholly or partly for charitable. The "trust" includes any other legal obligation.

**Section 28:** Any compensation received or receivable by any person whether revenue or capital in connection with the termination or the modification of the terms and conditions of any contract relating to his business shall also be taxable under the head Profits and gains of business.

**Key Issue :** Whether impugned order of deletion of addition in respect of cash payment was sustainable?

**Citation Details :** Priyanka Chopra vs. Dy. CIT, Central Circle-1(3) (16.01.2018 - ITAT Mumbai): MANU/IU/0037/2018

**Summary Judgment :**

**Facts:** The course of search on the assessee Priyanka Chopra, an amount was declared as undisclosed income for cash payment for purchase of Studio. When the same was confronted to the mother of the assessee who was managing the affairs of the assessee. Subsequently, the mother of the assessee filed in the office of Income Tax Office, retracted the statement. In this background, the Assessing Officer was of the opinion regarding the retraction statement of mother of Assessee, that no cash payment was made for purchase of Studio, except the payment made by a cheque. However, the Assessing Officer was not convinced. He observed that the assessee had not contradicted the seized material on the basis of which she had disclosed an amount being made for purchase of Studio. Instead, the assessee had simply stated that there is no cash component as agreed in the statement recorded during the course of search. Therefore, the contention of the assessee was not accepted. On appeal, the Commissioner deleted addition made by AO. Hence, present appeal.

**Held:** The assessee has also raised an **additional ground wherein it is urged that addition is not based upon any incriminating material**. On the same reasoning, as the **previous ground adjudicated by us wherein we have admitted the additional ground and**

**referred the issue to the file of the Assessing Officer**, we similarly admit this ground. **The Assessing Officer is directed to consider the issue afresh** in accordance with the ratio arising out of the order of this court.

Dariusz Szostek | Mariusz Załucki (eds.)

# Legal Tech

Information technology tools in the administration of justice



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## Introduction

The use of technological solutions, increasingly often referred to as *LegalTech*, in the administration of justice is nowadays necessary. It is impossible to imagine courts functioning without information systems or law firms not using electronic databases of case law and legal literature. However, technology is developing further and starting to go beyond the comfort zone of traditional legal services. Solutions are appearing which can and sometimes do replace people in tasks which people used to deal with not so long ago. Such solutions are e.g. those based on artificial intelligence, resulting in various algorithms functioning in practice, not always understandable for statistical users of legal services. This is, among other reasons, why in many aspects the use of the LegalTech tool raises significant doubts and leads to many unavoidable questions, including: Will traditional lawyers survive? Will robots and automatons replace us? Will artificial intelligence replace us in providing legal advice, creating contracts or issuing judgments? Is the effectiveness of LegalTech tools greater than the work of traditional lawyers? Or perhaps we are irreplaceable, irremovable and have nothing to worry about, and the role of the lawyer will not change? Of course, such and similar questions can be multiplied, and the answer to them basically boils down to explaining what the various LegalTech tools are, whether and how to implement them, and whether it is necessary or just useful?

In this monograph we try to explore this research area and to bring the reader closer to the next stage of development of law, which more and more courageously uses various technological tools. Undoubtedly, the previously separate “worlds” of law, engineering, information technology and technology have come together in everyday life. Traditionally, the law regulated technical issues, defined technical standards, influenced the way IT systems were built or operated, including Internet platforms, while engineers followed the advice or opinions of lawyers. It was the law and lawyers who regulated technology and indicated the directions of implementation. However, the last stage of the digital revolution has quite significantly changed this situation, resulting in the equalization of law and technology, and thus the influence of lawyers on engineers. Increasingly, engineering is entering a domain that until recently was reserved exclusively for lawyers, and information systems are effectively replacing the work of a lawyer. In some aspects, such as Blockchain or

Bitcoin, engineering has even overtaken the law, forcing lawyers to learn, pioneered research directions and forced new, necessary regulations on the market. And, as you might think, more challenges lie ahead, and there is no turning back from the digital road. It is the time of algorithms, the time of legal technologization, the time of LegalTech. Therefore, the aim of our research is not only to indicate how the law and the lawyer's work is changing now, but also how much this area will change in the coming years.

The book is an effect of scientific research of an inter-university team of an international group of scientists dealing with problems of new technologies and law in the aspect of digital economy 3.0 and economy 4.0. The first results of the team's work have already been published in Polish as part of the publication "LegalTech. Czyli jak bezpiecznie z narzędziami IT w organizacji, w tym w kancelarii oraz dziale prawnym" (LegalTech. How to safely use IT tools in an organisation, including a law firm and a legal department), published by C.H. Beck (Warsaw 2021). The current publication is a slightly revised and updated version of the Polish book, which also includes new texts and a new perspective on the rapidly changing technological reality that surrounds us.

The publication is divided into two parts. The first part is more theoretical and explains the basic aspects and legal framework of technological tools, while the second part presents LegalTech solutions functioning in selected countries around the world. In the first part, we reflect on the limits of technology, algorithms and various possibilities of applying LegalTech tools in practice. In turn, in the second part, we show how particular legislators have applied technological possibilities and how this has improved the work of their judiciary.

Undoubtedly, our publication does not explain all aspects of technological tools in the administration of justice. However, we believe that it can provide a voice in the discussion on the current and future shape of the legal services market. Therefore, we encourage you to discuss it with us. Since the work has a collective character, it should be emphasised here that the individual authors represent their own views. The fact that in such a group we do not always agree on a particular thought, in our opinion, only proves that we are open to other views, and the law is only the art of interpretation, for which in the changing technological reality, there is much room.

*Introduction*

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**PART ONE**

**Information Technology Tools in the Administration of  
Justice: Definitions, Possibilities, Barriers, Doubts**



**SECTION ONE.**  
**The Concept of Legal Technology and its Borderlands**



# The Concept of Legal Technology (LegalTech) and Legal Engineering

Dariusz Szostek

## 1. Definition

Information technology extends its scope to further new fields. This does not exclude the work of lawyers, or the law itself for that matter, both public and private.

The concept of “Legal Technology” (abbreviated to “LegalTech”, and its synonyms “Law Tech”, “Legal IT”, or “Legal Informatics”<sup>1</sup>), which exists in the academic sphere, is not currently reflected in any legal definition. It is a doctrinal concept, understood differently by many authors. At its broadest understanding, that concept is understood as IT solutions that include both hardware and software utilised in the law<sup>2</sup>.

LegalTech is a combination of the concepts of a “legal service”<sup>3</sup> and “technology”<sup>4</sup>. Both of those are imprecise and do not meaningfully contribute to the possibility of defining the scope of that phrase. The concept at issue originally had a marketing-related nature, and was, at first, used by start-ups during the second decade of the 21<sup>st</sup> century in the USA, to signify their area of practice. This does not preclude the fact that the concept at hand, when viewed more broadly (i.e., as a technology for

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1 Micha-Manuel Bues and Emilio Matthaei, ‘LegalTech on the Rise: technology Changes Legal Work Behaviors, But Does Not Replace Its Profession’ in Kai Jacob, Dierk Schnidler and Roger Strathausen (eds), *Liquid Legal* (Springer International Publishing 2017) 90.

2 Jens Wagner, *Legaltech und Legal Robots. Der Wandel im Rechtswesen durch neue Technologien und Kunstliche Intelligenz*, (Springer 2020) 2; Michael Grupp, ‘Legal tech – Impulse fur Streitbeilegung und Rechtsdienstleistung’ (2014) 8-9 Anwaltsblatt <[https://www.juris.de/jportal/portal/page/bsabprod.psml?doc.id=jzs-AnwBl2014080019-000\\_660&st=zs&showdoccase=1&paramfromHL=true](https://www.juris.de/jportal/portal/page/bsabprod.psml?doc.id=jzs-AnwBl2014080019-000_660&st=zs&showdoccase=1&paramfromHL=true)> accessed 18 November 2020; Bues and Matthaei (n 1) 90.

3 On the subject of “legal service”, see Brian Sheppard, ‘Incomplete Innovation and the Premature Disruption of Legal Services’ (2015) 1797 Michigan State Law Rev 1800.

4 Markus Hartung, Michal-Manuel Bues and Gernot Halbleib, Legal Tech, How Technology is Changing the Legal World (Nomos 2018) 5.

the benefit of law and lawyers, including expert systems), was subject to research as early as in the 1950s<sup>5</sup>.

One of the first definitions of LegalTech in Europe<sup>6</sup> (in a manner true to the new technologies themselves – by posting it on a blog) was presented in September 2015 by Martin Bues: “If one were to attempt at defining LegalTech as a general concept, it would have to be conceded that the use of modern, digital information technology, for automation, simplification and – let us hope – betterment as regards search, application, and access to public authorities and the administration of justice, through innovation, is being described<sup>7</sup>. It was posited in a monograph “LegalTech”, edited by Nomos, that Legal Technology refers to the use of technology and software for the purposes of providing legal services and supporting the legal industry<sup>8</sup>. In his newest monograph, M. Ebers indicates that the applications of LegalTech come in various forms and shapes, beginning with the infrastructure connecting clients with lawyers, through automation of drafting documents, ODR services, to algorithmic (automated) decision making<sup>9</sup>. As that author puts it, some of those are standalone technologies, such as legal chatbots and virtual assistants, while others are only enablers of legal advice.

Remarkably, as late as in 2015, Brian Sheppard<sup>10</sup> (Harvard Law School) in his extensive paper on the influence of new technologies on the law, lawyers and their services did not use the term “Legal Technology”, for it was not commonly used in the doctrine at that time. A descriptive approach to that concept or using it without a prior definition are more prevalent in older academic works.

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5 Further on the issue of history of LegalTech and expert systems: Bues and Matt-haei (n 1) 91–92.

6 Hartung, Bues and Halblieb, (n 4) 5.

7 Legal Tech Blog, ‘Was ist “Legal Tech”?’ 2 September 2015 <<https://legal-tech-blog.de/was-ist-legal-tech>>, accessed 18 November 2020.

8 Hartung, Bues and Halblieb, (n 4) 5; see also Wikipedia, ‘Legal technology’ <[https://en.wikipedia.org/wiki/Legal\\_technology#cite\\_note-LawTechToday-3](https://en.wikipedia.org/wiki/Legal_technology#cite_note-LawTechToday-3)>, accessed 18 November 2020.

9 Martin Ebers, *LegalTech and EU Consumer Law* (Cambridge 2021) 2-3.

10 Sheppard (n 3) 1800.

## *2. The Categorisation of LegalTech*

There are three stages of Legal Technology indicated by the German academic literature<sup>11</sup>, pursuant to the proposal by O. Goodenough<sup>12</sup> from the US: LegalTech 1.0, 2.0., and 3.0.

LegalTech 1.0 refers to technology, including software, that supports the work of lawyers as professionals. This pertains to long-known IT systems meant for organisation and the workings of a law firm, document drafting and production, legal information system (also known as legal research system(s)), expert systems, as well as other online services, such as videoconferencing, online communication with the courts, online trials, online education, etc. Those are not new solutions. Nevertheless, it is worth noting that they have finally entered widespread usage among lawyers due the COVID-19 pandemic. Those solutions are used within the framework of existing procedures and the traditional manner of legal work. It is only the method of communication that is altered.

LegalTech 2.0 relates to the far more advanced technology, not only supporting lawyers, but also substituting itself for the work of humans and automating the acts to be taken. LegalTech 2.0. solutions are offered by many providers, either from the technology industry, from the legal sector, or from the academia. Those solutions are used in many activities, including fact-finding or fact assessment (e.g. as applied by investigative bodies), automatic document, contract or claim drafting, etc. Smart contracts or tokenisation of processes are also counted among the solutions belonging to this category. It is interesting to note that, during the past two years, there were legislative proposals or legislation introduced that regulate the use of such tools in specific areas of law, for instance smart contract in

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11 Hartung, Bues and Halbleib (n 4) 5; Wagner (n 2) 15.

12 Oliver R. Goodenough, 'Legal Technology 3.0' (HuffPost, 2 April 2015) <[https://www.huffpost.com/entry/legal-technology-30\\_b\\_6603658?guccounter=1&guce\\_referrer=aHR0cHM6Ly9kZS53aWtpcGVkaWEub3JnLw&guce\\_referrer\\_sig=AQAAJmQ5R47vQkZD-CLSEI62GMZFFamcZbEroAVqRj0BgQ3GNQ-M7\\_Mp42oSaiMJThfkfRJZ2XRPcDqKQplfWZyMly0joNI6cn\\_4BElooGzWowCm\\_XIpcCaJidFyB\\_gju\\_bruNDzgN9wcy-tWt9MbzUWKIDaN8n4FSY6sEDJ5t-RSeB>](https://www.huffpost.com/entry/legal-technology-30_b_6603658?guccounter=1&guce_referrer=aHR0cHM6Ly9kZS53aWtpcGVkaWEub3JnLw&guce_referrer_sig=AQAAJmQ5R47vQkZD-CLSEI62GMZFFamcZbEroAVqRj0BgQ3GNQ-M7_Mp42oSaiMJThfkfRJZ2XRPcDqKQplfWZyMly0joNI6cn_4BElooGzWowCm_XIpcCaJidFyB_gju_bruNDzgN9wcy-tWt9MbzUWKIDaN8n4FSY6sEDJ5t-RSeB> accessed 19 November 2020; see also Oliver R. Goodenough, 'Legal Technology 3.0' (HuffPost, 2 April 2015) <<a href=) accessed 19 November 2020.

crypto-assets. More of that type of regulation is to be expected. We are at the stage of rapid development of extant solutions in the framework of LegalTech 2.0, and of finding new solutions thereof, as well.

Finally, there is the stage of LegalTech 3.0, in the scope of which automation and substitution of a human by technology is not the crux of the matter – the possibility to make autonomous decisions is. Using AI or advanced algorithms utilising machine learning are indicated here. LegalTech 2.0 is a recreation of pre-programmed instances and automation, yet on pre-set terms. LegalTech 3.0 is the higher tier where the decision is made by a system, on the basis of independently acquired data and self-learning (which may take various forms). The final decision may be made directly by the IT system, or by approval thereof by a human. As of now, we are at the stage of pilot implementation of such systems. There is an intense debate in the academia on the prospective regulatory framework for AI, including accountability for its decisions. At times, smart contract is included in LegalTech 3.0 by the doctrine<sup>13</sup>. When choosing the criterion of independent decision-making to differentiate LegalTech 3.0, a self-standing smart contract deprived of an AI-based oracle, and thus performing pre-programmed sequences, irrespective of the fact whether such sequences would be independently initiated, initiated by a human, or by a different occurrence, should be placed in the category of LegalTech 2.0 solutions.

This work adopts the above categorisation as the basic one.

LegalTech may be categorised pursuant to other criteria. One of them is the manner of coding, of providing data, or of providing knowledge by LegalTech solutions. Data (knowledge) may be input manually by a human or made available directly to a human (most commonly within the framework of LegalTech 1.0 or 2.0), or such data (knowledge) may be acquired independently by the system and used thereby, to the exclusion of a human (LegalTech 3.0). Coding may be manual or automatic<sup>14</sup>. The former category comprises several expert systems, where, based on output data, conclusions are formed.

A different categorisation is as follows:

1. technologies facilitating access to data and their processing,
2. assisting solutions for legal work (including law firm management),

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13 Hartung, Bues and Halblieb (n 4) 6.

14 Ebers (n 9) 4.

3. solutions supporting activities in the scope of substantive law, such as automatic contract drafting, Online Dispute Resolution (ODR), smart contract<sup>15</sup>.

Another distinct classification is linked to the levels of technical solutions; finally, there is a classification according to the thematic areas (Prof. Braidenbach's idea, Europa-Universität Viadrina): industrialised legal services, AI and blockchain<sup>16</sup>.

- 3. The Scope of the Concept of LegalTech vis-à-vis Other Concepts, such as RegTech, FinTech, Insure Tech, or Legal Informatics*

Regardless of the adopted criteria, the definition of LegalTech put forward in the doctrine is very broad, and such is the definition adopted herein for the purposes of our research. There appears a number of other new concepts apart from that one, such as FinTech<sup>17</sup>, RegTech<sup>18</sup>, or lately, InsureTech<sup>19</sup>. They are linked to the application of IT in their respective sectors, which are regulated rather restrictively (banking sector, insurance sector, or securities). The scope of those concepts in principle falls within the definition of LegalTech, constituting a regulatory section of LegalTech, distinguished by virtue of both the sector (subjective criterion) and the object of regulation (objective criterion).

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15 Bues and Matthaei (n 1) 91.

16 Wagner (n 2) 15.

17 <<https://home.kpmg/xx/en/home/insights/2019/11/2019-fintech100-leading-global-fintech-innovators-fs.html>> accessed 19 November 2020.

18 RegTech: Tanel Kerikmae (ed), *Regulating eTechnologies in the European Union. Normative Realities and Trends* (Springer 2014); See also: ROFIEG, '30 Recommendations on regulation, innovation and finance. Final Report to the European Commission' (13 December 2019) 27 ff <[https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/191113-report-expert-group-regulatory-obstacles-financial-innovation\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/191113-report-expert-group-regulatory-obstacles-financial-innovation_en.pdf)> accessed 24 February 2021. Analysis of the scope of the concepts of FinTech and RegTech exceeds the scope of this paper.

19 Pierpalo Marano and Kyriaki Noussia (eds), *InsurTech: A Legal and Regulatory View* (Springer 2020); Pierpalo Marano, Dariusz Szostek, *Smart Contract and Insurance* (Palgrave MacMillan 2021).

While not going into much detail, LegalTech should be distinguished from legal informatics<sup>20</sup>, whose scope is significantly narrower than that of Legal Technology.

#### 4. The Consequences of Development of LegalTech

Most experts in the field of LegalTech point to significant changes that are induced, today, and even more in the future, by the development of information technology for the work of a lawyer. There is no escape from such changes. De-regulation of the law is most often highlighted, as is the upcoming change of the market in legal services. Richard and Daniel Susskind<sup>21</sup> posit in their monograph *The Future of Professions* that automation and computerisation is going to alter the functioning of professionals, lawyers included, whose hitherto expert knowledge shall be, to a large extent, available both easily and inexpensively to the general public. The demand for lawyers would not cease, yet their role and manner of functioning would change. New challenges are going to appear (such as certification, cybersecurity analysis) which are not necessarily going to be linked only to the law. An even more insightful analysis of the impending changes is offered by R. Susskind in monographs *Tomorrow's Lawyers. An Introduction to Your Future*<sup>22</sup> and *Online Courts and the Future of Justice*<sup>23</sup>. Similar views are expressed by other authors<sup>24</sup>, at the same time necessitating a greater degree of competition in the field of expert knowledge not only with other lawyers, but also with inexpensive-to-use LegalTech solutions. It is thus suggested that the next two decades are going to be even more revolutionary for lawyers as far as the change of the manner of functioning is concerned than the last century. Many challenges await us, including the changes as to how the professional associations operate, in

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20 Wojciech R. Wiewiórowski, Grzegorz Wierczyński, *Informatyka prawnicza* (4th edn, Wolters Kluwer 2006).

21 Richard Susskind and Daniel Susskind, *The Future of the Professions* (Oxford University Press 2015) 231.

22 Richard Susskind, *Tomorrow's Lawyers. An Introduction to Your Future* (Oxford University Press 2nd edn, 2017).

23 Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 19.

24 Paul Lippe and Daniel M. Katz, '10 Predictions about how IBM's Watson will impact the Legal Profession' (ABA Journal: Legal Rebels, 2 October 2014) <[https://www.abajournal.com/legalrebels/article/10\\_predictions\\_about\\_how\\_ibms\\_watson\\_will\\_impact](https://www.abajournal.com/legalrebels/article/10_predictions_about_how_ibms_watson_will_impact)> accessed 19 November 2020; Bues and Matthaei (n 1) 90.

privileges, duties, and to the lifestyle. Straightforward activities of lawyers are being taken over by IT systems, while a lawyer has the upper hand as regards the more complicated ones, for now. The professional bylaws and hitherto extant procedural rules, requiring the participation of counsel, are not without importance for inhibiting the process of superseding the lawyers by the LegalTech solutions. However, that also is subject to change. Indeed, that change is slow where arbitration is concerned, and gradual as regards the judiciary, both of which we address below. The lawyers shall not perish. Their manner of functioning and operational procedures will. Likewise, the medical profession has not perished, despite the introduction of technological solutions which support, and at times replace their work (including advanced AI). However, that profession has also had to learn using such solutions.

### *5. Legal Engineering*

Digital Economy 3.0 and Industry 4.0 are based on information technology, data (often including personal data), Internet of Things (IoT), cloud, etc. The law, algorithms and engineering intertwine ever more intensively. The last of those three appears even more frequently either at the faculties of law, or in law firms. Technology and engineering, codes included, interact ever more boldly with the law through a complex system of dependencies and interdependencies. The law, both public and private, governs the manner in which given entities behave or function (duties to behave in a certain way, or prohibitions thereof). On the other hand, algorithms specify the scope of discretion for those who use software while in cyberspace. One cannot perform an action within an IT system which would not be predetermined. Step by step, that situation is going to undergo changes, especially where a strong AI would be involved, which however does not preclude the fact that algorithms must take account of the rules and the legal order of the European Union<sup>1</sup>, according to the opinion of experts. An ever more intensive technologisation of the law, in the scope of which the law is, in a way, “sewn into” programming codes<sup>2</sup>, is taking place. Many behaviours in cyberspace emerge through custom, evolving then into *soft law*, including technological norms.

Interaction of the law and technology may be divided into three stages<sup>3</sup>. First of those, and the one which is largely beyond us, is the digitalisation of the legal system, i.e. the transfer of the contents of the law (statutes, executive acts, judicial decisions, etc) to the legal information systems and databases. At that stage, on one hand, the law hitherto introduced was

digitised, while promulgating new regulation in digital form in official journals in parallel (the new official journals allow for significantly more possibilities than their publication on paper)<sup>4</sup>. At that stage, a lawyer still performs his or her work in a similar manner to the “analog” one, the difference being that they use electronic sources of the law and (quite simple) search engines.

Another stage is based on automating decisional processes<sup>5</sup>. It is implemented in various ways, beginning with simple setup wizards, templates, simple office suite solutions, through more complex expert systems (LES, Legal Expert System) that use advanced algorithms (which more and more often include machine learning), suggesting and proposing solutions to case studies for a lawyer, pointing to a prospective decision. Jordan Furlong points to the following components of such systems: knowledge databases representing information used by the system in the problem-solving process; a mechanism of inference, that constitutes, at various levels, advanced algorithms that ensure interaction between the database and input data related to the problem that has to be solved, and provides conclusions based on that interaction; and a user interface – a mechanism ensuring information exchange between the user<sup>6</sup>. The final decision belongs to a human, however.

The third stage consists in a direct fusion of the provisions of law or the contents of agreements with programming code, in a manner allowing for their performance or enforcement<sup>7</sup>. This is the so-called legal engineering<sup>8</sup> - the linking of legal regulation, as theses, with IT modules that are program codes (implementation of the provisions of law into programming codes). We observe legal engineering both in private law and (ever more boldly) in public law. Intense development thereof mainly occurs in the field of private law, and chiefly through increasingly widespread implementation of *smart contracts* or tokenisation of values. Linking of codes with the law was not subject to legal regulation until only recently. The European legislator and (above all) national legislators have noticed this problem, ever more boldly introducing regulation pertinent to, on one hand, substantive issues, and to engineering of the law and control over algorithms on the other, connecting the respective entries in algorithms with legal presumptions<sup>9</sup>.

Other views on the interaction of the law and algorithms are appearing, as well<sup>10</sup>. It was pointed out that, for many years, those were the lawyers who had enormous influence on codes, through introduction or application of respective legal regulation, judicial decisions, and in states creating their system on precedent – through appropriate precedents referring directly or indirectly to algorithms. Cyberspace is (made of) algorithms. By

creating legal rules pertinent to behaviour in cyberspace (prohibitions and duties), lawyers specify the manner of behaviour in the virtual world, and indirectly, the principles of its creation, and thus the manner in which algorithms function. When they are making decisions, including judicial decisions, lawyers base themselves mainly on the law, while often lacking basic knowledge in the scope of algorithms, software codes and the interactions occurring between them. Those were the lawyers who imposed and still impose certain behaviour through specifying requirements relating to digital platforms, online services, etc. The second, indirect way to influence the codes and the architecture, and thus the cyberspace, are regulations (including best practices) requiring modifications of basic codes for the purposes of upholding legal assumptions. An example of that may be found in the eIDAS Regulation, which vests express obligations in the trusted entities as regards software architecture. Others are found in Digital Rights Management (DRM) systems, which are a direct modification in algorithms. Putting it differently, there is an indirect implementation of the law into codes at work here - enforcing the architecture of the code in conformity with the requirements of legal regulation.

A further step is found in the direct implementation of the law into codes within the framework of legal engineering, where the law and code are one – complete interaction. Instances of that are *smart contract*<sup>11</sup>, autonomous decision-making systems, and the ever-bolder attempts at incorporating legal regulations into codes, as well.

For the purposes of correct implementation of legal regulation or an agreement into codes, the cooperation between lawyers and programmers is required:

- 1) lawyers – not only as architects and designers, but also interpreters of social rules inscribed into legal rules;
- 2) programmers as architects of cyberspace through the creation of code allowing for one to function in the cyberspace pursuant to the rules of the law, or even for enforcement of law.

Recreating the law within the architecture of an algorithm, implementation of the law into codes (be it that which follows from an agreement, or statutory law), requires joint preparation by lawyers and programmers. Lawyers introduce legal regulations, perform the interpretation thereof, and oversee their transcription (see Chapter II of the present monograph). Programmers impose codes and algorithmize, or inscribe the law into codes<sup>12</sup>. As a result, lawyers and programmers contribute to the mechanism of regulating social relations – which is their joint regulatory contribution<sup>13</sup>, by forming an approach to regulating social norms. An intersec-

tion of science, and informatics in particular, with the legal discipline forces a change of methodology for applying knowledge from both of those domains, as well as a link between legal language and programming language(s). It further forces acquiring basic knowledge of IT by lawyers, and legal knowledge by programmers, and collaborative work on a project at many stages. This includes constant monitoring of proper operation of the law, which was implemented in codes, and of codes containing the law. That requires a new type of specialists, both on the side of lawyers and the side of programmers. Legal engineering is not a simple transposition of the work of a lawyer and that of an IT specialist. It is an amalgamation of both those domains, requiring expert knowledge.

The manner in which lawyers function undergoes change<sup>14</sup>, both due to using solutions of LegalTech 1.0, 2.0 or 3.0, and due to the fact that the expertise required on the market is subject to change. Apart from traditional lawyers that concern themselves with legal process, contracts, the applicable law, the regulated market(s), etc., the legal market expands to include specialists in the field of legal engineering, combining unique expertise in law and IT, or at least specialising in one of those fields and having basic knowledge of the other. Apart from coding the law into algorithms, there are specialists in the scope of tokenisation, blockchain coding, cybersecurity, knowledge on the functioning of machine learning, or AI ecosystems. Richard Susskind<sup>15</sup> points to new specialisations of lawyers, to a large extent based on legal engineering: *The Expert Trusted Adviser*, *The Legal Knowledge Engineer*, *The Legal Technologist*, *The Legal Hybrid*, *The Legal Project Manager*, *The Legal Data Scientist*, *The R&D Worker (Research and Development)*, *The ODR Practitioner*, *The Legal Risk Manager*, etc. That group is going to constantly expand. The role of a lawyer undergoes major changes. As of now, the career path for legal alumni includes not only the possibility of practice in traditional roles, such as a judge, prosecutor, advocate, attorney-at-law, notary, or an enforcement officer, but also new specialisations which were not existing until recently, and which are either functioning on their own or together with the traditional ones. The role of the universities is to properly prepare the lawyers to operate in the near future.

# Algorithmisation and Tokenisation of Law

Rafał Prabucki, Rafał Skibicki, Dariusz Szostek, Jakub Wyczik

*Donda's Law: "What a small computer can do with a large program,  
a large computer can also do with a small program;  
hence the logical conclusion is that an infinitely large program  
can work alone, i.e. without any computer".  
- S. Lem, "From the memoirs of Ijon Tichy"*

## 1. Introduction

Codes, after Legal Design, are the second most rapidly growing branch of legal engineering within LegalTech, which is a consequence of increasing the willingness to have the impact of law on society by transcribing regulations into code or, similarly, increasing the impact of arrangements between parties in commercial transactions. More than 22 years ago, at the end of the 20th century, Lawrence Lessig in his bestselling monograph "Code and Other Laws of Cyberspace"<sup>1</sup> proposed to link law with algorithmic code. Since law regulates the rights and obligations of subjects, and algorithmic code is the regulator of cyberspace, it is natural to link them. Code is law. A year earlier, J. Reidenberg<sup>2</sup> had proposed that "Lex Electronica" should regulate itself through "architecture standards", e.g. through properly configured codes as the legal regulator of cyberspace. Two decades ago this concept was considered by many to be futuristic, or at most, futurological. Today we are witnessing its realization and this phenomenon can be observed not only in private law in smart contracts, but also in increasingly daring government projects, such as the ones relating to the legislative process or even the incorporation of law into codes. By way of examples only, here can be mentioned the proposal of

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1 Lawrence Lessig, *Code and Other Laws of Cyberspace* (1st edn, Basic Books 1999).

2 Joel Reidenberg, 'Lex Informatica: The formulation of information policy rules through technology' (1998) 76 Texas Law Review 553.

G. Wood<sup>3</sup> to regulate the law on cryptocurrencies in algorithmic codes as well as the concepts of A. Wright & P. De Filippi<sup>4</sup> and additionally also the one which relates to D. Szostek's<sup>5</sup> proposal to regulate AI codes with algorithmic codes, at least by using RegTech.

Undoubtedly, for several decades now, there has been an increasing integration of law and algorithmic codes at various levels starting from the regulation of algorithms, through law, to the incorporation of law (e.g. contracts) into codes. This integration will continue to deepen more and more. In this chapter some aspects and problems related to the use of algorithmic codes in law will be pointed out.

## 2. *Code, Algorithms, Algorithmic Technology*

Operating with the terms - code and algorithm - is difficult, mainly due to their interdisciplinary nature. However, it should be emphasised that the term "algorithm" is not reserved exclusively for an academic discipline such as computer science and the IT sector. The term has a universal meaning. A uniform and universally accepted definition of an algorithm has not been developed in the world. However, many researchers from different fields are taking attempts to solve this problem<sup>6</sup>. The main trouble arises from the fact that there is no single type of algorithm. Most agree, however, that the general concept of an algorithm involves general processes for producing some "output" data (ang. output) from an "input" data (ang. input), through the use of various symbols with a finite set of rules. All algorithms must be specified in a formal language with a set of well-defined rules. However, this still does not solve the problems of definition. Nevertheless, in American jurisprudence, algorithms were defined rather laconically in *Gottschalk v. Benson* case law as<sup>7</sup> "(...) a procedure for solving a certain mathematical problem". International doctrine, however,

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3 Gavin Wood, 'Ethereum: A secure decentralised generalised transaction ledger' GAVWOOD.COM <<https://gavwood.com/paper.pdf>> accessed 11 December 2020;

4 Aaron Wright and Primavera De Filippi, 'Decentralized blockchain technology and the rise of Lex Cryptographia' (2015) <<https://ssrn.com/abstract=2580664>> accessed 11 December 2020.

5 Dariusz Szostek, 'Sztuczna Inteligencja a kody' in *Luigi Lai and Marek Świerczyński* (eds), *Prawo sztucznej inteligencji* (C. H. Beck 2020) 15.

6 Samuel R. Buss, Alexander S. Kechris, A. Pillay and Richard A. Shore, 'The Prospects for Mathematical Logic in the Twenty-first Century' (2001) 7 Bulletin of Symbolic Logic 169.

7 *Gottschalk v Benson* (1972) 409 U.S. 63.

tries to perceive the issue of algorithms more broadly, presenting them as rules or instructions, the execution of which allows to solve a certain problem. In a nutshell, an algorithm is a synonym for a procedure that aims at solving a specific problem<sup>8</sup>. In this approach, therefore, a type of algorithm is both a mathematical formula and an instruction to assemble furniture.

As it has already been mentioned, algorithms may take various forms, including different implementations. Nowadays they are, among others, the basis of computer science and computer programs. The starting point for consideration of the legal status of computer programs in the international doctrine was the assumption that algorithms are written as programs by means of codes<sup>9</sup>. However, it is impossible to find an indisputable limit of the scope of these concepts on the grounds of legal logic. The first thing that should be stressed, therefore, is that there is no generally accepted meaning of the word. This is not an exceptional situation, as the same is the case with technology and with many other words from the sphere of exact sciences. Moreover, computer programs do not have a uniform definition. During the preparatory work on the WIPO Copyright Treaty (WCT)<sup>10</sup>, it was agreed that a computer program should be understood as "a set of instructions which, when placed on a machine-readable medium, will enable to cause a machine with information processing capabilities to indicate, perform or achieve a specific function, task or result"<sup>11</sup>. However, this definition was not reflected in the final text of the act. Similarly, in the case of European Directive 2009/24/EC on the legal protection of computer programs<sup>12</sup> it was decided not to include a definition of this phrase, in order to avoid

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8 cf Rob Kitchin, 'Thinking critically about and researching algorithms' (2017) 20:1 *Information, Communication & Society* 14; See Barfield Woodrow and Pagallo Ugo, *Advanced Introduction to Law and Artificial Intelligence*, Cheltenham (Edward Elgar Publishing 2020).

9 See Idelle R. Abrams, 'Statutory Protection of the Algorithm in a Computer Program: A Comparison of the Copyright and patent laws' (1989) 9:2 *Computer Law Journal*.

10 World Intellectual Property Organization treaty [1996].

11 WIPO document states: „set of instructions capable, when incorporated in a machine-readable medium, of causing a machine having information-processing capabilities to indicate, perform or achieve a particular function, task or result”, (WIPO) <[www.wipo.int/edocs/mdocs/copyright/en/wipo\\_ip\\_cm\\_07/wipo\\_ip\\_cm\\_07\\_ww\\_w\\_82573.doc](http://www.wipo.int/edocs/mdocs/copyright/en/wipo_ip_cm_07/wipo_ip_cm_07_ww_w_82573.doc)> accessed 11 December 2020.

12 Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) [2009] OJ L11/16.

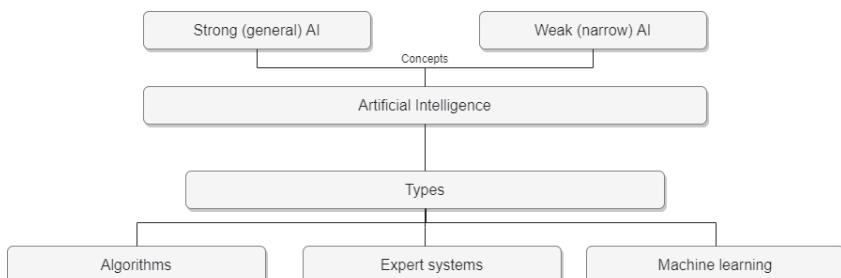
its rapid obsolescence due to technological progress<sup>13</sup>, and therefore, it was decided to be restricted to stating only that "the role of software is to interact and function together with other components of a computer system and with users, [and] in order to achieve this, it is required that there be logical and, where appropriate, physical interconnection and interaction so as to permit all elements of software and hardware to function with other software, hardware and users in all the forms of operation for which they are intended"<sup>14</sup>, further stating that its interfaces<sup>15</sup> are part of it, which ensure interoperability<sup>16</sup>. Consequently, computer programmes are recognised by source and result codes. However, there is no clear definition at all of what programming code actually is. It is, however, impossible not to agree that it is simply a kind of written text, constituting a system of signs<sup>17</sup>, which is comprehensible for computers. Putting the abovementioned together with the notion of an algorithm, a computer program is essentially a type of algorithm, which is implementable as a text containing sets of commands to be executed by a machine. Programming code is in fact an algorithm that makes it possible to achieve a specific result. Although the legal

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- 13 Which, it seems, was not necessarily the case. Modern computer programs in their nature have not changed that much from their original versions. The definition set out above still seems to touch the essence. This is confirmed by the still unchanged definition of computer programs in U.S. law, which does not hinder the thriving high-tech industry (17 U.S.C. § 101). See also African Regional Intellectual Property Organization, 'ARIPO Model Law on Copyright and Related Rights' (ARIPO, July 2019) <<https://www.aripo.org/wp-content/uploads/2019/10/ARIPO-Model-Law-on-Copyright-and-Related-Rights.pdf>> accessed 11 December 2020 10.
- 14 Recital 10 of Directive 2009/24/EC.
- 15 However, as is clear from the CJ case law, a graphical user interface does not allow for the reproduction of a computer program and therefore does not constitute a form of expression of a computer program within the meaning of the Software Directive and thus cannot benefit from the special protection granted thereunder. See Case 393/09 *Bezpečnostní softwarová asociace - Svaz softwarové ochrany v Ministerstvu kultury* [2010] ECLI:EU:C:2010:816, paras 28-42.
- 16 As defined in Directive 2009/24/EC, being the functional, interconnection and interaction of software, enabling it to function with other software, hardware and users according to its intended use.
- 17 According to Wikipedia: "*code is a system of rules to convert information—such as a letter, word, sound, image, or gesture—into another form, sometimes shortened or secret, for communication through a communication channel or storage in a storage medium*" Wikipedia, 'Code' <<https://en.wikipedia.org/wiki/Code>> accessed 11 December 2020.

status of programming code raises many doubts, particularly as a result the controversial CJEU case law affecting the interpretation of European law<sup>18</sup>.

In the last decade, however, algorithms as such have become of more intense interest to representatives of many scientific fields as a result of the development of AI, becoming its main core. The concept of AI is as undefined as the algorithm itself. For the purpose of scientific discussion, without having to delve into the definitional problem there can be encountered an approach of defining AI and algorithms collectively as algorithmic technology (*ang. Algorithmic-based technology*)<sup>19</sup>. However, attempts are being made in international doctrine to structure the systematics of artificial intelligence. Such a proposal was presented by *B. Woodrow i P. Ugo* (Figure 1).

*Figure 1. Types and distinctions of artificial intelligence in international legal doctrine*



Source: Own elaboration based on *W. Barfield, U. Pagallo*, Law and Artificial Intelligence, Cheltenham-Northhampton 2020, pp. 19–23.

An independent group of experts from the European Commission also came up with a definition, proposing that AI systems are software (and possibly hardware) developed by humans that operate in the physical or digital domain in pursuit of goals, perceiving their environment by collecting and interpreting data, relying on knowledge or information derived from this data, and taking the best steps to accomplish the tasks

18 See for example Case 128/11 *UsedSoft GmbH v Oracle International Corp* [2012] ECLI:EU:C:2012:407.

19 See Marta C. Gamito and Martin Ebers, ‘Algorithmic Governance and Governance of Algorithms: An Introduction’ in Martin Ebers and Marta C. Gamito (eds), *Algorithmic Governance and Governance of Algorithms: Legal and Ethical Challenges* (Springer 2021).

assigned to them<sup>20</sup>. This definition is therefore primarily based on viewing AI through the prism of a characteristic type of algorithms. AI systems can use well-known mathematical concepts for their operation, implementing them into modern technological solutions, as well as they can simultaneously adapt to the changing environment on the basis of previously made decisions. Intelligent algorithms thus differ from standard algorithms implemented in computer programs. However, such a broad definition of term leads at the same time to the inclusion in its scope of many different solutions, ranging from roboadvisors (or chatbots), interactive translators, facial or voice recognition systems, virtual opponents in computer games, to automated financial market management systems or autonomous androids. It seems obvious that this approach in defining will be insufficient. In fact, it is impossible to equate a translation system with an android. Hence, some representatives of the doctrine postulate that there is no need for a uniform definition of AI<sup>21</sup>. Thus, in order for the law to be effective, it is necessary to focus on individual solutions using AI instead of trying to complexly regulate all its types which appear to be doomed to failure from the outset. The general role of algorithms and AI in what we understand as LegalTech is related to the direction in which algorithmic techniques are to be used in legal practice. The theory of the path that depicts these directions was presented as early as 1897 by Oliver Wendell Holmes Junior<sup>22</sup>:

- 1) direction one: it aims at creating useful solutions to minimise the risk of litigation between the parties;
- 2) second direction: it involves carrying out argumentation before the dispute resolution body.

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20 High-Level Expert Group on Artificial Intelligence, established by the European Commission: „Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans, that given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal”, High-Level Expert Group on Artificial Intelligence, ‘A definition of AI: Main capabilities and scientific disciplines’ 6 (European Commission, April 2019) <[https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=56341](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=56341)> accessed 11 December 2020.

21 Martin Ebers, ‘Regulating AI and Robotics: Ethical and Legal Challenges’ in Martin Ebers and Susana Navas (eds), *Algorithms and Law* (Cambridge University Press 2020) 42.

22 Oliver W. Holmes, ‘The Path of the Law’ (1897) 457 Harvard Law Review.

In the first direction, in addition to supporting the lawyer in his work, there will be encountered a tendency to write down the court decisions between the parties in such a way as to make them readable to a machine which will automate certain transactions between the parties. The desired effect is to reduce the risk of litigation and thus to make the solution highly usable (a smart contract is an example). According to *David Howarth* it is precisely the right direction for law to be perceived as engineering<sup>23</sup>. The second direction is related to the implementation of solutions to both help the legal practitioner in the preparation of legal argumentation as well as can create tools for the dispute resolution body, indicating which arguments are properly constructed and supported by relevant evidence<sup>24</sup>.

However, from a LegalTech perspective, it is freedom of contract and legal engineering skills in creating contracts that should be thoroughly discussed. Where there is freedom in the legal system, there is equally the need to build trust. This can be constructed between the parties through contractual provisions. Historically, landmark events requiring trust between parties (e.g. the establishment of the American stock exchange), required a contract to be written in natural language and were local initiatives. Thanks to the development of new technologies, as well as the global nature of the parties' relationship and also due to the need for a high level of trust, certain relationships are regulated by means of a computer program, and a computer program is de facto a code<sup>25</sup>.

### *3. Law as a Code*

As indicated at the beginning, technological developments have led to the concept of transcribing law into codes. The conceptual scope of legal engineering has also changed. The early conception of the cited view formulated by Howarth implied that law perceived as engineering is supposed to create useful solutions and, in the context of the work of a legal practitioner, it is expected to involve contracts<sup>26</sup>. Nowadays, the conceptual scope has evolved. There is no doubt that this is due to the transition

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23 David Howarth, *Law As Engineering: Thinking about What Lawyers Do* (Edward Elgar Publishing 2014).

24 See Douglas Walton, *Argumentation Methods for Artificial Intelligence in Law* (Springer 2005) 5-8.

25 Kevin Werbach, *The Blockchain and the new architecture of trust* (MIT Press 2018) 1-7.

26 Howarth (n 23) 51-152.

from the level of consideration of *lex informatica* to *lex cryptographia* in international legal doctrine. A modest approach to this process can be seen in the work of G. Wood, who observed that it was the development of cryptography that would result in the realisation of law as a code. In his view, crypto-law is characterised by the fact that it is possible to write certain rules known from traditional law in a strongly secure space, thanks to advanced cryptography (hence the term crypto-) of the space. According to Wood, the moment of real implementation of crypto-law is related to the development of blockchain technology. As an example, the author cites Ethereum<sup>27</sup>. The concept of crypto-law practically refers to cryptocurrencies, but the basis of this approach is related to the work of Mark S. Miller, in which the process of moving away from law to its new approach was presented and where the impracticality of law in the era of developing new technologies was recognised. Along with the diminishing importance of law in the aspect of building trust in the relations of global society, the role of computer security techniques - including cryptography - is increasing. The intersection of decline and growth is the point at which law in the traditional model will stop existing<sup>28</sup>. Although this theoretical approach sounds evolutionary, from the perspective of many years of law formation it looks like an abrupt change, especially as the basic assumptions of traditionally understood law are subject to ongoing changes<sup>29</sup>.

Both Ethereum and Bitcoin are concepts that use advanced cryptography to build a trusted place in cyberspace where code-based solutions can be created. According to the Lex Cryptographia approach, they can be challenging for certain legal systems, due to the fact that the concepts used are created independently of the law factor assigned to a certain territory (e.g. DAO - equivalent to a certain type of company contract, foundation, etc., but with high anonymity of the partners or members of the organisation and with its own management rule)<sup>30</sup>.

The quintessential point is that both cryptocurrency and Lex Cryptographia is a smart contract written in a block (as in Ethereum), or otherwise named place for transaction data in some register, code. This

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27 cf Wood (n 3); See Wright and De Filippi (n 4).

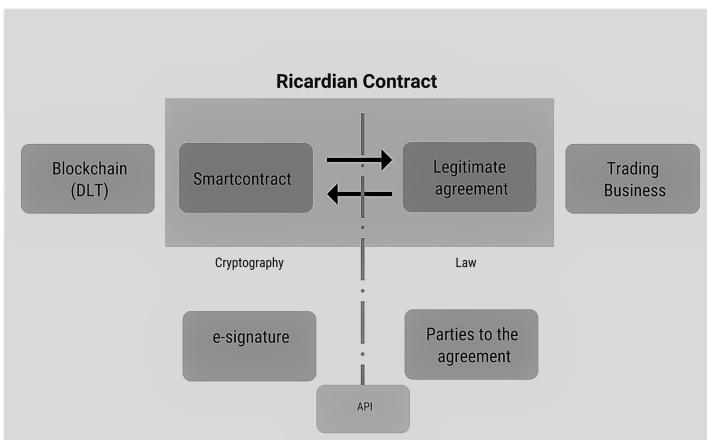
28 Mark S. Miller, 'The Future of Law' CAPLET.COM (August 1997) <www.caplet.com/security/futurelaw> accessed 16 March 2021.

29 Dariusz Szostek, 'Consequences of applying new technologies to sources of law' in García G. Javier, Alzina L. Álvaro and Martín R. Gabriel (eds), *El derecho público y privado ante las nuevas tecnologías* (Dykinson 2020).

30 See Wright and De Filippi (n 4).

code implements certain automated decisions (ADM, from automated decision making) regarding transactions. In certain legal systems, it may be a contract in its own right that complies with certain civil laws, or it may be an element of such a contract, i.e. its structure may fall within contractual regulations in certain provisions. The creator of this concept was Nick Szabo, and a smart contract in its current sense is associated with blockchain solutions. Additionally, D. Szostek, following the definitional scope indicated by the author, notes that bitcoin should also be considered as a certain zero form of smart contract<sup>31</sup>.

*Figure 2. Graphical representation of the Ricardian contract concept*



Source: Own elaboration.

However, fixing code in the form of a smart contract requires specialised, non-legal knowledge. Ethereum-based smart contracts typically use the Solidity programming language, which is a type of high-level object-oriented language developed on top of C++, Python and JavaScript<sup>32</sup>. Provisions for the parties written in this kind of artificial language will not be understandable to, for example, a court in the event of a litigation. On the other hand, it does not seem possible for this type of agreement to go completely beyond the current legal regulations and thus remain in a kind of magic

31 Dariusz Szostek, *Blockchain and the law* (1st edn, Nomos 2019) 111.

32 Solidity Documentation: <<https://docs.soliditylang.org/en/v0.8.0/>> accessed 17 January 2021.

circle<sup>33</sup>. Therefore, for effective management of such contracts, close cooperation between the programmer and the lawyer will be necessary. The golden mean in this matter comes from the Ricardian approach and serves to balance things out. The so-called Ricardian contract assumes that, on the one hand, a provision will be drawn up for the parties in the form of a certain natural language using a specialised legal language, but an integral part of the contract will be the transfer of part or the writing of part of the provisions in a programming language<sup>34</sup>. If this becomes applicable in the current reality, advanced cryptographic techniques (electronic signature, blockchain) will enable the operation of smart contracts, and moreover, a contract drawn up in a legal manner will guarantee the existence of provisions in artificial languages in business dealings regulated in a traditional manner, i.e. by law. In such a situation, the court is not likely to fail to recognise the existence of the records on the grounds that they are illegible. Moreover, in this case the possibility of using an API may allow the parties to observe smart contracts operating in coupling, through a party-friendly application. It also seems necessary to signal that the allegation that the parties will not understand the programming language is exaggerated. The parties may well not understand a specialist language such as a legal language expressed in a certain natural language. This is why contracts are increasingly being marketed using graphic symbols (simplification and visualisation), which can be understood even by people who cannot or do not fully use a certain natural language (see figure)<sup>35</sup>.

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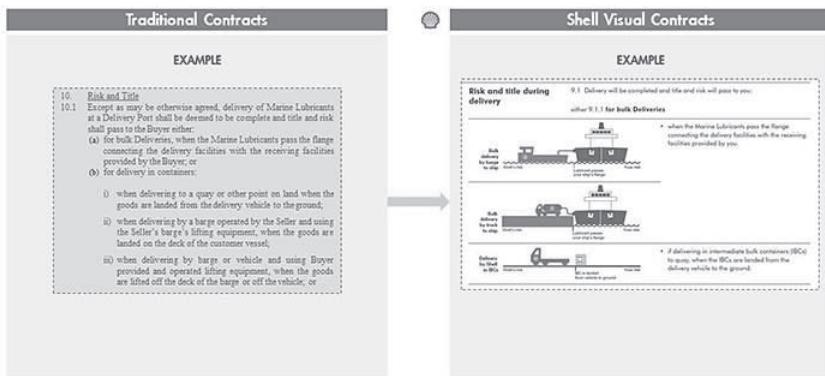
33 J. Huizinga, author of *Homo ludens*, is regarded as the creator of the concept of the magic circle. The concept of the magic circle is often used when considering virtual property - see Katie Salen and Eric Zimmerman, *Rules of play: game design fundamentals* (MIT Press 2003) 95. It is worth noting, however, that J. Huizinga himself seems to remain far from sceptical of this idea, while the actual originator of its adaptation is E. Zimmerman - see Eric Zimmerman, 'Jerked Around by the Magic Circle - Clearing the Air Ten Years Later' (Gamasutra, February 2012 <[https://www.gamasutra.com/view/feature/135063/jerked\\_around\\_by\\_the\\_magic\\_circle\\_.php](https://www.gamasutra.com/view/feature/135063/jerked_around_by_the_magic_circle_.php)> accessed 17 January 2021).

34 Dariusz Szostek (n 31) 116.

35 See Helena Haapio and Thomas D. Barton, 'Business-Friendly Contracting: How Simplification and Visualization Can Help Bring It to Practice' in Kai Jacob, Dierk Schindler and Roger Strathausen (eds), *Liquid Legal* (Springer 2017); see Gerlinde Berger-Walliser, Thomas D. Barton and Helena Haapio, 'From Visualization to Legal Design: A Collaborative and Creative Process' (2017) 54:2 American Business Law Journal 347.

The same can be presented to the parties to a smart contract - in the form of mainly graphical signs<sup>36</sup>.

*Figure 3. An example of Legal Design (exactly visualisation and simplification) from practice, where graphic signs were used instead of signs that make up a certain natural language, in this case the English legal language*



Source: <https://www.ft.com/content/032ddcb0-e6b1-11e9-b8e0-026e07cbe5b4>

However, it should be emphasised that both the theoretical framework of the concept of a contract written in a language other than natural, i.e. smart contracts, and the undertaking of some limited developments of regulating the relationship between parties by means of codes were already taking place before the introduction of the Ethereum distributed registry. This can be observed, inter alia, in certain solutions for gamers in the game industry<sup>37</sup>. Solutions based on the automatic execution of contracts have already existed for many years in MMO games, particularly in the form of so-called auction houses, which act as automatic exchanges of virtual goods, where players can place bids to sell or buy goods. When another player accepts the offer, the system will automatically transfer the rights to the object of the transaction to the purchasing player, taking the appropriate amount of the in-game currency and assigning its value to

36 See O. S. Grin, E. S. Grin and A. V. Solovyov, 'The Legal Design of the Smart Contract: The Legal Nature and Scope of Application' (2019) 8 Lex Russia 51.

37 The mechanics of MMO games also seem to provide an important starting point for the theory of L. Lessig's theory, as evidenced by the many references contained in his book – see Lawrence Lessig, *Code and Other Laws of Cyberspace. Version 2.0* (2nd revised edn, Basic Books 2006) 9.

the selling player's account. At the same time, even in this type of games we can notice how the law is written in codes, because what the player and her/his virtual character can do, is limited to what the programmer envisaged at the stage of creating the code. It is therefore true that there are solutions where programming code replaces natural language, so that some representatives of the doctrine consider that such a program as a smart contract, is an alternative form of a legally binding contract<sup>38</sup>.

This observation is, however, quite controversial, in particular because the moment such a smart contract has been activated, a doubt arises immediately regarding the additional powers of the party<sup>39</sup>. This has led to the emergence of sharp criticism of blockchain-based solutions in international legal doctrine. On the one hand, there is the jellyfish perspective, which assumes that smart contracts that are heavily regulated, especially in the context of electronic data, will cease to thrive, just as a jellyfish, which after having been washed ashore, withers. The jellyfish perspective assumes that the implementation of N. Szabo's idea is not complete, and only the future will show how the concept of smart contracts will develop, i.e. whether contracts will actually become not only automatic, but also more complex and whether they will take into account more factors that influence the parties to the contract.

The second main problem arises from the need to transfer physical objects to the virtual realm (e.g. as part of so-called tokenisation). As long as digital goods, such as cryptocurrencies, remain the object of transaction, the transfer of "ownership" of such an object is technically not a problem. However, the dematerialisation of other assets is a significant challenge. In order to do an efficient transfer of ownership of a flat in the above manner, at the very least, a decentralised system of notarised property registry would be necessary. It is also possible to imagine installing smart locks in the flat that would verify the identity of their owner and fulfilling this realization appears much easier nowadays than in the earlier times<sup>40</sup>, but it still seems that creating a technically advanced system, while at the same time ensuring its sufficient openness (e.g. through API) and security

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38 Stephen McJohn and Ian McJohn, 'The Commercial Law of Bitcoin and Blockchain Transactions' (2016) 16-13 Legal Studies Research Paper Series Research Paper 15.

39 *ibid.*

40 Even so, it requires significant investment, which may not necessarily appear reasonable from the perspective of all owners.

(bearing in mind particularly the DAO Hack<sup>41</sup>), can happen not to be so simple<sup>42</sup>.

#### *4. Tokenization of Assets*

Let us introduce the definition of “token”. First of all, the linguistic interpretation of this word should be analysed. The etymology of the English word "token" allows us to conclude that it probably comes from the Old English word "tacen" which meant "sign, symbol, proof"<sup>43</sup>. The American *Merriam-Webster* dictionary defines „token” as „a piece resembling a coin issued for use by a particular group on specified terms”<sup>44</sup>. The Cambridge Dictionary indicates that it is a symbol, a paper worth money that can be exchanged for goods in a store, or a round metal or plastic disc that is used instead of money in various types of machines<sup>45</sup>. The Black's Law Dictionary proposed the same semantic explanation, as it defines token as a sign or symbol, being a material proof of a fact<sup>46</sup>. To sum up, the linguistic interpretation helps us to capture the essence of a token, i.e. its symbolism. However, it does not explain the legal implications of it. Therefore, it is necessary to make a further interpretation on the basis of the legal scholarship.

*Michelle Finck* defines token as an artificially produced digital good, recorded through blockchain, which, due to the nature of the system, can only be used once<sup>47</sup>. In our opinion, the aforementioned definition seems

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41 Samuel Falkon, ‘The Story of the DAO — Its History and Consequences’ (Medium, December 2017) <<https://medium.com/swlh/the-story-of-the-dao-its-history-and-consequences-71e6a8a551ee>> accessed 19 January 2021.

42 Focusing our attention at least for a moment on the economic analysis of law, it is impossible not to mention here also the total redundancy of notaries in such a system. See Jeff Lingwall and Ramya Mogallapu, ‘Should Code Be Law? Smart Contracts, Blockchain, and Boilerplate’ (2019) 88:1 University of Missouri-Kansas City Law Review 311.

43 ‘Token’, *Online Etymology Dictionary* <<https://www.etymonline.com/word/token>> accessed 2 February 2021.

44 ‘Token’, *Merriam-Webster Dictionary* <<https://www.merriam-webster.com/dictionary/token>> accessed 2 February 2021.

45 ‘Token’, *Cambridge Dictionary* <<https://dictionary.cambridge.org/dictionary/english/token>> accessed 2 February 2021.

46 Henry C. Black, ‘Token’, *The Black’s Law Dictionary* (Rev 4<sup>th</sup> edn, West Publishing Co. 1968) 1658.

47 Michèle Finck, *Blockchain Regulation and Governance in Europe* (CUP 2018) 16, which relies on Jean Bacon, Johan David Michels, Christopher Millard and Jatinder

to be too narrowed down to the concept of blockchain, and it is possible for token to exist without this technology<sup>48</sup>. Nevertheless, this definition is a good starting point for further considerations. More broadly and universally speaking, *token can be defined as a digital good representing values or rights, within or outside the DLT register*. However, it should be borne in mind that tokens exist and have value primarily within their system<sup>49</sup>, hence they are usually used in individual business models, without intermediaries and entities facilitating the distribution of the product<sup>50</sup>.

We can distinguish two different aspects of the value of tokens<sup>51</sup>. Firstly, they can have exclusive value only within their blockchain. Secondly, they can be an avatar of real assets, such as goods (e.g. gold<sup>52</sup> or medical marijuana<sup>53</sup>), services (e.g. dental services<sup>54</sup>), or specific rights (e.g. economic copyrights<sup>55</sup>).

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Singh, 'Blockchain Demystified' (2017) 268/2017 Queen Mary School of Law Legal Studies Research Paper 5 <<https://ssrn.com/abstract=3091218>> accessed 6 February 2021. See also regarding feature of one-time use Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' 1 <<https://bitcoin.org/bitcoin.pdf>> accessed 8 February 2021.

48 Szostek (n 31) 126.

49 Stefan Tönnissen, Jan Heinrich Beinke, Frank Teuteberg, 'Understanding Token-based Ecosystems – a Taxonomy of Blockchain-based Business Models of Start-ups' (2020), 30 Electron Markets 307, 309 <<https://doi.org/10.1007/s12525-020-00396-6>> accessed 8 February 2021.

50 William Mougayar, 'Tokenomics — A Business Guide to Token Usage, Utility and Value' (Medium, 10 June 2017) <<https://medium.com/@wmougayar/tokenomics-a-business-guide-to-token-usage-utility-and-value-b19242053416>> accessed 6 February 2021.

51 Finck (n 47) 10.

52 For example, PAX Gold, which is a cryptocurrency, where each token is secured by one troy ounce, the holder of which becomes the owner of the physical gold held by a trust company. See. <<https://www.paxos.com/paxgold/>> accessed 6 February 2021.

53 For example, CannabisCoin (CANN), it is a cryptocurrency created in 2014, the purpose of which was to directly exchange 1 token for 1 gram of medical marijuana. See. <<https://www.investopedia.com/news/top-marijuana-cryptocurrencies/>> accessed 6 February 2021.

54 For example, *dentacoin* cryptocurrency. See: <<https://dentacoin.com/>> accessed 6 February 2021.

55 For example, KodakCoin. It is a cryptocurrency created by a famous manufacturer of cameras that allows the photographer to manage his copyrights to photos, license them and collect remuneration for it.. See: David Gerard, 'The KodakCoin ICO failed, and now everyone wants their money' (David Gerard, 10 December 2018) <<https://davidgerard.co.uk/blockchain/2018/12/10/the-kodakcoin-ico-failed-and-now-everyone-wants-their-money/>> accessed 6 February 2021 and

The first type of the value of token, as undoubtedly more abstract, requires a deeper explanation. Cryptocurrencies will be an example of such an asset, including the most famous of them *bitcoin*, and, perhaps a more glaring example, *Dogecoin*<sup>56</sup>, a joke cryptocurrency created in 2013 and inspired by the once-famous meme with a *shiba inu* dog, known as a "doge". Dogecoin has basically no value in the traditional sense and neither it is the equivalent of anything real, nor it is secured by a state monopoly. It does not change the fact that its market capitalization is currently close to \$ 6.5 billion, and the value of one Dogecoin has reached the level of 5 cents<sup>57</sup>, while its initial value was 0.03 cents<sup>58</sup>. Another, but also a thought-provoking example of this phenomenon is the digital work entitled "The First 5000 days" created by an artist nicknamed Beeple (Mike Winkelman), which is a non-fungible token, sold at Christie's for \$ 69.3 million<sup>59</sup>.

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<<https://www.ryde.one/>> accessed 6 February 2021. See also: Balazs Bodo, Daniel Gervais, Joao Pedro Quintais, 'Blockchain and Smart Contracts: the Missing Link in Copyright Licensing?' (2018) 26 International Journal of Law and Information Technology 311 <<https://academic.oup.com/ijlit/article/26/4/311/5106727>> accessed 7 February 2021; Michele Finck, Valentina Moscon, 'Copyright Law on Blockchains: Between New Forms of Rights Administration and Digital Rights Management 2.0.' (2019) 50 IIC – International Review of Intellectual Property and Competition Law 77; Annabel Tresise, Jake Goldenfein and Dan Hunter, 'What Blockchain Can and Can't Do for Copyright' (2018) 28 Australian Intellectual Property Journal 144 <<https://ssrn.com/abstract=3227381>> accessed 7 February 2021.

56 <<https://dogecoin.com/>> accessed 6 February 2021.

57 <<https://www.coingecko.com/pl/waluty/dogecoin>> accessed 6 February 2021.

58 <<https://finance.yahoo.com/quote/DOGE-USD/>> accessed 6 February 2021.

59 Hannah Denham, Gerrit De Vynck and Rachel Lerman, 'What is an NFT, and how did an artist called Beeple sell one for \$69 million at Christie's?' The *Washington Post* (Washington D.C., 12 March 2021) <<https://www.washingtonpost.com/technology/2021/03/12/nft-beeple-christies-blockchain/>> accessed 15 March 2021.

From the legal point of view, token raises many doubts, which mainly concern financial law and trading security<sup>60</sup>, hence the vast majority of global regulations apply to this matter<sup>61</sup>.

However, the main problem related to tokens is the phenomenon of tokenisation. By tokenisation we mean a *process of representing a given value (goods, services or rights) as a unit of account within or outside the DLT register*<sup>62</sup>. This process is mostly carried out by an Initial Coin Offering (ICO), which is a fundraising technique of blockchain-based tokens sale in exchange for cryptocurrency or fiat money with the aim to collect financial support for a given initiative<sup>63</sup>.

It is worth emphasizing that “smart contracts” play also important role in tokenisation as tokens offered in the ICO are most often distributed through smart contracts.<sup>64</sup> To put it simply, since such contracts are self-executing, they automatically exchange cash or other cryptocurrencies for tokens of a given publisher<sup>65</sup>. However, smart contracts are usually much more complicated and subject to additional conditions, e.g. they enable the fastest investors to receive an additional 5 % of tokens or they make the payment dependent on collecting a predetermined minimum amount<sup>66</sup>.

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60 See more Robby Houben and Alexander Snyers, ‘Cryptocurrencies and blockchain. Legal context and implications for financial crime, money laundering and tax evasion’, (European Parliament’s Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance 2018), <<https://www.europarl.europa.eu/cmsdata/150761/TAX3%20Study%20on%20cryptocurrencies%20and%20blockchain.pdf>> accessed 8 February 2021.

61 The topic will be elaborated on in the third subchapter "Comparative Legal Analysis of Selected Regulations Regarding the Token. Will the European Union Synthesize It?" .

62 See: Omri Ross, Jihane Rude Jensen and Truls Asheim, ‘Assets under Tokenization’ (2019) <<https://ssrn.com/abstract=3488344>> accessed 9 March 2021.

63 Alexis Collomb, Primavera De Filippi and Klara Sok, ‘Blockchain Technology and Financial Regulation: A Risk-Based Approach to the Regulation of ICOs’ (2019) 10 European Journal of Risk Regulation 263, 264 <[doi:10.1017/err.2019.41](https://doi.org/10.1017/err.2019.41)> accessed 9 March 2021.

David Uzsoki, ‘Tokenization of Infrastructure: A blockchain-based solution to financing sustainable infrastructure, (International Institute for Sustainable Development 2019) 2 <[doi:10.2307/resrep22004.3](https://doi.org/10.2307/resrep22004.3)> accessed: 9 March 2021.

64 Szostek (n 31) 127.

65 Valentina Gatteschi, Fabrizio Lamberti and Claudio Demartini, ‘Technology of Smart Contracts’ in Larry DiMatteo, Michel Cannarsa, Cristina Poncibò (eds), *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms* (CUP 2019) 45 <[doi:10.1017/9781108592239.003](https://doi.org/10.1017/9781108592239.003)> accessed 9 March 2021.

66 *ibid*.

#### 4.2. Types of Tokens - the Basic Knowledge of Every Legal Engineer

In principle, tokens can represent any value or any right<sup>67</sup>. However, because of their functions, both legislators and legal scholarship try to typologise them, as the application of certain legal provisions depends on their characteristics. The most popular typology is the following one<sup>68</sup>:

- 1) *Exchange tokens* (known also as cryptocurrencies or payment tokens)  
– tokens used primarily as a means of payment used to buy and sell goods and services without intermediaries; an example of such tokens are *bitcoin* or *Ethereum*<sup>69</sup>;
- 2) *Utility tokens* – tokens that grant its holders access to a current or potential product or service, but do not grant them the same rights as those granted by specific investments. Examples of such tokens are Golem (GNT)<sup>70</sup>, which allows to access specific computing power resources, or Filecoin (FIL)<sup>71</sup>, which enables to store information;
- 3) *Security tokens* (known also as „asset tokens” or „investment tokens”) – tokens with specific properties, like rights and obligations similar to stocks or financial instruments, with a largely similar function as stocks or bonds. According to R. Houben and A. Snyers<sup>72</sup>, an example of such a token is the "BNK token" by Bankera, which gives its holder the right to a weekly dividend of 50 Ethereum.

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67 Finck (n 47) 16.

68 See: Financial Conduct Authority, ‘Guidance on Cryptoassets Feedback and Final Guidance to CP 19/3’ (2019) 4 <<https://www.fca.org.uk/publication/policy/ps19-2-2.pdf>> accessed 7 February 2021; FINMA, ‘Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs)’ (2018) 3, <<https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegeleitung-ico.pdf?la=en>> accessed 7 February 2021; EBA, ‘Report with advice for the European Commission on crypto-assets’ (2019) 7. See also similar recital 10 of Comission, ‘Proposal for a Regulation Of The European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937’, (2020) COM/2020/593 final.

69 Sometimes this type of tokens stands out as a separate category due to their popularity, simply calling them cryptocurrencies. See: Robby Houben and Alexander Snyers, ‘Crypto-assets. Key developments, regulatory concerns and responses’ (European Parliament’s Committee on Economic and Monetary Affairs 2020), 18 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648779/IPOL\\_STU\(2020\)648779\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648779/IPOL_STU(2020)648779_EN.pdf)> accessed 7 February 2021

70 <<https://golem.network/>> accessed 7 February 2021.

71 <<https://www.filecoin.com/>> accessed 7 February 2021.

72 Houben and Snyers (n 60) 21.

#### 4.3. Comparative Legal Analysis of Selected Regulations Regarding the Token. Will the European Union Synthesise It?

Regulations regarding tokens can be divided into two main types. The first one is the regulation of cryptocurrencies through money laundering legislation, and the second one is the regulation of payment services, either by creating new service laws or by issuing binding interpretations by the regulator. There is also a group of countries that regulate the issue of tokens and tokenisation in both of these regulatory areas. The EU (and thus its Member States)<sup>73</sup>, Great Britain<sup>74</sup>, Liechtenstein<sup>75</sup> and Switzerland<sup>76</sup> are all in the first group.

Among the EU Member States, Malta is worth paying particular attention to, as this state was a pioneer of crypto industry legislation on the European continent. The Maltese regulation comprises in three legal acts: *Virtual Financial Assets Bill* (VFA)<sup>77</sup>, *Innovative Technology Arrangements and Services Bill* (ITASA)<sup>78</sup> and *Malta Digital Innovation Authority Bill* (MDIA)<sup>79</sup>. They constitute legal framework for the functioning of digital economy based on *DLT* and *blockchain* and for activities involving tokens

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73 This was done by 90. Directive 2018/843 of European Parliament and of the Council of 30 May 2018 amending Directive 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43, hereinafter referred to as AMLD5.

74 The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, implementing AMLD5.

75 Act on Professional Due Diligence to Combat Money Laundering, Organized Crime, and Terrorist Financing (*Gesetz über berufliche Sorgfaltspflichten zur Bekämpfung von Geldwäsche, organisierter Kriminalität und Terrorismusfinanzierung (Sorgfaltspflichtgesetz)*, Landesgesetzbuch Nummer (O.J. 2009, no 47 with amendments) <<https://www.gesetze.li/konso/pdf/2009047000?version=19>> accessed 7 February 2021, see unofficial English translation <[https://www.regierung.li/media/medienarchiv/952\\_1\\_17\\_11\\_2017\\_en\\_636524807784985165.pdf?t=5](https://www.regierung.li/media/medienarchiv/952_1_17_11_2017_en_636524807784985165.pdf?t=5)> accessed 7 February 2021.

76 It is worth remembering, however, that in Switzerland such application of anti-money laundering provisions was not determined directly by the legislator, but by the Swiss financial market supervisory authority (i.e. *Swiss Financial Market Supervisory Authority* - FINMA). See. FINMA (n 68).

77 <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=29079&l=1>> accessed 7 February 2021.

78 <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=29078&l=1>> accessed 7 February 2021.

79 <<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=29080&l=1>> accessed 7 February 2021.

and smart contracts. For example, Art. 2 of VFA defines the term "virtual tokens" as „a form of digital medium recordation that has no utility, value or application outside of the DLT platform on which it was issued and may only be redeemed for funds on such platform directly by the issuer of such DLT asset". Thus, the Maltese regulations can be assigned to both above-mentioned groups.

The United States of America is an unusual regulator, as due to the federal nature of the state, it has left the regulation of cryptocurrencies to individual States. Not all States have legally regulated the operation of the crypto industry. In some of them (e.g. in Florida<sup>80</sup>) case-law, established by either judicial or regulatory authorities, has the key role. On the other hand, the provisions introduced in the State of New York deserve special attention. Model regulation based on the law of payment services has been introduced there, requiring from entities involved to obtain a special license<sup>81</sup>.

Similar solutions were adopted by, for example, Belarus, which decided to regulate the entire activity of cryptocurrencies and tokens, including their exchange, as a type of payment services<sup>82</sup>. However, the Belarusian regulation does not apply to the entire territory of the country, but only to residents of the Park of High Technologies. Obtaining such a status requires the undertaking to apply in advance for a registration in the Supervisory Board of the Park, in accordance with the Decree of the President of the Republic of Belarus of September 22, 2005 No. 12, constituting the Regulations of the Park of High Technologies<sup>83</sup>. The second group

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80 This concerns, in particular, the verdict in the Florida v. Espinoza case, which indicated the need to adapt the statutory regulations of the state of Florida in the field of payment services to new technologies. See. Florida v Espinoza, Case No F14-2923 (Fla 11th Cir Ct) <[https://www.morrisoncohen.com/siteFiles/files/2014\\_02\\_06%20-%20Florida%20v\\_%20Espinoza.pdf](https://www.morrisoncohen.com/siteFiles/files/2014_02_06%20-%20Florida%20v_%20Espinoza.pdf)> accessed 7 February 2021; Florida v. Espinoza, Case No. 3D16-1860; Gabrielle Patrick and Anurag Bana, 'Report. Rule of Law Versus Rule of Code: A Blockchain-Driven Legal Word' (2017) International Bar Association Legal Policy & Research Unit 16.

81 See: Bitlicense (2020) 23 CRR-NY I 200, <[https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=I7444ce80169611e594630000845b8d3e&originationContext=documenttoc&transitionType=Default&contextData=\(sc.Default\)](https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=I7444ce80169611e594630000845b8d3e&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default))> accessed 7 February 2021.

82 See: Decree of the President of the Republic of Belarus from 21.12.2017, No. 8 On Development of Digital Economy <<http://law.by/document/?guid=3871&p0=Pd1700008e>> accessed 7 February 2021.

83 In the amended version after entry into force of Decree of the President of the Republic of Belarus from 21.12.2017, No. 8 On Development of Digital Econo-

should also include Singapore<sup>84</sup> and Japan<sup>85</sup>, as in both countries token trading was regulated by amendments to previously proclaimed acts on payment services.

It is also worth noticing that the research conducted recently by the EU<sup>86</sup> indicates that the development of the crypto industry has overtaken the EU legislator and it has become necessary to introduce a new law aimed at regulating cryptoassets, i.e. broadly understood cryptocurrencies and tokens<sup>87</sup>. The solution to this problem will be Regulation of the European Parliament and of The Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, which is currently a proposal. As Ursula von der Leyen, President of the European Commission pointed out, the purpose of the regulation is to create “a common approach with Member States on cryptocurrencies to ensure we understand how to make the most of the opportunities they create and address the new risks they may pose”<sup>88</sup>. By the above-mentioned normative act, the European Commission is trying to regulate the crypto assets, including tokens, in a holistic manner, by following the legal scholarship and distinguishing three types of tokens: tokens associated with assets (which correspond to investment tokens), utility tokens and crypto-assets (exchangeable tokens)<sup>89</sup>. This proposal should therefore be seen as a necessary step in the right direction.

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my, <<http://law.by/document/?guid=3871&p0=Pd1700008e>> accessed 7 February 2021.

84 Singapore's Payment Services Bill No. 48/2018 <[https://sso.agc.gov.sg/Bills-Supp/4-8-2018/Published/20181119?DocDate=20181119#Sc1->">https://sso.agc.gov.sg/Bills-Supp/4-8-2018/Published/20181119?DocDate=20181119#Sc1->](https://sso.agc.gov.sg/Bills-Supp/4-8-2018/Published/20181119?DocDate=20181119#Sc1-) accessed 7 February 2021.

85 Japanese Act No. 59 of June 24, 2009 on Payment Services. See English translation: <<http://www.japaneselawtranslation.go.jp/law/detail/?id=3078&cvm=02&cre=02e&new=1>> accessed 7 February 2021.

86 The last and most up-to-date feature is the ‘Consultation Document on an EU framework for markets in crypto-assets’ presented by the European Comission. See: <[https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/2019-crypto-assets-consultation-document\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2019-crypto-assets-consultation-document_en.pdf)> accessed 8 February 2021.

87 Houben and Snyers (n 60) 48.

88 Mission letter of President-elect Von der Leyen to Vice-President Dombrovskis (10 September 2019) <[https://multimedia.europarl.europa.eu/documents/20143/0/mission-letter-valdis-dombrovskis-2019\\_en+%281%29.pdf/d3645133-8c2e-7fdd-4367-77059b892232?t=1569412036000&download=true](https://multimedia.europarl.europa.eu/documents/20143/0/mission-letter-valdis-dombrovskis-2019_en+%281%29.pdf/d3645133-8c2e-7fdd-4367-77059b892232?t=1569412036000&download=true)> accessed 15 March 2021.

89 See recital 9 and Art. 2 of the discussed proposal. However, it would be suggested to change the nomenclature of the latter subgroup, as it coincides with the name of the entire group (this problem occurs at least in Polish, English, French and German versions).

#### 4.4. What about Lawyers When the Code Becomes Law? Selected Legal Challenges of Tokenisation

So what a lawyer can do in the face of such tokenised future? The tokenisation itself, usually reduced to blockchain technology, can undoubtedly be called a technology that is autonomous in relation to the law, and certainly is not adapted to it<sup>90</sup>. It is no coincidence that blockchain is usually referred to as a disruptive and revolutionary technology<sup>91</sup>. It creates new markets but it destroys current states, companies and networks at the same time<sup>92</sup>. However, this is a double-edged mismatch because the law is also not adjusted to the technology mentioned above. Moreover, the law is mismatched in a way in which it loses. On the line of mismatch between technology and law and in the new markets created the most tasks for lawyers open up.

Such a task would be, for example, finding of the applicable law to which the token will be subject given that there are no international standards on this matter<sup>93</sup>. In most cases, due to the tokens trade in cyberspace, the norms of private international law will enter into the civil law

<sup>90</sup> Matthias Lehmann, ‘Who Owns Bitcoin? Private Law Facing the Blockchain’ (2019) 21 Minnesota Journal of Law, Science & Technology 93, 107 <<https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1474&context=mjlst>> accessed 15 March 2021.

<sup>91</sup> See: Michael Nofer, Peter Gomber, Oliver Hinz and Dirk Schiereck, ‘Blockchain’ (2017) 59 Business & Information Systems Engineering 183 <[doi 10.1007/s12599-017-0467-3](https://doi.org/10.1007/s12599-017-0467-3)> accessed 15 March 2021; Lawrence J Trautman, ‘Is Disruptive Blockchain Technology the Future of Financial Services?’ (2016) 69 The Consumer Finance Law Quarterly Report 232, 239 <<https://ssrn.com/abstract=2786186>> accessed 15 March 2021; Sinclair Davidson, Primavera De Filippi and Jason Potts, ‘Disrupting Governance: The New Institutional Economics of Distributed Ledger Technology’ (2016), 2-5, <<http://dx.doi.org/10.2139/ssrn.2811995>> accessed 9 March 2021.

<sup>92</sup> We use this meaning after: Joseph. L Bower and Clayton M Christensen, ‘Disruptive Technologies: Catching the Wave’ (January-Februrary 1995) Harvard Business Review 43 <<https://hbr.org/1995/01/disruptive-technologies-catching-the-wave>> accessed 2 February 2021.

<sup>93</sup> Riccardo de Caria, ‘A Digital Revolution in International Trade? The International Legal Framework for Blockchain Technologies, Virtual Currencies and Smart Contracts: Challenges and Opportunities’ (Modernizing International Trade Law to Support Innovation and Sustainable Development Proceedings of the Congress of the United Nations Commission on International Trade Law, Vienna, July 2017) <<https://aperto.unito.it/retrieve/handle/2318/1632525/464608/R.%20de%20Caria%2c%20A%20Digital%20Revolution%20%282017%29.pdf>> accessed 2 February 2021.

relations of the parties. If the parties have not chosen the law applicable (e.g. in the case of contractual tokens trade), which happens in the vast majority of cases, then legal norms applicable to the habitual residence of the party obliged to the so-called characteristic performance will apply<sup>94</sup>. However, it may not be possible to apply this standard to token trading due to the anonymity of such a blockchain transfer, in which neither party knows the other participant or its address<sup>95</sup>. Perhaps the problem could be solved by the closest connection connecting factor, although it is neither the most reliable nor the objective one<sup>96</sup>. In addition, the application of CISG cannot be ruled out for some transactions with the use of tokens if they constitute remuneration for the sale of real goods between entrepreneurs<sup>97</sup>. Furthermore, determining the law applicable to the "ownership" of a token may be found similarly problematic<sup>98</sup>.

As we have indicated earlier, problems requiring legal solutions will also arise due to the mismatch between the law and the characteristics of tokens and blockchain technology. The technical feasibility of the law applicable to tokens within the DLT is also becoming a serious issue. In some cases, especially those related with enforcement, the law will be ineffective, as token usually eludes it both in the legal sense and in the sense of technical feasibility. Not knowing the password (i.e. private key), it is impossible to get to the given tokens. For example, let us consider the situation of would-be millionaire James Howell who threw away his old hard drive on which he gathered 7,500 bitcoins (currently worth about GBP 210 million)

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94 See. art. 4 (2) Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] O.J. L 177/6.

95 Lehmann (n 114) 15.

96 See: Florence Guillaume, 'Aspects of private international law related to blockchain transactions' in Daniel Kraus, Thierry Obrist and Olivier Hari (eds), *Blockchains, Smart Contracts, Decentralised Autonomous Organisations and the Law* (Edward Elgar 2019) 82, which indicates that in most cases due to the inability to use other connecting factors the *lex fori* principle will apply. See also: Szostek, (n 31) 68–80 as regards the indication of the copyright law applicable to Bitcoin blockchain copyright and *Bitcoin agreements*.

97 See: United Nations Commission on international trade law, 'United Nations Convention on Contracts for the International Sale of Goods' (1980) <[https://unctad.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951\\_e\\_ebook.pdf](https://unctad.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf)> accessed 2 February 2021. See also: Sebastian Omlor, 'The CISG and libra: monetary revolution for international commercial transactions?' (2020) 3(1) Stanford Journal of Blockchain Law & Policy 83–95.

98 Lehmann (n 90) 16–17.

and is looking for it in a landfill<sup>99</sup>. The same goes for German prosecutor's office, which recently "confiscated" EUR 50 million worth of bitcoins<sup>100</sup>. However, there was one problem. The former owner of these bitcoins, now convicted of fraud, does not intend to reveal his private key to the prosecutor. Therefore, the prosecutor's office has to rely on the grace and disfavour of the convict. As Chainanalysis, a cryptocurrency data research firm, points out, about 20 % of bitcoins, worth a total of USD130 billion, appear to be lost forever due to the loss of private keys by their owners.

Courts will also have to deal with the above-mentioned technology in terms of the appropriate treatment of evidence presented in court proceedings on an undeniable medium such as *blockchain*<sup>101</sup>. Such evidence had already been submitted and processed by the Chinese Internet Court in June 2018 in the case *Hangzhou Huatai Media Culture Media Co., Ltd. v. Shenzhen Daotong Technology Development Co., Ltd.*<sup>102</sup> This issue was directly regulated three months later in the provisions of the Supreme Court of the People's Republic of China concerning the hearing of cases by internet courts<sup>103</sup>. However, the Chinese legislator was not the first to regulate this problem, because e.g. Vermont and Arizona were faster to introduce such rules in 2016 and 2017 respectively<sup>104</sup>.

99 <<https://www.bbc.com/news/uk-wales-55658942>> accessed 9 February 2021.

100 <<https://www.reuters.com/article/us-crypto-currency-germany-password/police-seize-60-million-of-bitcoin-now-wheresthe-password-idINKBN2A511T>> accessed 9 February 2021.

101 See: Szostek (n 31) 97–108.

102 See: 'Hangzhou Huatai Media Culture Media Co., Ltd. v. Shenzhen Daotong Technology Development Co., Ltd. Case of Dispute over Right of Dissemination over Internet' (The Supreme People's Court of the People's Republic of China, 4 April 2019) <[http://english.court.gov.cn/2019-12/04/content\\_37527759.htm](http://english.court.gov.cn/2019-12/04/content_37527759.htm)> accessed 9 February 2021. See also: Raphael Prabucki, 'About Chinese Courts and Blockchain — A Simple Chain Foundation commentary' (Medium, 18 June 2020) <<https://medium.com/@prabucki.rafael/chinese-justice-and-blockchain-what-can-we-learn-ed4285e1a34d>> accessed 9 February 2021.

103 Vivien Chan and Anna Mae Koo, 'Blockchain Evidence in Internet Courts in China: The Fast Track for Evidence Collection for Online Disputes' (Lexology, 15 July 2020) <<https://www.lexology.com/library/detail.aspx?g=1631e87b-155a-40b4-a6aa-5260a2e4b9bb>> accessed 9 February 2021. See: Sylvia Polydor, 'Blockchain evidence in court proceedings in China a comparative study of admissible evidence in the digital age (as of june 4, 2019)' (2020) No. 3(1) Stanford Journal of Blockchain Law & Policy 96.

104 See more in the further chapter by Agnieszka Kubiak-Cyrul, Dariusz Szostek, 'Smart Contracts, Blockchain and Distributed Ledger Technology (DLT) in the Work of a Lawyer'.

*Michelle Finck* also points to another very interesting, revolutionary and at the same time threatening tokenisation feature, associated with utility tokens<sup>105</sup>. Due to the ease and certainty of transferring ownership over the token in the blockchain chain, we risk a liquid and intermediary-less (sometimes a system fuse, such as notaries under real estate law) "transferring" real estate ownership, intellectual property or any other property right across the whole world<sup>106</sup>. The increasing popularity of this phenomenon will therefore most likely lead to a deepening gap between applicable laws and jurisdiction. Thus, we can encounter an increasing number of activities effective within the framework of a distributed register but invalid or ineffective in legal reality. This situation will not be beneficial for either party. This leads to the conclusion that tokens will have to be adjusted to the law, not the law to tokens.

## 5. Control of Codes and LegalTech

### 5.1. Introduction

Equally important is the issue of control over codes. Undoubtedly, taking smart contracts as an example, it would have to be said that any particular control is in contradiction not only with their nature but with the essence of DLT technology<sup>107</sup> as well, which should be deduced from the fact that this solution eliminates the need for a trusted third party (e.g. interference of a legally established public trust institution such as a notary, bank, etc.). The absence of intermediaries and the risk of contract default constitute the main advantages of smart contracts, but at the same time they are also their biggest disadvantages. Smart contract operate as programming code, which means that they are automatically executable<sup>108</sup>. As a result

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105 Finck (n 47) 18.

106 Wright and De Filippi (n 4) 28.

107 As stated in the description of Solidity on GitHub: "Smart contracts are programs that are executed inside a peer-to-peer network *where nobody has special authority over the execution*, and thus they allow to implement tokens of value, ownership, voting, and other kinds of logic", <<https://github.com/ethereum/solidity>> accessed 6 February 2021).

108 However, when talking about contracts here, the vast majority of such contracts will be of an adhesion nature. For example, in a sales contract, the buyer, by sending the appropriate instruction, will accept the offer and enter into the contract, which will be self-executing. See D. Szostek, (n 5).

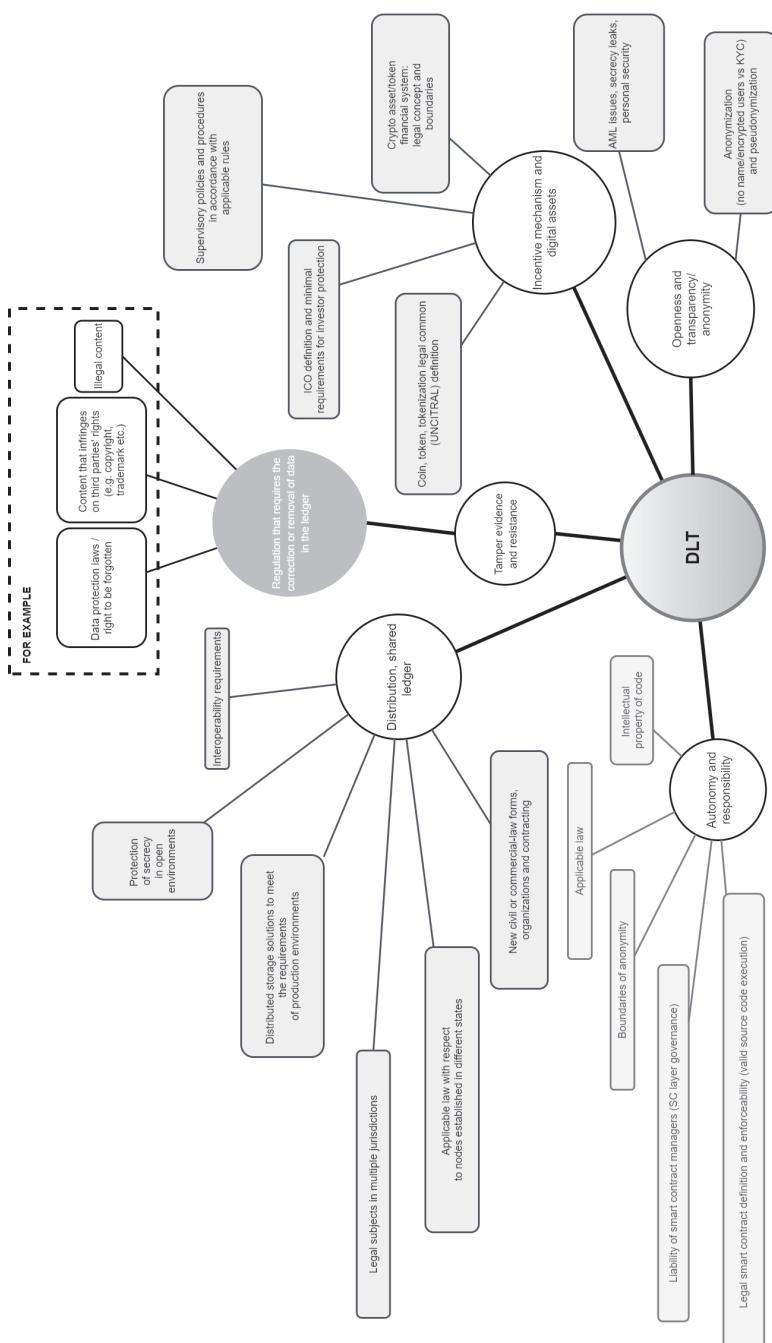
the parties to such transactions have to rely primarily on the developer of the code.

The question then arises whether something whose main feature is the limitation of control in the perspective of traditional law (territory, applicable law, court) should be controlled? According to current legislative trends in the EU, it cannot be considered sufficient to give complete freedom in this respect, relying on the parties' extensive contractual rights<sup>109</sup>. In all likelihood, the Code does not exist in a legally irrelevant vacuum either. The ITU has provided a universal legal control key based on the possible control of codes in DLTs (Figure 4<sup>\*</sup>).

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109 With regard to general code control, the above need assumes particular importance, *inter alia*, in the context of the European Commission's recent decision on its preliminary opinion on Amazon's restrictive practices, <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_2077](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077)> accessed 6 February 2021); Undoubtedly, the lack of appropriate interference by legislators with the increasing prevalence of artificial intelligence algorithms used to gain competitive advantage will lead to a gradual monopolisation of markets. For more on the potential for abuse of algorithms, see the report: Competition and Markets Authority (UK), 'Algorithms: How they can reduce competition and harm consumers' (Crown, 2021) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/954331/Algorithms\\_++.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/954331/Algorithms_++.pdf)> accessed 19 January 2021.

\* Source: Own elaboration based on the International Telecommunication Union, Technical Report FG DLT D4.1 Distributed ledger technology regulatory framework, 2019.



This issue is becoming more and more essential in LegalTech, which has implications for the security of legal transactions. In view of this, it would be more appropriate to ask: how should the technology and the codes be controlled? Should we require disclosure of the algorithms hidden in the codes of LegalTech systems? What new regulations should be adopted to ensure cyber security? Or should some of the existing regulations simply be extended? Undoubtedly, the elaboration of the above issues deserves a separate even more detailed study, but the purpose of this piece is to give them a general consideration and to highlight selected issues<sup>110</sup>.

Alison Hook presented her 2019 report on the use and regulation of LegalTech<sup>111</sup>. The author identified four leading approaches that can be seen amongst current regulatory trends<sup>112</sup>:

- 1) Most countries adopt what has been termed a "wait and see" approach. The plethora of other regulatory obligations and the prioritisation of issues with limited resources means that the legal approach to LegalTech is not a leading theme in legislative work. All the more so, it does not receive much attention in the area of soft regulation either;
- 2) There are sometimes cases where lawyers are even prohibited from using such technologies, for example by restricting their access to the market for online legal services. There is a tendency to impose a kind of LegalTech prohibition<sup>113</sup>;
- 3) The third approach is based on an attempt to extend current regulations to cover the problem of control of the LegalTech sector. Moreover, some legal authorities have led to the acquisition of providers of such technologies or they have even been given the opportunity to influence

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110 Particularly noteworthy in this regard is the expert opinion of: Mario Martini 'Fundamentals of a Regulatory System for Algorithm-based Processes' (2019) <[https://www.vzbv.de/sites/default/files/downloads/2019/07/19/martini\\_regulatory\\_system\\_algorithm\\_based\\_processes.pdf](https://www.vzbv.de/sites/default/files/downloads/2019/07/19/martini_regulatory_system_algorithm_based_processes.pdf)> accessed 18 November 2020.

111 Alison Hook, 'The Use and Regulation of Technology in the Legal Sector beyond England and Wales. Research Paper for the Legal Services Board' (Hook Tangaza, 2019) <<https://www.legalservicesboard.org.uk/wp-content/uploads/2019/07/International-AH-Report-VfP-4-Jul-2019.pdf>> accessed 16 March 2021.

112 *ibid* 8.

113 Already in 2010, the Taiwan Bar Association banned its members from participating in online legal services exchanges on the grounds that they violated the Bar Code of Ethics, under the pretext of the dangers of referral fees. For more examples see: *ibid* 34.

the development of such technologies to ensure their compliance with current regulations<sup>114</sup>;

- 4) Finally, there are several cases of jurisdictions that have made efforts and attempted to facilitate access to the legal sector by allowing IT players to enter it through the support of local government bodies and by opening a dialogue to coordinate cross-sectoral cooperation<sup>115</sup>.

However, it should be stressed that the right approach and the use of a key by the creators of a certain DLT, which would comply with a certain legal system, makes it possible to obtain a DLT in which each code would be somewhat controlled in such a perspective that it is the algorithmic code that creates the DLT data (that is, e.g., the way it is managed, the number of access layers) that would control the program code written in it<sup>116</sup>. This process, however, requires legal knowledge in order to relate the ITU key to the applicable laws in a certain system<sup>117</sup>.

## 5.2. Prior control

At present, however, there are no hard legal solutions apparent at the European level, hence - as it has been indicated above - the approach to the scope in discussion varies significantly from country to country. European regulations to date do not in any way harmonise the rules on the provision of legal services beyond what is applicable to all service providers, in particular as regards the automated processing and profiling of personal data under the GDPR<sup>118</sup>. Work on the first draft code regulations is still in progress.

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<sup>114</sup> A classic example of this is the *CloudLawyers* portal, an online marketplace for legal services created in partnership with *American Bar Association*, <<https://www.zeekbeek.com>> accessed 16 March 2021.

<sup>115</sup> See *LegalFuel* <<https://www.legalfuel.com>> accessed 16 March 2021; *Future Law Innovation Programme* <<https://www.flip.org.sg>> accessed 16 March 2021; *Abogacía Española* <<https://www.abogacia.es/servicios>> accessed 16 March 2021.

<sup>116</sup> Szostek (n 29) 15.

<sup>117</sup> As K. Werbach notes - developers need to consider both codes and incorporate them - both programmatic and legal. See Kevin Werbach, 'Trust, But Verify: Why the Blockchain Needs the Law' (2019) 33/2 Berkeley Technology Law Journal 497.

<sup>118</sup> See 131. Martin Ebers, 'Legal Tech and EU Consumer Law' in: Larry A. DiMatteo, André Janssen, Pietro Ortolani, André Janssen, Pietro Ortolani, Francisco de Elizalde, Francisco de Elizalde, Michel Cannarsa, Mateja Durovic (eds), *Lawyering in the Digital Age* (Cambridge University Press 2021).

Current trends in the harmonisation of the market for algorithms in the EU are well illustrated by three reports which are European Parliament resolutions adopted on 20.10.2020 in the field of EU legislation on artificial intelligence on: a framework of ethical aspects of artificial intelligence, robotics and related technologies<sup>119</sup>; a civil liability regime for artificial intelligence<sup>120</sup> and intellectual property rights for the development of artificial intelligence technologies<sup>121</sup>. The parliamentarians agreed that, above all, AI regulations should be human-centred. The human being is put at the centre of any solution and the aim of regulation should be his or her safety<sup>122</sup>, achieved by ensuring transparency in the functioning of the algorithms, non-discriminatory operation<sup>123</sup>, as well as the right of redress against their operators, not excluding privacy and data protection issues.

Prior control is certainly not just a manifestation of current AI trends. For example, for the purposes of the eIDAS Regulation<sup>124</sup>, an obligation was established to audit the qualified services launched, covering both documentation and IT systems audit. This approach is particularly justified in view of the fact that these services are associated with a number of legal presumptions, e.g. as to the authenticity or integrity of data and service<sup>125</sup>. However, state regulations of some countries are the most developed, and the following examples of such national regulations are the

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119 <[https://www.europarl.europa.eu/doceo/document/TA-9-2020-0275\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0275_EN.html)> access 16 March 2021.

120 <[https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html)> access 16 March 2021.

121 <[https://www.europarl.europa.eu/doceo/document/TA-9-2020-0277\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0277_EN.html)> access 16 March 2021.

122 The proposed revision of the NIS Directive deserves additional attention as regards cyber security, <<https://ec.europa.eu/digital-single-market/en/news/proposal-directive-measures-high-common-level-cybersecurity-across-union>> access 16 March 2021; unfortunately, the LegalTech sector is not directly mentioned in the regulation, although Annex 1 includes cloud service providers among the entities belonging to the group of "essential entities".

123 For an extensive study of the problems of algorithmic discrimination in Europe, see the special report prepared for the European Commission – Janneke Gerards and Raphaële Xenidis, 'Algorithmic discrimination in Europe: Challenges and opportunities for gender equality and non-discrimination law' (European Commission 2020) <<https://op.europa.eu/en/publication-detail/-/publication/082f1dbc-821d-11eb-9ac9-01aa75ed71a1>> access 16 March 2021;

124 Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC.

125 Dariusz Szostek, 'IBAC (IoT, Blockchain, AI i Cyberbezpieczeństwo) – samoregulacja kodów czy kontrola uprzednia?' in Kinga Flaga-Gierszynska, Jacek

Maltese *Virtual Financial Assets Act*<sup>126</sup>, *Malta Digital Innovation Authority Act*<sup>127</sup> i *Innovative Technology Arrangement and Services Act*<sup>128</sup>. Within these arrangements, an appropriate *Malta Digital Innovation Authority* (MDIA)<sup>129</sup> licence is required to provide *Virtual Financial Assets*<sup>130</sup> services. It is worth noting that the mentioned legal act also introduces many requirements for further control, including with respect to whitepapers of Initial VFA Offerings<sup>131</sup>, which must contain, in particular, detailed descriptions of smart contracts<sup>132</sup>, oracles<sup>133</sup> or intellectual property rights related to the offer<sup>134</sup>.

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Gołaczyński and Dariusz Szostek (eds), *Sztuczna inteligencja, blockchain, cyber-bezpieczeństwo oraz dane osobowe. Zagadnienia wybrane* (C. H. Beck 2019);

- 126 Virtual Financial Assets Act (VFA) <<https://legislation.mt/eli/cap/590/eng/pdf>> access 2 February 2021.
- 127 Malta Digital Innovation Authority Act (MDIA) <<https://legislation.mt/eli/cap/591/eng/pdf>> access 2 February 2021.
- 128 Innovative Technology Arrangement and Services Act (ITAS) <<https://legislation.mt/eli/cap/592/eng/pdf>> access 2 February 2021.
- 129 Part III and IV of VFA Act.
- 130 For the purposes of the VFA Act, VFA means any form of digital storage that is used as a digital medium of exchange, unit of account or store of value that is not simultaneously: (1) electronic money, (2) a financial instrument or (3) a virtual token.
- 131 This term covers in principle *Initial Coin Offering* (ICO), Investopedia, ‘Initial Coin Offering’ <<https://www.investopedia.com/terms/i/initial-coin-offering-ico.asp>> access 2 February 2021.
- 132 Including, but not limited to, adopted standards, core protocols, functionalities and associated operating costs, as well as any built-in constraints, if any, including investment and geographical.
- 133 Entities offering services of obtaining and verifying data described in smart contracts; see also Patrick Collins, ‘What Is a Blockchain Oracle?’ (Medium, 2 September 2020) <<https://medium.com/better-programming/what-is-a-blockchain-oracle-f5ccab8dbd72>> accessed 10 February 2021. Taking this opportunity, it is worth pointing out in this regard that the tendency to view the crypto-asset market as inherently independent seems to be completely unfounded, since, as in AI systems, the correctness of the operation of smart contracts depends on the quality of the data provided, which are in the possession of the aforementioned oracles. As a result, smart contracts are in principle entirely dependent on the providers of such services, which means that the postulate of no specific control is not applicable in practice.
- 134 Detailed regulations in this respect are contained in the First Schedule to VFA Act.

### 5.3. Follow-up actions

The control of algorithms is also directly affected by follow-up actions, including, in particular, the attribution of liability for AI. The European Parliament proposes a solution that will apply to physical and virtual AI activities that will cause material damage or serious non-material damage resulting in verifiable economic loss. Liability rules are differentiated according to the classification of AI technology as high-risk<sup>135</sup>. Operators of AI systems that fall into this category should also be subject to compulsory third party liability insurance similar to that for drivers of passenger vehicles<sup>136</sup>. However, it should be noted that the proposed solutions concern only artificial intelligence systems, so to the extent to which individual codes do not meet the conditions contained in the final regulation, liability for them will be shaped differently<sup>137</sup>.

In terms of the development of smart contracts and their control, the most interesting trend is the implementation of dispute resolution mechanisms and protocols (following N. Szabo's terminology that a smart contract is a combination of protocols), of which Aragon Court (trade name, see Figure 5) is a working example. This program can be qualified as ADR in an adjunctive model but as a private initiative, i.e. aimed at resolving disputes which have arisen from smart contracts related to Aragon Network token transactions (ANT)<sup>138</sup>. There are also first statements and opinions expressed in the international doctrine that the development of dispute resolution protocols for smart contracts is also a signal for changes in traditional courts and arbitration<sup>139</sup>.

<sup>135</sup> Paragraphs 14-22 of the European Parliament resolution of 20.10.2020 with recommendations to the Commission on a civil liability regime for artificial intelligence [2020/2014(INL)].

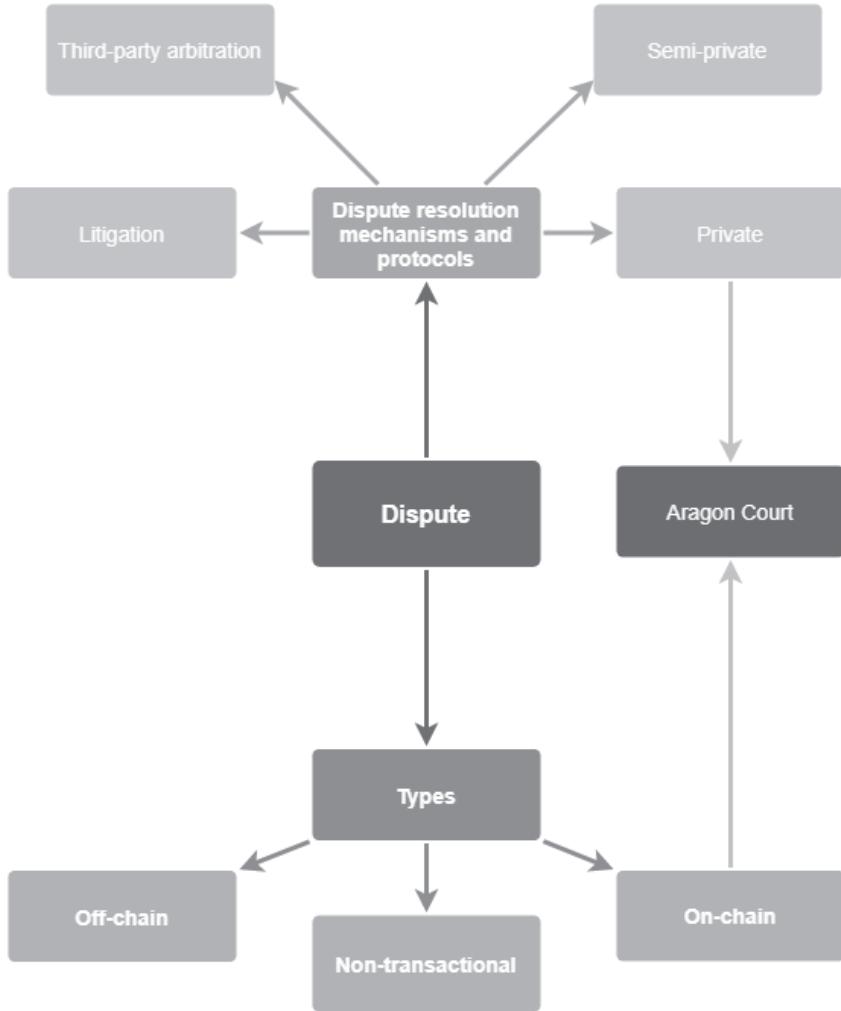
<sup>136</sup> ibid, paragraphs 23–25.

<sup>137</sup> European Parliament proposes definition of "artificial intelligence system" as "system that is either software-based or embedded in hardware devices, and that displays intelligent behaviour by, inter alia, collecting, processing, analysing, and interpreting its environment, and by taking action, with some degree of autonomy, to achieve specific goals".

<sup>138</sup> World Economic Forum, 'Bridging the Governance Gap: Dispute resolution for blockchain-based transactions' (White Paper, December 2020) access 16 March 2021.

<sup>139</sup> Bedrettin Gürçan, 'Jurisdiction on Blockchain' (2020) ICBEMM-ICISSS 14.

Figure 5. The types of disputes possible for parties to smart contracts and the mechanisms and protocols for resolving them. The figure indicates the location of the Aragon Court dispute resolution protocol along with the type of disputes it allows to be resolved



Source: Own elaboration based on World Economic Forum, Bridging the Governance Gap: Dispute resolution for blockchain-based transactions, 2020, <https://www.weforum.org/whitepapers/bridging-the-governance-gap-dispute-resolution-for-blockchain-based-transactions>.

Private dispute resolution mechanisms and protocols are not an issue that characterises the codes in DLT. Aragon Court or Kleros<sup>140</sup> provides human participation in their operation at a reasonably advanced degree. The parties, i.e. humans, mark their objections to the transaction with evidence and also humans vote on the verdict (the verdict works on the principle: either side A or B is right). While the algorithm uses the laws of mathematics and programming code, the operation of the code is initiated by a human (a party to the dispute) and the decision is made by people, although it is also verified on the basis of game theory, i.e. the party that gets more votes wins the dispute. Codes on social platforms are not as transparent in their operation as private adjudication models<sup>141</sup>. In these, it is not easy to establish the role and involvement of the human in controlling the operation of the code (ADM). Furthermore, the basis of the decision is unknown<sup>142</sup>.

#### *5.4. Soft Law*

In the context of scrutiny, there is also a need to mention standards that aim to help, i.e. to indicate certain good practices. This is important to signal because EP Resolution 2020/2012 (INL), which appears in the context of artificial intelligence, robotics and related technologies, indicates that future EU law will focus on such a target as code developers, whose choices regarding development, deployment and use will determine not only the benefits but also the impact of codes on society (see Figure 6). This approach led EP Resolution 2020/2012 (INL) to point out in paragraph 11 that "(...) the development, deployment and use of artificial intelligence,

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140 Kleros is similar project to Aragon Court, <[kleros.io/](http://kleros.io/)> accessed 12 January 2021.

141 Mark R. Leiser, ‘‘Private jurisprudence’’ and the right to be forgotten balancing test’ (2020) 29 Computer Law & Security Review; See Przemysław Polański, ‘Zwalczanie bezprawnych treści oraz zapewnienie retrievedności cyfrowej z pomocą algorytmów sztucznej inteligencji’ in Luigi Lai and Marek Świerczyński (ed) *Prawo sztucznej inteligencji* (C. H. Beck 2020).

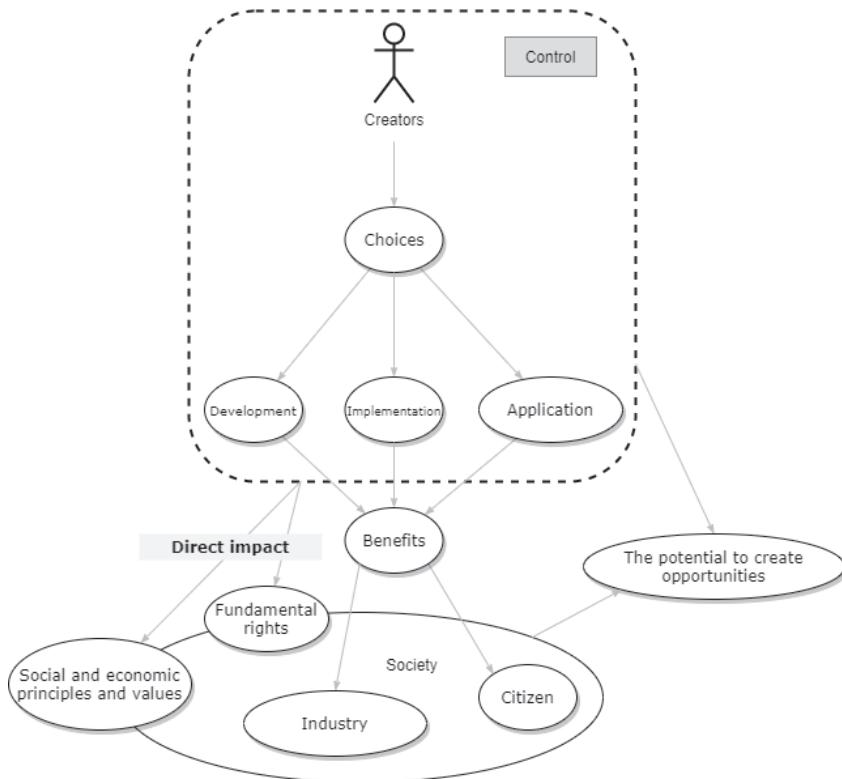
142 However, it is worth noting here the proposed regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC [COM(2020) 825 final], which provides for a number of control mechanisms for online platforms, including those based on internal complaint handling systems (Article 17), out-of-court dispute resolution (Article 18) and instruments of enhanced supervision of very large online platforms (Article 50 et seq.). Also noteworthy is the need for very large online platforms to designate dedicated compliance officers (Article 32).

robotics and related high-risk technologies, including but not limited to human handling, shall always be ethically guided, and designed to respect and allow for human agency and democratic oversight, as well as allow the retrieval of human control when needed by implementing appropriate control measures". The term "democratic oversight" seems to refer to oversight arising from the specificity of the relationship between European law and technical standards, the preparation and dissemination of which are handled by standardisation organisations. They will also be expected to provide a framework of good practice for code developers. Compliance with technical standards will be ensured by the developers themselves. They will have to submit to certification by audit checks when required by law or when they consider it a necessary business action. A properly conducted audit will confirm implementation and operation according to good practice. This type of action is also in line with the technological neutrality of European regulations - it is the technical standards that will indicate current and essential directions for developers' solutions. This also supports the concept of self-regulation and use of DLTs proposed by D. Szostek. Another element of democratic oversight may be an administrative body that will license creators<sup>143</sup>. Such democratic oversight represents, on the one hand, specific benefits for European society and, on the other hand, the certainty that the impact of creators and their codes on fundamental rights and social and economic principles and values will not remain outside oversight and control. In this way, the potential for opportunity creation can be achieved (Figure 6).

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143 In the context of licensing, see also European Commission Communication *Open Source Software*: European Commission, 'OPEN SOURCE SOFTWARE STRATEGY 2020 – 2023 Think Open' (Communication to the Commission, 21 November 2020) <[https://ec.europa.eu/info/sites/default/files/en\\_ec\\_open\\_source\\_strategy\\_2020-2023.pdf](https://ec.europa.eu/info/sites/default/files/en_ec_open_source_strategy_2020-2023.pdf)> accessed 12 January 2021.

*Figure 6. Graphical representation of the significant element of control in terms of EP Resolution 2020/2012 (INL) and justification*



Source: Own elaboration.

## 6. Summary

In terms of comparing smart contract codes with AI codes, it is essential to note that both codes implement ADM but differently. An automated decision realised by deep learning can be complex, not very transparent, and depends on the inputs on which such AI has trained. On the other hand, smart contracts offer code in a trackable form for a person with knowledge of a particular contractual programming language as well as they also by assumption offer easy accessibility to this code, and thus high transparency. Besides, their aim is not to eliminate but to reduce the

human factor, mainly the one who stands in the intermediary place and is not a party.

Furthermore, there is no legislation that directly addresses codes in a universal manner. What is regulated are entities that use codes to create programs or by using programs themselves, fall within a certain regulatory framework. However, it seems that the European Union has started to notice the problem of increased control of entities operating in cyberspace, which is confirmed by the work on regulations dedicated to digital services<sup>144</sup> and markets<sup>145</sup>. The control solutions drafted for the purpose of the mentioned acts should be considered important to observe and worth considering also in the broader context indicated in this work. Unfortunately, a drawback of the proposed provisions is that their scope is still limited to basic platform services offered by access gatekeepers<sup>146</sup> or "to certain specific categories of intermediary service providers"<sup>147</sup>. The lack of adequate general regulations raises many doubts, even with regard to the legal status of the codes themselves.

We must bear in mind that the success of tokens depends on their legal recognition so that they can be effective in the real world and, thus, on their compliance with applicable law. If not, cryptocurrencies will bring us none "technical revolution"<sup>148</sup>. Will we live to see the "lex cryptographia"<sup>149</sup>, a branch of law regulating tokens and their turnover? We are now witnessing the process of creating such a law. In the last few years, we have been flooded with token regulations, especially in countries or territories with high digital competences, PRC, US and the EU among them. In total, these cover over 2 billion entities. And this is no longer a trivial group. For lawyers the tomorrow has started today or, maybe, it started yesterday but no one noticed?

There is therefore no doubt that efforts need to be made to begin work on the issues identified. It is important, however, to approach the

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144 Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM(2020) 825 *final*.

145 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 *final*.

146 See Article 1(2) of the draft Digital Markets Act.

147 See Article 1(1)(b) of the draft Digital Services Act.

148 See: as to one of the first uses of the term: Don Tapscott and Alex Tapscott, *Blockchain revolution. How The Technology Behind Bitcoin Is Changing Money, Business, And The World* (Penguin Random House 2016).

149 See: Wright and De Filippi (n 4) 48–56.

control mechanisms carefully so as not to create a situation of overregulation of the market. Excessive legal restrictions may effectively block the development of new technologies and progress because of the high entry threshold for compliance with the standards in force. As a result, instead of ensuring security and transparency, mechanisms of control will become a monopolising instrument, as only technological giants will be able to afford to operate in such areas.

It should also be noted that algorithmisation appears not only on the ground of law from the perspective of legal practice but also from the impact of law on society. However, these are issues that fall under the broad term of cybernetics and the relationship of the citizen to the state apparatus. Although this apparatus also includes bodies both applying the law and overseeing compliance with the law, it is more about the algorithms that allow and regulate access to these bodies and allow the state to carry out its functions<sup>150</sup>.

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150 See Thomas D. Grant and Damon Wischik, *On the path to AI. Law's prophecies and the conceptual foundations of the machine learning age* (Palgrave Macmillan 2020). See Tom Barraclough, Hamish Fraser and Curtis Barnes, 'Legislation as a code for New Zealand: opportunities, risks, and recommendations' (2021) 3 NZLFRP 12-13.



# Borderlands of the Law and Technology: from Digital Machines to LegalTech

*Maria Dymitruk*

## *1. Introduction*

Since the creation of first computers<sup>1</sup> capable of automatically processing data due to software, i.e. due to inputting of a schedule of tasks to be performed into the memory of the machine, the borderlands of the law and technology has become an area of interest of many scholars, rekindling bold images of improving the work of lawyers and the functioning of the entire legal system. Inspired by the potential of “digital machines”<sup>2</sup>, lawyers quickly began to consider the possibility of applying technological achievements in the area of law. The first “wave” of technological development, which may be equated to LegalTech 1.0, crashed through the legal sector much later – principally in the 1980s and 1990s. During that period, the first commercial legal databases became popular (such as Westlaw or LexisNexis), accelerating the process of searching for information on the law and improving the day-to-day legal analysis by virtue of computer-assisted legal research (CALR). At the next stage of development, electronic databases publishing the contents of normative acts, case-law and the writings of the doctrine transferred to the online sphere, allowing for instant access to legal information that is updated in real-time. Each new “wave” of technological changes improved, and over time automated further components of the work of lawyers, leading to significant surge of interest in legal profession-related technologies among the practitioners (the so-called LegalTech boom) during the last few years. At first, LegalTech solutions served to improve and automate non-substantive activities

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- 1 The first digital computers were created in the 1940s. One of the first of those was the ENIAC (Electronic Numerical Integrator and Computer), constructed in the USA in the mid-1940s.
  - 2 The term “computer” did not take hold all over the world at first. For instance, a computer was addressed in Poland with the monikers of a “digital machine”, a “cybernetic machine”, or a “mathematical machine”. It was not a coincidence that the first computer manufactured in Poland (1960s) was named “UMC” (“Uniwersalna Maszyna Cyfrowa”, Universal Digital Machine).

that were clerical or organisational (such as organising cases, managing electronic casefiles, invoicing, registration of working time, etc), in time allowing for support of substantive work of lawyers through automation of legal decisional processes.

Over the span of years, technological trends in the legal sector changed many times. Certain tendencies are, however, constant: lawyers that are also members of the academia are fascinated by technologies, capabilities and by dangers posed by the former for the law, and practitioners are continuously characterised by faint praise for (at times revolutionary) changes that are brought by technological development in the scope of their work. The description of transformations that the respective components of the legal landscape are undergoing in the broadly viewed area of IT is provided in many chapters of this monograph. The object of this chapter is not to reiterate them or to provide a synthesis thereof, but to present the development of academic research on the technological transitions in the law<sup>3</sup>. In that regard, one must stress that while the conservative approach of the majority of practitioners to new technologies induced the adoption of a slow schedule (belated when compared to other sectors of the economy) for adapting innovation in the area of law, the legal academia have always boldly looked into the future, often surpassing the actual capabilities of implementation in the field of IT and the law by decades.

For the purposes of avoiding any doubt, it must be emphasised at the very beginning that, from the academic point of view, there are many disciplines at the intersection of the law on one hand, and the mathematical sciences and informatics on the other: above all, legal informatics<sup>4</sup>,

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3 This work makes no claim to be a definitive description for the stages of developing research on IT applications in the law. Its purpose is simply to indicate approaches to research in order to present the academic landscape that led to the creation of LegalTech, and the changes which that landscape underwent over the years, in an illustrative manner.

4 It is not possible to create a single, uniformly accepted definition of legal informatics, and thus it is expedient to restrict the description of legal informatics to a term referring to the research on drafting and applying the law through the use of computers. For more on that subject see Abdul Paliwala (ed), *A history of legal informatics* (Series 9 LEFIS, Prensas de la Universidad de Zaragoza 2010) 1-287; Jacek Janowski, *Informatyka prawnicza* (C. H. Beck 2011) 2 – 14; Jacek Janowski, *Informatyka prawa. Zadania i znaczenie w związku z kształtowaniem się elektronicznego obrotu prawnego* (Wydawnictwo UMCs 2011) 328 – 340; Jacek Petzel, *Informatyka prawnicza. Zagadnienia teorii i praktyki* (LIBER 1999) 13 – 32.

but also legal cybernetics<sup>5</sup> and jurimetrics<sup>6</sup>. The trends indicated above intertwine with one another, at times having inseparable fields of research. Nevertheless, they are joined primarily by the fact that all of them are theoretical and legal disciplines that fully draw from the achievements of science. Those disciplines are further linked to other fields of science on new technologies in the law (mainly doctrinal disciplines that are of interdisciplinary nature, aimed at researching the connection of substantive or procedural legal issues with the subject of technology), and often to the traditional areas of jurisprudence, such as the theory of law, legal logic, or philosophy of the law.

Somewhat in opposition to the theoretical deliberations on the influence of technology on the law, one could present LegalTech. This is because that is not a scientific discipline, but more of a field of business. While legal informatics and its cognate scientific disciplines address academic research and the creation of theoretical foundations for the purposes of future implementation, LegalTech should be viewed from the point of view of application. However, given that LegalTech is based on using contemporary IT in the area of law<sup>7</sup>, it could be assumed for the sake of simplicity that it constitutes an application of the achievements of legal informatics and related fields of study in legal practice. It constitutes a fragment of the economy, connecting the technological market with the market in legal services and with the broadly construed public legal space. It is therefore not surprising from the point of view of applicable terminology, that the use of “legal informatics” and cognate disciplines is preponderant in the academic literature, while the concept of LegalTech is used mainly by legal

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5 The capability of applying cybernetics (the science of control and transmission of information connected thereto) in the area of law is subjected to analysis within the framework of that trend. Mario Giuseppe Losano is considered to be the creator of cybernetics. See Mario Giuseppe Losano, *Giuscybernetica: Macchine e modelli cibernetici nel diritto* (Einaudi 1969), and Giuseppe Contissa, Francesco Godano and Giovanni Sartor, ‘Computation, Cybernetics and the Law at the Origins of Legal Informatics’ [in:] Simona Chiodo and Viola Schiaffonati (eds), *Italian Philosophy of Technology: Socio-Cultural, Legal, Scientific and Aesthetic Perspectives on Technology* (Vol. 35, Springer 2021) 91 – 110.

6 Jurimetrics is concerned with the application of quantitative methods (especially probability and statistics) to the law. Lee Loevinger is considered to be its creator. See Lee Loevinger, ‘Jurimetrics: The Next Step Forward’ (1949) 33, 5 Minn L Rev 455 – 493.

7 See more on that subject in the chapter “The Concept of Legal Technology (LegalTech). Legal engineering”, authored by Dariusz Szostek.

practitioners or by the representatives of the technology sector, who offer their products to lawyers or to public decision-makers.

It must be however stressed that the existence of the LegalTech sector which is directly linked to using IT solutions by lawyers (and, in technologically advanced instances of automation – also without the participation of lawyers, but for legal purposes) would not be possible if not for the prior theoretical and legal analysis of the possibilities of such application. Thus, it must be stated that the current popularity of practical IT applications in the field of law is the result of the earlier efforts of the members of the academia, who have already been exploring the issues created at the cusp of legal sciences and informatics for several decades. The aim of the present chapter is therefore to present the academic foundation, constituting a cornerstone of the current success of the LegalTech market, in two main areas: 1) legal information retrieval, legal IR, and 2) automation of legal decisional processes, including legal decision support systems (legal DSS), for they constitute the core of the LegalTech market in its current shape.

## *2. Searching for Information on the Law*

Legal informatics, since time immemorial and by definition<sup>8</sup>, concerns itself with processing information on the law. A basic prerequisite for the system of law as such to function is its universality and the availability of information on the legal provisions in force, because those are the foundations of the legal assumption that awareness of the law is universal. Thus, it should come as no surprise that automatic search for (dispersed) legal information was, since the beginning, one of the main tasks the scholars addressing the potential of using technology in the law set for themselves. “Manual” search through huge (originally paper-based) databases was always a significant challenge in legal practice, being at the same time one of the key, but also one of the most time-consuming and labour-intensive tasks of a lawyer. Together with the development of the law, and with the occurrence of the phenomenon of regulatory inflation, that core of legal work became exceptionally onerous<sup>9</sup>. This problem was already addressed

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8 For informatics is the science of processing information.

9 This problem became apparent earlier in the USA (compared to European countries). As early as in the early 1960s, there was a big discussion in the American legal community on the excessively swift growth rate of data with which a lawyer had had to familiarise him- or herself to carry out comprehensive legal analysis

in 1958 by Lucien Mehl, who in a paper titled “Automation in the Legal World: from the Machine Processing of Legal Information to the “Law Machine<sup>10</sup>” pointed to the mechanisation of information retrieval as a remedy, positing that the purpose of that process would be the automatic discovery of relevant precedent (mainly in the scope of the common law systems), requisite article of a normative act (primarily in the scope of systems of continental law), or a fitting excerpt from the academic works.

1960s brought a much-appreciated initiative of John F. Harty of the University of Pittsburgh, who created the first automatic legal information retrieval system<sup>11</sup>. The prosaic reason due to which that system was created had been the request of the Pennsylvania state authorities, wishing to minimise the financial strain and time considerations induced by the need to alter one phrase that the state administration was using, that is substituting the phrase “retarded child” with the more neutral phrase “exceptional child<sup>12</sup>”. The system created by John Harty was capable of automatically finding legal enactments using certain phrases (here: primarily the terms “child” and “retarded”) which does not appear to be something exceptionally difficult today, but at that time constituted an undeniable breakthrough. That achievement later allowed for creation of the first commercial legal information retrieval systems, such as ASPEN and, later, LITE<sup>13</sup>. The second of the mentioned databases was, moreover, the biggest database of legislation and case-law in the USA in the 1970s<sup>14</sup>. It is specifically worth noting that, while lawyers were never viewed (and still are not viewed) as the “technological vanguard”, the first text information retrie-

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(see William G. Harrington, ‘A Brief History of Computer-Assisted Legal Research’ (1984) 77, 3 Law. Libr. J. 543. In Europe, the phenomenon of “information crisis in the law” was belated for at least a decade (Petzel (n 4) 209). (see William G. Harrington, ‘A Brief History of Computer-Assisted Legal Research’ (1984) 77, 3 Law. Libr. J. 543. In Europe, the phenomenon of “information crisis in the law” was belated for at least a decade (Petzel (n 4) 209).

10 Lucien Mehl, *Automation in the legal world* (National Physical Laboratory 1958) 755.

11 Jon Bing, ‘Performance of Legal Text Retrieval Systems: The Curse of Boole’ (1987) 79 Law. Libr. J. 187.

12 Jon Bing, ‘Let there be LITE: a brief history of legal information retrieval’ (2010) 1 European Journal of Law and Technology.

13 LITE is the abbreviation of Legal Information Through Electronics.

14 For more on the subject of those systems, and on other examples of legal information retrieval systems, see Jacek Petzel, *Systemy wyszukiwania informacji prawnej* (Wolters Kluwer 2017) 372; Harrington (n 9) 543 – 556.

val systems were created due to their efforts<sup>15</sup>. However, this conclusion should not give one pause, for the law is an area profoundly based on text, and the need to use textual information while in legal practice at times far exceeds such a need within other areas of societal life. Thus, it should come as no surprise those were the lawyers who, as one of the first, actively participated in the work on the automation of information retrieval from text.

Ever more frequent commercial implementation successes in the scope of legal information retrieval in the law obviously were corresponding to the development of research in that field. From the simple search based on keyword and Boolean algebra, the research on IR in the law underwent a long process, and one that was also reinforced by the achievements in the field of research on the AI<sup>16</sup>. It needs to be pointed out that the producers of commercial legal information databases long refrained from transitioning to more advanced approaches to IR, which was met with criticism not only by the academia, but also by the very users of those systems,

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- 15 Jon Bing rightfully highlights that issue, while at the same time pointing out that those early achievements contributed to (significantly later) success of Internet search engines. See Bing (n 187), quote: “*One may point out that though lawyers are not known for being technological avant-gardists, text retrieval was actually developed by lawyers and for lawyers, due to the need to consult the authentic text for legal interpretation. The search engines of the Internet today harvest what was sown by the early efforts of the legal community*”.
- 16 In that regard, an important role was played by *inter alia* research of Carole Hafner on the use of research approaches in the field of AI & Law to improve the quality of legal information retrieval (see Carole Hafner, ‘Representation of knowledge in a legal information retrieval system’ in: *Proceedings of the 3rd annual ACM conference on research and development in information retrieval* (1980) 139). During the later period, the works of Marie-Francine Moens were also important in the field (see e.g. Marie-Francine Moens, Caroline Uyttendaele and Jos Dumortier, ‘Abstracting of legal cases: The SALOMON experience’ (ICAIL’97: Proceedings of the 6th international conference on Artificial Intelligence and Law, Melbourne, 30 June – 3 July 1997); Marie-Francine Moens, Caroline Uyttendaele, Jos Dumortier, ‘Information extraction from legal texts: the potential of discourse analysis’ (1999) 51 International Journal of Human-Computer Studies 1155), and so were those of Edwina Rissland and Jody Daniels (see Jody Daniels and Edwina Rissland ‘Integrating IR and CBR to locate relevant texts and passages’ (Database and Expert Systems Applications, 8th International Conference, Proceedings, DEXA’97, Toulouse, 1-2 September 1997); Jody Daniels, Edwina Rissland, ‘What you saw is what you want: Using cases to seed information retrieval’ in *International Conference on Case-Based Reasoning* (Springer, Berlin, Heidelberg 1997) 325).

which in a way forced the producers to make use of the achievements of the AI & Law trend in that regard<sup>17</sup>.

As of now, there are two main approaches to legal information retrieval to be discerned<sup>18</sup>: one based on manual knowledge engineering, and the other based on techniques of natural language processing (NLP)<sup>19</sup>. The first concept is based on inference, in turn based on cases (case-based reasoning, CBR) and on the existence of legal ontologies, by which one should understand formal structures of concepts and relations between them, intended to organise information on a given field of study<sup>20</sup>. In this instance, retrieving information on the law is an attempt of translating how the lawyers classify their cases into the language understandable for a computer system<sup>21</sup>.

The second approach to managing automatic legal information retrieval is based on the techniques of natural language processing (automatic linguistic analysis). Through that approach, IR is founded on the assumption that there does not exist a single possible manner of organising knowledge on the law. Here, a computer system enables the user to input search queries in natural language (in a language that humans use for communication between them; non-formalised language). The guiding idea on which NLP systems are based is to enable interaction with computer systems that

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17 Petzel (n 14) 269.

18 See Tamsin Maxwell and Burkhard Schafer, 'Concept and Context in Legal Information Retrieval' (Proceedings of the 2008 conference on Legal Knowledge and Information Systems: JURIX 2008: The Twenty-First Annual Conference, 8 July 2008) 63.

19 NLP is the domain of AI which handles automation of analysis, construction, translation and generation of natural language by a computer system.

20 The principal aim of legal ontologies is to formalise the knowledge on the law. To quote Adam Wyner: "*An ontology is an explicit, formal, and general specification of a conceptualisation of the objects and structural relations between those objects in a given domain. It defines a common vocabulary and organization of information which can be shared, tested, and modified by researchers.*" (see Adam Wyner, 'An ontology in OWL for legal case-based reasoning' (2008) 16 Artificial Intelligence and Law 362).

21 Maxwell and Schafer, '(n 193) 64. In that paper see more on the subject of disadvantages and advantages of the approach to IR which is based on the traditional knowledge engineering (specifically, as far as its disadvantages would be concerned, causing low efficacy of that strategy for practical legal applications, including its problems with efficiency and scalability).

is natural for a human<sup>22</sup>. The task for natural language processing models is then to identify and isolate rules of natural language, in such a manner that unstructured data would be converted in a form understandable for a computer system, which then retrieved a respective meaning therefrom<sup>23</sup>. One could then place their greatest hopes for improving both academic and commercial legal information retrieval systems<sup>24</sup> in the development of NLP techniques<sup>25</sup>.

### 3. The Automation of Legal Decision-Making Processes

The question regarding the construction of a machine capable of adjudicating legal cases was raised surprisingly early, for in 1948 already, by the founder of legal geometry, Lee Loevinger<sup>26</sup>. Ten years later, Lucien Mahl, in the above cited publication: *Automation in the Legal World: from the Machine Processing of Legal Information to the "Law Machine"* of 1958, theorized not only about the possibility of automating the retrieval of legal information, but also on the automation of legal reasoning. He viewed the latter in two varieties: 1) a narrow one, involving the issuance of decisions within a very specific, specialised area of law, and 2) a wide one that assumed the existence of a “consultation machine” which would be capable of assisting a lawyer in problems originating from several areas of law<sup>27</sup>. He saw this machine as a system based on classical logic, which corresponds to scientists' original ideas about the possible methods of automation of legal reasoning. He illustrated his theoretical assumptions

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- 22 At the same time, it should be recalled that research and implementation in the field of techniques for processing natural language must, to a large extent, occur separately for every language, having in mind the specifics of a given language.
  - 23 As one could easily guess, the main problem for researchers of NLP lies in the nature of human language and the ambiguity inscribed into it.
  - 24 For more on the advantages of NLP for the legal field, see Haoxi Zhong, Chaojun Xiao, Cunchao Tu, Tianyang Zhang, Zhiyuan Liu and Maosong Sun, 'How Does NLP Benefit Legal System: A Summary of Legal Artificial Intelligence', (2020) arXiv:2004.12158 arXiv.org.
  - 25 The LEMKIN project, which is aimed at creating an intelligent legal information system and is headed by Aleksander Smywiński-Pohl (<<https://lemkin.pl>>, accessed on 08.02.2021) remains an interesting Polish initiative in the area of using natural language processing techniques.
  - 26 The original wording is “*Why should not a machine be constructed to decide law-suits?*”; Lee Loevinger (n 6) 455.
  - 27 Mehl (n 10) 768.

using the example of a machine operating within the area of tax law<sup>28</sup>. Tax law - due to its specific, often binary nature - quickly became, moreover, one of the first branches of law on the basis of which actually functioning automation systems have been built. This happened almost twenty years later in 1977, when L. Thorne McCarty presented the TAXMAN system<sup>29</sup>, he had developed. This system was concerned with modelling selected aspects of the conceptual structures found in the US legislation relating to the taxation of corporate transformation. The system was able to carry out simple legal reasoning and, based on the description of a case concerning company transformation, analyse the presented facts in terms of selected legal concepts (contained in the provisions of the Code and not resulting from the case-law)<sup>30</sup>.

Obviously, academic debate on automation of legal reasoning was closely intertwined with the development of research on AI. The first important contribution in that field is the 1970s paper “*Some Speculation About Artificial Intelligence and Legal Reasoning*” by Bruce Buchanan and Thomas Headrick<sup>31</sup>, who may be said to be the founding fathers of the “AI & Law” approach<sup>32</sup>. While the deliberations on the possibility of using AI in order to automate legal decision-making processes were rather preliminary in nature during the 1970s, 1980s brought rapid development of research on AI & Law, resulting in the transition from purely theoretical deliberations to practical actions. For instance, Marek J. Sergot et al. used logic programming during that time to formalise the British Nationality Act

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28 Ibid 771 – 776.

29 L. Thorne McCarty, ‘Reflections on TAXMAN: an experiment in artificial intelligence and legal reasoning’ (1977) 90, 5 Harv. L. Rev. 837.

30 That project was continued as TAXMAN II (see L. Thorne McCarty and Natesa Sridharan, ‘The Representation of an Evolving System of Legal Concepts: II. Prototypes and Deformations’ (Proceedings of the Seventh International Joint Conference on Artificial Intelligence: IJCAI-81, Vancouver, 24-28 August 1981) 246).

31 Bruce Buchanan and Thomas Headrick, ‘Some Speculation About Artificial Intelligence and Legal Reasoning’ (1970) 23, 1 Stan. L. Rev. 40.

32 Bruce Buchanan was one of the creators of the DENDRAL expert system, created a year before that, automating the identification of molecular structure of unknown organic compounds on the basis of the electromagnetic spectrum. In a paper “*Some Speculation About Artificial Intelligence and Legal Reasoning*” the authors proposed using the DENDRAL’s achievements in the legal field, i.e. creating an analogous program which would be able to identify a legal issue and create the potential ways to solve it.

1981<sup>33</sup>. Despite the fact that the Act at issue exhibited typical legislative problems (lexical complexity, ambiguity, and references to hitherto introduced legislation), a major part of that Act was successfully translated into programming language named “Prolog”. 1987 turned out to be a breakthrough year for research on AI&Law<sup>34</sup>, when the first international ICAIL academic conference (International Conference on Artificial Intelligence and Law) was held<sup>35</sup>. That venue became the main forum for presenting and exchanging opinions in the field of scientific research on AI in law<sup>36</sup>. Interestingly and since the very beginning, the conference served as a venue for demonstration of implementations in the field of automation of decision-making processes in the law, including legal reasoning support systems<sup>37</sup>. For example, Richard Susskind and Phillip Caper presented the Latent Damage System, an expert system whose purpose was to support counsel in applying the UK’s Latent Damage Act 1986, during ICAIL’89<sup>38</sup>. What is more, the system thus created was a commercial endeavour, becoming the first expert system in the world meant for lawyers (sold on floppy disks, together with a manual describing the workings of that system), and one which was equipped not only with knowledge on the Act itself and on precedents by British courts, but also with the general context of tort law, law of obligations, and on product liability rules.

The scientific approach to automation of decision-making in the scope of the law, and, by further extension, approach to implementation thereof, were developed in parallel to the general trends in the field of research

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33 Marek J. Sergot, Fariba Sadri, Robert A. Kowalski, Frank Kriwaczek, Philip Hammond and Harry T. Cory, ‘The British Nationality Act as a logic program’ (1986) 29 Communications of the ACM 370.

34 Two very influential academic works (which were extended versions of doctoral dissertations) in the field of AI&Law were published in 1987: *An Artificial Intelligence Approach to Legal Reasoning* by Anne Gardner and *Expert Systems in Law* by Richard Susskind.

35 Previous meetings of researchers active in the field of AI&Law were singular in nature.

36 Other important fora for exchange of opinions were in time found in the annual JURIX conference, organised since 1988, and the Artificial Intelligence and Law scientific journal, published since 1992.

37 On the need of greater focus of research on AI & Law on practical applications of theoretical models, already in the 1990s, see Anja Oskamp, Maaike Tragter and Cees Groenewijk, ‘AI and Law: What about the Future?’ (1995) 3 Artificial Intelligence and Law 209.

38 Richard Susskind, ‘The Latent Damage System: a jurisprudential analysis’ (ICAIL ’89: Proceedings of the 2nd International Conference on Artificial Intelligence and Law, Vancouver 1989) 23.

on AI, going a long way from approaches of symbolic AI that were based on logic<sup>39</sup>, which were in time dubbed “Good Old-Fashioned Artificial Intelligence”, or “GOFAI” and found their expression largely in expert legal systems, to advanced models within the trend of computational intelligence, including *inter alia* systems based on fuzzy logic<sup>40</sup>, neural networks<sup>41</sup>, or evolutionary computation, which in practice resulted in, among other things, legal applications of efficient machine learning (ML) systems<sup>42</sup>. The last of those in particular turned out to be in great demand for implementation in the area of law, being the main animating force of the contemporary development of the LegalTech sector. The applications in the scope of legal analytics or predictive analytics based on ML solutions are most prevalent within that sector, both in regard to implementation in legal offices and to the broadly understood public sphere. However, those are to an extent burdened with the problem of the lack of explainability and with difficulties related to the quality of data used to train a ML system (including the issue of bias)<sup>43</sup>. The above constitute key difficulties for responsible implementation of advanced systems automating legal decision-making processes in practice<sup>44</sup>, and thus are subject to increased

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- 39 For more on the subject of history of the development of that approach (together with the categorisation of rules-based and case-based reasoning systems, and valuable examples in the scope of CBR systems, such as HYPO and CATO), see the chapter “Computational Legal Problem Solving: What Can LegalTech Learn from the AI and Law Research, and Beyond” by Michał Araszkiewicz.
- 40 For instance, see Tecla Mazzarese, ‘Fuzzy Logic and Judicial Decision-Making: A New Perspective on the Alleged Norm-Irrationalism’ (1993) 2 Proceedings of the Computer and Vagueness: Fuzzy Logic and Neural Nets. Informatica e diritto 13; Jacky Legrand, ‘Some guidelines for fuzzy sets application in legal reasoning’ (1999) 7 Artificial Intelligence and Law 235.
- 41 See e.g. Jürgen Hollatz, ‘Analogy making in legal reasoning with neural networks and fuzzy logic’ (1999) 7 Artificial Intelligence and Law 289; Lothar Philipps and Giovanni Sartor, ‘Introduction: from legal theories to neural networks and fuzzy reasoning’ (1999) 7 Artificial Intelligence and Law 115.
- 42 For more see JC JC Smith, ‘Machine Intelligence and Legal Reasoning’ (1998) 73 Chi.-Kent L. Rev. 277.
- 43 For more see the chapter “Computational Legal Problem Solving: What Can LegalTech Learn from the AI and Law Research, and Beyond” by Michał Araszkiewicz.
- 44 See in that regard (in particular for the automation of judicial proceedings) conference paper: Maria Dymitruk, ‘Need for explainable artificial intelligence in automated judicial proceedings’ (Doctoral Consortium at 17th International Conference on Artificial Intelligence and Law, Montreal 17 – 21 June 2019).

interest of academia active in the field of AI&Law<sup>45</sup>. It is very likely that, again, it is going to be the academia that would find a solution to the growing pains of innovative implementations in the field of LegalTech, ensuring safer and more ethical framework for development of legal technologies.

#### 4. Conclusions

To sum up, it is worthwhile to return to the first, purely theoretical deliberations on the possibility of automation within the law. Despite the passing of decades, those retain a certain modicum of relevance due to their universal nature. As Lucien Mehl wrote in 1958, "thus although the juridical machine is suited to conduct legal argument, it is incapable of evaluating facts. This task falls to man, because the factual world often defies pure (rational) analysis. Finally, although the machine may be able to suggest solutions to us, it cannot formulate precepts. Elaborating the principles of law is for man to undertake. A juridical machine can thus only be an aid to the jurist and not a substitute for him. We shall have no "electronic judges" in the world to come, any more than we shall have a machine to rule us"<sup>46</sup>. Regardless of the fact that those words were expressed some 63 years ago, and the degree of generality of theses posited by them partially precludes fully agreeing to them, they are still relevant to a degree – pointing out key (extra-technological) challenges related to the development of legal informatics and the LegalTech sector. After all, Lucien Mehl rightly foresaw that automating systems within the law would better handle legal reasoning which would be an analysis of the sources of law (regardless of whether a precedent or a normative act would

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45 On explainability, see Karl Branting and others 'Semi-Supervised Methods for Explainable Legal Prediction' (Proceedings of the Seventeenth International Conference on Artificial Intelligence and Law (ICAIL '19), Montreal, 17 – 21 June 2019) 22; Jeroen Keppens, 'Explainable Bayesian Network Query Results via Natural Language Generation Systems' (Proceedings of the Seventeenth International Conference on Artificial Intelligence and Law (ICAIL '19), Montreal, 17 – 21 June 2019) 42. On the problem of bias see Songül Tolan, Marius Miron, Emilia Gómez and Carlos Castillo, 'Why Machine Learning May Lead to Unfairness: Evidence from Risk Assessment for Juvenile Justice in Catalonia' (Proceedings of the Seventeenth International Conference on Artificial Intelligence and Law (ICAIL '19), Montreal, 17 – 21 June 2019) 83.

46 Mehl (n 10) 778.

be such a source) instead of a reasoning related to facts of a case (including the reasoning completed by making a decision on evidence).

Despite the existence of many problems related to the intersection of the law and technology (which are partially still left unsolved despite increased effort of representatives from both the area of law and the sciences in the field of IT), the majority of the representatives of the LegalTech sector adamantly promote the broadest possible implementation, and acceleration of work on automation. This chapter might have been ended on a somewhat trivial note, to the effect that while academics gladly explore the ‘technological’ areas in the law, the legal market is characterised by a conservative approach to new technologies and sluggishness in implementing innovations in practice. Thus, intensifying work for the purpose of broadening the use of LegalTech solutions by lawyers remains essential. This thesis is true, yet it does not paint a full picture of results brought by the development of the LegalTech sector.

While there is no place here for carrying out full analysis of potentially dangerous outcomes related to the intersection of the law and technology, and in the scope of automation in particular, it is worth noting that there are extant dangers even within an ostensibly trivial area of LegalTech application, namely legal information retrieval (markedly less controversial than automation of decision-making processes), and such dangers are not trifling matters. To explain the thesis thus posited, one must point to the fact that the reason for the success of legal informatics, and the LegalTech sector as a result, is still found in the processing of information on the law. The examples of developing that processing of information set out in this chapter show the degree to which the capability of IT systems to form automatic conclusions from that processing is key. Unrestricted access to any legal information, dreamt of by scientists over a half of a century ago, appears to come into being as of now, often leading to the situation of the excessive influx of information. That in turn results in the vastness of information (e.g. the hitherto unpublished judicial decisions) being brought *en masse* to the legal information databases, risking the throttling of the area of law<sup>47</sup>. This is not only relevant to the difficulties with “manual” analysis of excessive amount of data by a single lawyer, unable to review thousands of judicial decisions attributed to a given legal provision subject to analy-

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47 This risk is pointed out by Tamsin Maxwell and Burkhard Schafer, ‘Concept and Context in Legal Information Retrieval’ (*Proceedings of the 2008 conference on Legal Knowledge and Information Systems: JURIX 2008: The Twenty-First Annual Conference*, 8 July 2008) 63.

sis. This problem is equally relevant while using solutions automating legal analysis. An explosion of electronic databases accessible online, filled with hundreds of thousands of judicial decisions, coupled with the capability of creating predictive models based on those decisions<sup>48</sup> may for example result in equalling the importance of a momentous judicial decision by a court of higher instance (which would shape the jurisprudence of lower instance courts in the future) with a single, poorly written, and not very well reasoned decision of a court at the lowest instance. That example rightly shows how many pitfalls (some of which not readily apparent) are borne out of even a prosaic use of technology in the field of law.

The efforts of the academia in braving the subsequent milestones (including every hardship and shortcoming) in the area of technology and the law must thus be viewed with full appreciation. Those efforts led us to a situation where we can observe and analyse the LegalTech market. It is also up to us to appropriately shape the development of that portion of the market, having in mind not automation at any cost, but the complementary effort of humans and technology in offering the highest possible quality of legal services, public legal services included<sup>49</sup>.

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48 Predictive analysis consists in automatic prediction of probability for certain events to occur in the future on the basis of historic data, e.g. predicting the outcome of judicial proceedings on the basis of data on existing case-law of the courts, and of the facts of the case the outcome of which is being predicted. Its current iteration is most often based on advanced models of machine learning.

49 In that scope see also Frank Pasquale, 'A Rule of Persons, Not Machines: The Limits of Legal Automation' (2019) 87, 1 Geo. Wash. L. Rev. 1.

# Legal Tech - Bringing Law into the “Twentieth” Century

by Tomasz Grzegory, Janos Puskas

## 1. Introduction

Legal professionals are renowned for their affection for the past. One could say that dogmatism is in the DNA of the legal profession. We still heavily rely on paper documents, attorney's letters delivered by registered mail, telephone calls and emails - all of which are 20th century inventions.

The global pandemic quickly levelled us up to video chats, online collaboration and cloud computing. Still, these are inventions from the past century, only, until now, largely disregarded by the legal industry.

However, the world outside is changing at an exponential rate. Innovation and disruption are the key leading drivers of human development. Technology is changing our everyday lives.

This applies to the legal profession as well. There are some exciting ideas to leverage technology and use it for the benefit of lawyers and their clients. Some of them are becoming working products, but innovations are yet to have a disruptive impact on everyday work.<sup>1</sup> Legal tech has a high potential when it comes to supporting law firms or legal departments in their processes and helping improve their effectiveness. However, the legal profession is still behind other businesses in the adoption of innovative technologies and the use of legal tech is not widespread in practice.<sup>2</sup> This is attributable only partially to the fact that statutory regulations do not keep up with the development of technology.

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1 Helena Hallgarn, ‘Legal Tech: Moving from ideas to execution’ (2020) <<https://www.legalbusinessworld.com/post/legal-tech-moving-from-ideas-to-execution>> accessed 15 February 2021.

2 The Law Society of England and Wales, ‘Lawtech Adoption Research Report’ (2019) <<https://www.lawsociety.org.uk/topics/research/lawtech-adoption-report>> accessed 15 February 2021.

## 2. “If Only I Had the Right Questions!” Where Are We and Where Do We Go in the Legal Tech?

Lawyers face the challenges of transforming markets, data overload and ever-increasing complexity of information while meeting client’s expectations and staying productive. In order to fulfil work objectives, it is already helpful to apply innovative changes and automate certain tasks. Introducing new technologies in daily practice becomes indispensable.

Most of the challenges stem from the ever-increasing and fast-changing regulatory environment. Over time, regulatory frameworks become more complex and detailed, with more and more new regulated areas. A perfect example of this are the recent (and future) regulations in the European Union affecting digital services, like GDPR and DSA. The expansion of consumer regulatory framework leads also to customer-facing companies receiving an increased number of complaints, which are more and more complex. According to Google’s transparency report<sup>3</sup>, Google has received a total of 1 011 696 ‘right to be forgotten’ removal requests (concerning 3 971 081 URLs) by individuals since January 2015.

In addition to European Union regulations, national content monitoring laws like the German NetzDG generate further legal obligations on tech organizations. Digital service providers regularly receive requests to remove content from their products by courts and government agencies around the world. According to Facebook’s transparency reports, Facebook has performed 10 content removals by the request of the Hungarian government<sup>4</sup> and 12 content removals by the request of the Polish government<sup>5</sup> since 2017.

It is important to point out that the regulatory burden has increased across industries in the past decades. If we consider the EU level legislation together with the national level legislation regarding a specific case, it may be necessary to review thousands of pages of legal material in order to answer a legal question.

The increasing number of regulations generates both legal and operational tasks. These tasks can be performed either by humans or by applying

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3 According to data published on 25 February 2021 <<https://transparencyreport.google.com/eu-privacy/overview?hl=en>> accessed 26 February 2021.

4 According to data published on 25 February 2021 <<https://transparency.facebook.com/content-restrictions/country/HU>> accessed 26 February 2021.

5 According to data published on 25 February 2021 <<https://transparency.facebook.com/content-restrictions/country/PL>> accessed 26 February 2021.

legal tech solutions. As we explain below, deploying legal tech solutions will be more efficient and cost-effective in the long run.

Certain legal tasks or procedures (e.g., due diligence, compliance investigations) require lawyers to review large amounts of data. As companies accumulate more and more data and work with digital tools, the number of documents to be reviewed is also constantly increasing.

### *3. What's Hot in the Legal Tech?*

The buzzwords of the early 21st century are among others: #bigdata, #blockchain, #machinelearning, #AI, #cybersecurity, #encryption, #collaboration, #cloudcomputing.

In our present review we group legal tech applications into two categories: the first contains generic software that is used by legal professionals to provide back-office support to teams of law firms' employees (such as automated billing software, timesheet software, project management tools, communication tools, online security tools), the second contains software applications that are designed and tailor made with solely the legal industry in mind (e.g. tools for legal research, e-discovery, contract management, predictive analytics).

Both groups however have one common denominator. They are using already existing ideas and solutions that were repurposed to serve legal functions.

Within applied legal tech, some promising areas of development emerged:

- Text analysis: The automated process of sorting unstructured text data, making it easier to retrieve relevant information. A massive amount of paperwork can be generated when conducting various legally important processes (e.g., due diligence). Well-designed algorithms can analyze thousands of documents better and faster than the human workforce. Such tools search through an organization's documents to automatically pick out legal concepts - which helps reduce risk and make the due diligence process a whole lot faster.<sup>6</sup>

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6 Alejandro Esteve de Miguel Anglada, ‘AI and Machine Learning in Legal: Tools Every Lawyer Needs to Know (In a Nutshell)’ (2020) <<https://blog.biglelegal.com/en/ai-and-machine-learning-legal-tools-every-lawyer-needs-to-know>> accessed 22 February 2021.

- Text analysis software is widely used in knowledge-driven organizations to discover new information or help answer specific research questions from large collections of documents.<sup>7</sup> First, text analysis gathers unstructured data from multiple text-based data sources. Then, it detects and removes anomalies by conducting pre-processing and cleansing operations and extracts all relevant information. After the extraction, the software converts the information into a structured form that can be further analyzed or presented directly.<sup>8</sup>
- Text analysis uses various methods to process texts, one of the most important is '*natural language processing*'.
- E.g., an advanced text analytics software<sup>9</sup> combines text analytics with machine learning technology and natural language processing in order to automatically identify and structure all possibly relevant information from all types of text data. In addition, the software allows its users to customize the system's capabilities and tailor the system to the user's own operational specifications and requirements.
- Law firm practice and compliance management: There are Task/Matter Management software, through which certain business tasks can be subdivided and distributed among different corporate departments/lawyers, this makes whole projects more transparent. The participants of the project can collaborate effectively and comment on the current work progress. This category also includes applications for document storage and automated billing. The most advanced software is capable of performing all the relevant tasks on their own, automating all business and legal processes.<sup>10</sup>
- Most of these software enables to track performance on ongoing legal matters, reporting and invoicing on client projects, remotely manage legal cases, automatically log working hours and manage all email and communication and other documents.

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7 Kevin D. Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age* (Cambridge University Press 2017) 88.

8 Linguamatics, 'What is Text Mining, Text Analytics and Natural Language Processing?' <<https://www.linguamatics.com/what-text-mining-text-analytics-and-natural-language-processing>> accessed 22 February 2021.

9 An example is Kira Systems <<https://kirasystems.com/>> accessed 20 February 2021.

10 Salvatore Caserta and Mikael Madsen, 'The Legal Profession in the Era of Digital Capitalism: Disruption or New Dawn?' (2019) 149 iCourts Working Paper Series 10.

- E.g., an advanced practice management software<sup>11</sup> offers customized solutions not only for law firms, but also specifically for in-house legal teams and business teams. The contract management solution with a contracts database can support the alignment between legal and business units and significantly increase the transparency of contracting processes. Legal information processed by the software (on scale) may serve as a relevant data asset supporting business decisions.
- Communication tools: COVID-19 accelerated the use of online collaboration tools, cloud computing technologies, online video conferencing platforms and much more. The pandemic has forced an acceleration of the digital transformation in all industries. This created an interesting loopback - businesses migrated online and the legal industry had to follow.

#### *4. ‘All that Glitters Is Not Gold’*

Artificial intelligence (AI) has taken our world of expectations by storm. Nowadays, AI is often portrayed as a disruptive, almost magical technology that is going to entirely reform the legal profession as well.<sup>12</sup> It may even seem that AI could offer a solution to any problem concerning businesses or the legal profession. ‘AI’ is by far the most frequently used (and abused) buzzwords of the recent years. Even though it generates a constant buzz, the term ‘artificial intelligence’ can be a bit misleading when it comes to legal tech applications. In general, we can conclude that using the term ‘machine intelligence’ instead of ‘artificial intelligence’ is more accurate in the context of legal tech (please see detailed explanation of this distinction below, under the technology background).

Due to the current hype around AI, it may seem like every legal tech company is an AI solutions provider. The term ‘AI washing’ refers to the marketing practice based on inaccurate labeling of certain products or services to imply that they deliver AI, when in fact they might be nothing more than a simple automation, basic statistics or a new marketing spin

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11 An example is InvestCEE <<https://investcee.hu/>> accessed 22 February 2021.

12 Andrew Ng, ‘What Artificial Intelligence Can and Can’t Do Right Now’ (2016) Harvard Business Review <<https://hbr.org/2016/11/what-artificial-intelligence-can-and-cant-do-right-now>> accessed 22 February 2021.

for an existing application.<sup>13</sup> Automation is the result of a machine being told by a human precisely what to do, and then successfully doing it. This is a simple execution of a command that cannot qualify as an AI, since it is not trained to improve by itself over time. For example, digital signatures and excel formulas are automations that cannot be considered as AI solutions.

The phenomenon of “*washing*” isn’t new – we had experienced it with ‘*green washing*’ and ‘*cloud washing*’. Moreover, the tech industry has always been infatuated with buzzwords: before AI, ‘*big data*’, ‘*cloud computing*’, ‘*web 2.0*’ were trending.

The reality is that some “*AI companies*” don’t employ AI at all and only using the word to get funding or to generate attention and sales, leaving their customers dissatisfied by failing to live up to their own promises. AI washing risks turning artificial intelligence into nothing more than a broadly ignored marketing term by overinflating expectations<sup>14</sup> and creating widespread misconceptions related to AI, including its powers and what it can and cannot do.<sup>15</sup> At the end of the day, this commercial opportunism may lead people to lose trust in AI’s functionality and struggle to accept and adopt AI into their lives.

## 5. So, What Does ‘Artificial Intelligence’ Really Mean in the Legal Tech?

In addition to the AI-washing phenomenon, AI’s unclear definition<sup>16</sup> certainly aids in the confusion and deception regarding its applications. AI is a broad, ‘*umbrella*’ term covering plenty of different technology solutions (from the state-of-the-art deep learning models to human coded rules), thus, it can be complicated to determine which tool should count as AI and which shouldn’t.

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13 Stephanie Overby, ‘AI vs. automation: 6 ways to spot fake AI’ (2016) The Enterprisers Project <<https://enterprisersproject.com/article/2020/3/ai-vs-automation-6-ways-spot-fake-ai>> accessed 23 February 2021.

14 Kaveh Waddell, ‘The Dangers of “AI washing”’ (2019) <<https://www.axios.com/ai-washing-hidden-people-00ab65c0-ea2a-4034-bd82-4b747567cba7.html>> accessed 23 February 2021.

15 Dr Bimal Roy Bhanu, ‘AI-washing: is it Machine Learning ... or Worse?’ (2019) <<https://financialit.net/blog/artifical-intelligence/ai-washing-it-machine-learning-or-worse>> accessed 23 February 2021.

16 Michael Legg, Felicity Bell, ‘Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer’ (2019) 38(2) University of Tasmania Law Review 38.

Researchers in the field of artificial intelligence largely agree that AI means computer science methods that allow machines to complete tasks normally viewed as requiring human intellect, in other words, the ability of computers to exhibit human-like cognitive abilities. So, AI mimics certain operations of the human mind. Also, there is a difference between Strong AI (or AGI) and Weak AI (or Narrow AI): Weak AI focuses on performing a specific task<sup>17</sup>, while Strong AI can perform a variety of functions, and over time, it might (or might not) develop a human-like consciousness instead of simulating it, like Weak AI does.<sup>18</sup> AI currently used in legal technology have defined functions, so they are considered as Weak AI.

The terms “*machine learning*”, “*machine intelligence*” and “*artificial intelligence*” are often used interchangeably.<sup>19</sup> Instead of these three terms being identical, machine learning and machine intelligence are subsets of AI.

In particular, machine intelligence (as a form of Weak AI) means that the machine is programmed with some (but not all) aspects of human intelligence, including problem solving, prioritization and learning. It enables a technology (a machine, an algorithm or a device) to interact with its environment intelligently, meaning that it can take actions to maximize its chance of successfully accomplishing its objectives.<sup>20</sup> It is the intersection of artificial intelligence and machine learning.

Machine intelligence is a more exact term for legal tech applications in general because it covers the full spectrum of functions (learning, problem solving, prioritization) that legal tech applications may offer at the moment, contrarily to ‘AI’ which is a broader and less accurate term. The functions of machine intelligence are still very far from what a Strong AI (i.e., a hypothetical machine that exhibits behavior at least as skillful and flexible as a human’s) could perform.

And machine learning (ML) is one specific element of machine intelligence that centers around data, in which the computer uses algorithms

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17 The Law Society of England and Wales, ‘AI: Artificial intelligence and the Legal Profession’ (2018) <<https://www.lawsociety.org.uk/topics/research/ai-artificial-intelligence-and-the-legal-profession>> accessed 24 February 2021.

18 Marcelo Corrales, Mark Fenwick, Nikolaus Forgó, *Robotics, AI and the Future of Law*. (Springer 2018) 59.

19 Kate Prengel, ‘AI washing: Why Does it Matter?’ (2020) <<https://pivotaldetection.s.com/ai-washing-why-does-it-matter/>> accessed 24 February 2021.

20 Stephanie Enders, Cathy King, Spencer Murray, Anna Koop, ‘Machine Intelligence, Artificial Intelligence & Machine Learning’ (2016) <<https://www.amii.ca/latest-from-amii/machine-intelligence-artificial-intelligence-machine-learning/>> accessed 24 February 2021.

planted in the software to learn from data and improve automatically through experience. The aim of ML algorithms is to build a model based on sample data (“*training data*”)<sup>21</sup> that can make decisions or predictions about new, previously unseen sample data without being explicitly programmed to do so. ML is used in a wide variety of applications, e.g., such as e-mail filtering, image or speech recognition, automatic language translation, recommender systems and autonomous vehicles.

There is a difference also between ‘supervised’, ‘unsupervised’ and ‘reinforcement’ learning. Supervised learning means that the algorithm is trained with labeled data, i.e., the algorithm is using some data that is already tagged with the correct answer (output variables are given besides input variables).<sup>22</sup> Unsupervised learning means that no labels are given to the learning algorithm, the algorithm needs to find a structure in its input on its own. Reinforcement learning means that the algorithm interacts with a dynamic environment in which it must perform a certain goal (like driving a vehicle) while constantly receiving feedback.<sup>23</sup>

Machine learning is based around ‘*pattern recognition*’. This means that the algorithms can learn to recognize certain patterns based on a set of previously observed data. Once the algorithm is trained to identify a pattern, it uses that as a basis of comparison for all new data.<sup>24</sup> Pattern recognition can also detect anomalies, for example, it can point out to lawyers the areas that tend to be overlooked in legal documents, as well as highlighting missing pages, incorrect or strange words and extra clauses - among other things - so lawyers know exactly where to look while double-checking contracts. Face recognition and visual search are among the top uses for pattern recognition, where the algorithm describes pictures so they can become searchable.<sup>25</sup> The ultimate aim of pattern recognition technology is to simplify and connect analytics’ or search results.

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21 Lauri Donahue, ‘A Primer on Using Artificial Intelligence in the Legal Profession’ (2018) Jolt Digest <<https://jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession>> accessed 24 February 2021.

22 Harry Surden, ‘Machine Learning and Law’ (2014) 89(1) Washington Law Review 103.

23 Exigent-Group, ‘Why Machine Learning is Key to Legal Transformation’ (2020) <<https://www.exigent-group.com/blog/why-machine-learning-is-key-to-legal-transformation/>> accessed 24 February 2021.

24 Zee Gimon, ‘What Is Pattern Recognition in Machine Learning’ (2019) <<https://huspi.com/blog-open/pattern-recognition-in-machine-learning>> accessed 25 February 2021.

25 Yulia Gavrilova, ‘Pattern Recognition and Machine Learning’ (2020) <<https://serokell.io/blog/pattern-recognition>> accessed 25 February 2021.

Since ML algorithms are based on the training data, machine learning becomes more effective as the size of the training dataset grows. ‘*Big data*’ is a term that refers to the large volume of data, and it is also a collective name for methods of processing data that is so large, fast or complex that it would be difficult or impossible to process using traditional methods.<sup>26</sup> The ML process can be improved by feeding big data to the algorithm, because the more training data is shared with the algorithm, the more accurate the results will be.<sup>27</sup> If big data is involved, pattern recognition may identify hidden patterns and analytics even solely based on indirect data that we would never be able to find using a traditional rule-based search.

## *6. Do Machines Understand Us?*

We’ve mentioned natural language processing (NLP) as the main method applied by text analysis that helps in structuring text-based data. NLP is a subfield of machine intelligence and linguistics concerned with the interaction between algorithms and human language. NLP helps the algorithm read and derive meaning from text (or another input such as speech – like Siri, Alexa and Google’s voice search) by simulating the human ability to understand a certain language, such as English.<sup>28</sup> It works by learning human language, using context and prior queries and results to predict what attorneys may need in their searches. For example, NLP is applied by search engine autofill, spell checkers, speech recognition with voice assistants and chatbots. There are several areas of legal activity where NLP might play a significant role<sup>29</sup>:

- Legal research: NLP can translate plain English search terms into legal search. When searching case-law, the algorithm continues to learn ba-

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26 Patanjali Kashyap, *Machine Learning for Decision Makers* (Apress 2017) 12.

27 Hans Weber, *Big Data and Artificial Intelligence: Complete Guide to Data Science, AI, Big Data and Machine Learning* (2020) 100.

28 Benjamin Alarie, Anthony Niblett, Albert Yoon, ‘How Artificial Intelligence Will Affect the Practice of Law’ (2018) 68 (supp.1) University of Toronto Law Journal 106.

29 Robert Dale, ‘Law and Word Order: NLP in Legal Tech’ (2018) <<https://towardsdatascience.com/law-and-word-order-nlp-in-legal-tech-bd14257ebd06>> accessed 24 February 2021.

sed on what cases are clicked on and viewed. Moreover, it can reveal where specific phrases appear in a lengthy document.<sup>30</sup>

- Case predictions: NLP can provide predictive models to help better understand how a given judge or court may rule. This can help attorneys better tailor their arguments to support or combat the prediction. Based on the predictions, lawyers could structure their argument around what the judge will find most persuasive.<sup>31</sup>
- Electronic discovery: Determining the relevance of documents to an information request.
- Contract review: Checking that a contract is complete and avoids risk.<sup>32</sup>
- Document automation: Creating routine legal documents.
- Legal writing: Drafting legal advice (e.g., using question-and-answer dialogs to provide tailored advice), e-mails, court notes and case notes.

## 7. *E-discovery - Where Work Became Technology Assisted*

Organizations usually face the discovery process in complex business disputes, litigations or regulatory investigations. Discovery is an initial process where relevant information and records, along with all other evidence related to a case, are sought.<sup>33</sup>

With the development of computer technologies, most information that is produced, distributed, and stored by businesses now exists in electronic form. E-discovery (the short form of the term “electronic discovery”) encompasses what most often is referred to as electronically stored information, or ESI. The purpose of e-discovery is to locate, secure and preserve ESI

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30 Alison Wilkinson, ‘How Natural Language Processing Can Improve Legal Search Results’ (2020) <<https://kirasystems.com/learn/how-natural-language-processing-improving-can-improve-legal-search-results/>> accessed 24 February 2021.

31 Daniel Martin Katz, ‘Quantitative Legal Prediction – or – How I Learned to Stop Worrying and Start Preparing for the Data Driven Future of the Legal Services Industry’ (2013) 62 Emory Law Journal 936.

32 Mark Sears, ‘AI Challenges and Why Legal Is A Great Place to Kick-Start Great NLP’ (2019) <<https://www.forbes.com/sites/marksears1/2019/05/14/ai-challenges-and-why-legal-is-a-great-place-to-kick-start-great-nlp/?sh=79ec487f4408>> accessed 24 February 2021.

33 Burke Ward, Janice Sipior, Jamie Hopkins, Carolyn Purwin, Linda Volonino, ‘Electronic Discovery: Rules for a Digital Age’ (2012) 18(150) Boston University Journal of Science and Technology Law.

to be used as evidence as part of a legal case.<sup>34</sup> Data of all types can serve as evidence, e.g., database files, docs, e-mails, videos, images, instant messaging chats, voicemails, calendar files, spreadsheets, web sites, computer programs, animations, GPS and location data, IoT devices, mobile data, social media posts, audio files and even malware such as viruses, trojans and spyware. ESI is layered and often contains metadata such as timestamps, author and recipient information, and file properties. Metadata can be essential<sup>35</sup> when deciding on legal matters since it may contain the date and time a document was written as well.

Besides litigations and regulatory investigations, e-discovery software can be deployed also for early case assessment, internal investigations, and public records requests.<sup>36</sup>

E-discovery can be very complex and multi-layered depending on the current organization and the legal case i.e., how data is stored and how complex the data is.<sup>37</sup> E-discovery is more than one single task, it is rather a series of diligent steps and actions that together, as a consistent process, help build solid evidence for a legal case.<sup>38</sup>

E-discovery usually runs from the time a lawsuit is foreseeable to the time the digital evidence is presented in the litigation. The Electronic Discovery Reference Model (EDRM)<sup>39</sup> is a ubiquitous and widely referenced standard that represents a conceptual view of the stages involved in the e-discovery process<sup>40</sup>:

1. *Information governance:* It serves as a foundation for the e-discovery process and refers to the set of policies implemented to manage a company's data.
2. *Identification:* It is a phase when potentially responsive documents are identified. There are various methods to identify sources of potentially

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34 Kimberly Williams, John M. Facciola, Peter McCann, Vincent M. Catanzaro, *The Legal Technology Guidebook* (Springer 2017) 44.

35 Philip J. Favro, ‘A New Frontier in Electronic Discovery: Preserving and Obtaining Metadata’ (2007) 13 (1) B.U.J. Sci. & Tech.

36 Logikcull, ‘The Ultimate Guide to eDiscovery’ <<https://www.logikcull.com/guide>> accessed 25 February 2021.

37 ‘The Basics of e-discovery’ <<https://www.exterro.com/basics-of-e-discovery>> accessed 25 February 2021.

38 ‘What is e-discovery?’ <<https://www.barracuda.com/glossary/e-discovery>> accessed 25 February 2021.

39 The EDRM model is available at: <<https://edrm.net/resources/frameworks-and-standards/edrm-model/>> accessed 25 February 2021.

40 ‘The Basics of e-discovery. Chapter 1: Process’ <<https://www.exterro.com/basics-of-e-discovery/e-discovery-process>> accessed 25 February 2021.

- relevant ESI, e.g., interviewing key participants and reviewing case facts.
3. *Preservation:* After relevant ESI is identified, it needs to be protected from spoliation (any destruction or alteration of evidence). The most common way to preserve ESI is through a legal hold process. A duty to preserve information begins upon reasonable anticipation of litigation. According to *Zubulake v. UBS Warburg*<sup>41</sup> failure to issue a written legal hold notice whenever litigation is reasonably anticipated will be deemed grossly negligent.
  4. *Collection:* It means the transfer of the relevant ESI from a company to their legal counsel. Some companies that deal with frequent litigation have software in place to quickly place legal holds when an event (such as legal notice) is triggered and begin the collection process immediately. The collection method must ensure that the contents and metadata are not altered as a result of the process.
  5. *Processing:* It means the reduction the volume of ESI and converting it, if necessary, to forms more suitable for attorney review.
  6. *Review:* It means the evaluation of ESI for relevance and attorney-client privilege (which is exempt from e-discovery). Considering exponentially growing data volumes, manual review became impractical. There are artificial intelligence (AI) tools that can distinguish between relevant, non-relevant and privileged documents, thus, making the review process more viable and efficient.
  7. *Analysis:* Evaluating ESI for content and context, including key patterns, topics, people and discussion.
  8. *Production:* ESI determined to be relevant must be produced for use of potential evidence in appropriate forms and using appropriate delivery mechanisms. ESI can be produced either as native files or in a petrified format (such as PDF).
  9. *Presentation:* Displaying ESI before audiences (trials, hearings, etc.).

As mentioned above, legal teams can apply AI tools in order to save time and money on the review process and expedite e-discovery by prioritizing documents and reducing the number of documents required for manual review. These tools typically use predictive coding which leverages machine learning to surface likely relevant documents based on prior review decisions. Predictive coding goes by various names, including "*technology assisted review*" (TAR) and "*computer aided review*" (CAR). In order for

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<sup>41</sup> Zubulake v. UBS Warburg LLC - 220 F.R.D. 212 (S.D.N.Y. 2003)

the predictive algorithm to work properly, it needs to be ‘trained’ first. This means that reviewers pull a representative cross-section of documents (‘seed set’)<sup>42</sup> from the pool of ESI that need to be reviewed. Reviewers code each document in the seed set as relevant or not relevant and input those results into the predictive coding software. By these inputs, the software generates an internal algorithm for predicting the responsiveness of future ESI.<sup>43</sup> As the review goes on, machine learning enables the software to continually learn from reviewer decisions and make more accurate results in significantly less time than human reviewers.<sup>44</sup> Of course, if the seed set is coded incorrectly then the algorithm will multiply those errors across the entire document set, thus, it will lead to a ‘garbage in, garbage out’ situation.

US and UK courts have already adopted decisions on predictive coding. *Monique Da Silva Moore, et al. v. Publicis Groupe & MSL Group*<sup>45</sup>, a decision from the United States District Court for the Southern District of New York, is the first decision that explicitly recognized the use of predictive coding technology as an appropriate method to satisfy a producing party’s review obligation. The court held that the use of predictive coding technology “*is an acceptable way to search for relevant [electronically stored information] in appropriate cases*” and also that “*it is not a case of machine replacing humans: it is the process used and the interaction of man and machine that the courts need to examine*”. The court highlighted that the use of predictive coding is acceptable where it is applied in a manner that produces reliable and proportional results. In this case, the judge based his ultimate approval of its use on five factors: “(1) the parties’ agreement, (2) the vast amount of ESI to be reviewed (over three million documents), (3) the superiority of computer-assisted review to the available alternatives (i.e., linear manual review or keyword searches), (4) the need for cost effectiveness and proportionality [...], and (5) the transparent process proposed by [the Defendants].”

Regarding proportionality, the judge stated that:

“*In order to determine proportionality, it is necessary to have more information than the parties (or the Court) now have, including how many relevant documents will be produced and at what cost [...] In the final sample of documents*

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42 Gideon Christian, ‘Predictive Coding: Adopting and Adapting Artificial Intelligence (AI) In Civil Litigation’ (2019) 97 The Canadian Bar Review 490.

43 Dana A. Remus, ‘The Uncertain Promise of Predictive Coding’ (2014) 99 Iowa Law Review 1072.

44 Aaron Goodman, ‘Predictive Coding: A Better Way to Deal with Electronically Stored Information’ (2016) 43(1) Litigation 23.

45 Da Silva Moore v. Publicis Groupe - 287 F.R.D. 182 (S.D.N.Y. 2012)

*deemed irrelevant, are any relevant documents found that are “hot,” “smoking gun” documents (i.e., highly relevant)? Or are the only relevant documents more of the same thing? One hot document may require the software to be re-trained (or some other search method employed), while several documents that really do not add anything to the case might not matter. These types of questions are better decided “down the road,” when real information is available to the parties and the Court.”*

*Da Silva Moore* also set out guidelines for the appropriate use of predictive coding. First, parties intending to use this technology must choose a reliable e-discovery vendor and software, as well as design an “appropriate process” that includes “appropriate quality control testing”. Furthermore, in accordance with the decisions, the parties should consider the following steps<sup>46</sup>:

- Allow the requesting party to view ESI that were used to train and additional ESI that were used to stabilize the predictive analytics system (marked both as responsive and non-responsive).
- Do not limit the number of iterative reviews used to ‘train’ the system up front, but rather assess whether the system has stabilized before stopping the iterative reviews.
- Do not adhere to an arbitrary number of ESI that will be produced without reference to the statistical results.
- Bring the vendor experts to the court hearing to respond to the judge’s questions.

The first English decision on the use of predictive coding software was made in the *Pyrrho Investments Ltd & ors v MWB Property Ltd & ors case*<sup>47</sup>, where the High Court of Justice held that predictive coding is permitted and could amount to a reasonable search. In this case the judge stated that what fundamentally matters in the disclosure process is the scope and quality of the search, rather than the listing and production for inspection of the relevant documents, which were found during the process. The judge listed ten factors that favored the use of predictive coding in the case<sup>48</sup>, including, for instance, the fact that experience with predictive

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46 Special Counsel, ‘What Predictive Coding Court Rulings Can Teach Us’, blog.specialcounsel.com (3 November 2016); <<https://blog.specialcounsel.com/ediscovery/what-predictive-coding-court-rulings-can-teach-us/>> accessed 26 February 2021.

47 Pyrrho Investments Limited v MWB Property Limited [2016] EWHC 256 (Ch).

48 Oliver Browne and Hayley Pizzey ‘Pyrrho Investments Ltd v MWB Property Ltd: A Landmark Decision on Predictive Coding in e-Discovery’ (Latham.London, 15

coding in other jurisdictions has shown that the software can be useful in appropriate cases; the number of electronic documents in the case (amounting to over 3 million); the circumstance that the parties agreed on the use of the software and how to use it; the use of a computer to apply the approach of a senior lawyer towards the initial sample; and the conclusion that there is no evidence that predictive coding leads to less accurate disclosure compared to manual review and there is some evidence that it is more accurate than manual review.

Later, in *Triumph Controls UK Ltd & anr v Primus International Holding Co & ors*<sup>49</sup>, the High Court of Justice held that a party should not act unilaterally to use CAR in the disclosure process as there is a risk that the “*unilateral decision will be carefully scrutinized by the court at a later date, and a different course may be ordered.*” Also, when a party has acted unilaterally, that party should provide the other party with details about how the algorithm was set up and how it was operated. That had not happened in this case, which the judge found to be “*unsatisfactory*”. The court referred to *Pyrrho Investments Ltd.* where the court stated that the “*best practice would be for a single, senior lawyer who has mastered the issues in the case to consider the whole [teaching] sample*”. With respect to that, *Triumph Controls UK Ltd* held that CAR technology must be ‘taught’ properly, and the best practice involves a senior lawyer oversight. The court also ordered a manual review of 25 % (equal to 55 000 disputed documents) considering this a proportionate amount under the circumstances.

Based on the relevant case law, there is no doubt that the use of predictive coding will increase in the future as a global trend. However, there are several barriers that have kept predictive coding from being widely adopted in the legal industry.

Firstly, because predictive coding relies on highly complex algorithms based on advance data science and statistical sampling, it is often seen as a ‘black box’. Although humans train the algorithm, the internal processes are mostly opaque, causing the machine decision-making to be non-transparent.<sup>50</sup> The technology is understood by only a limited number of experts – and few of them are lawyers.

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July 2016) <<https://www.latham.london/2016/07/pyrrho-investments-ltd-v-mwb-property-ltd-a-landmark-decision-on-predictive-coding-in-e-discovery/>> accessed 26 February 2021.

49 *Triumph Controls UK Ltd & anr v Primus International Holding Co & ors* [2019] EWHC 565 (TCC).

50 Michael Weather, ‘Predictive coding: the current landscape’ *disputeresolution blog.practicallaw.com/* (Thomson Reuters 21 July 2016) <<http://disputeresolut>

Secondly, predictive coding is yet slow and expensive to implement. It may be beneficial as a long-term investment; but it may also be difficult to finance the technology. It takes significant manual-review time to train machine learning how to categorize ESI effectively.<sup>51</sup> As mentioned earlier, if the setup is faulty, the algorithm will produce poor results. Therefore, the setup needs senior attorneys with plenty of experience who are knowledgeable about the facts of the case; often, a more senior attorney whose time is even more expensive.

Thirdly, predictive coding only understands logic and cannot make nuanced content distinctions, for instance, whether a document contains privileged information. Moreover, lengthy documents often include a multitude of topics, which may adversely affect their classification by the predictive algorithm. If a long document contains one short (although relevant) reference, the algorithm may leave this document out of consideration due to the relative noise of the other content in the source.<sup>52</sup>

Lastly, although most courts (at least in the US and in the UK) accept a predictive coding workflow, there is still some legal risk depending on the procedures employed and the results obtained. Especially if there is no agreement between the parties regarding the details of how predictive coding will be used in the case. It is sure that not all legal cases are appropriate for predictive coding.

## 8. *OK Google, Negotiate! When Do Lawyers Become Obsolete?*

Recent technology trends have led some lawyers to raise that their jobs may be under threat by legal tech innovations.<sup>53</sup> But can we really expect that lawyers will eventually be replaced by technology? We believe that technology complements the work of lawyers, rather than replacing it, thus, we see that legal tech offers more benefits than threats to legal

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ionblog.practicallaw.com/predictive-coding-the-current-landscape/> accessed 26 February 2021.

51 Thomson Reuters Legal, ‘How to make the e-discovery process more efficient with predictive coding?’ <<https://legal.thomsonreuters.com/en/insights/articles/how-predictive-coding-makes-e-discovery-more-efficient>> accessed 26 February 2021.

52 PRISM Litigation Technology, ‘Predictive Coding: The Good, the Bad, and the Ugly’ (Prism Blog, 7 August 2019) <<https://prismlit.com/predictive-coding/>> accessed 26 February 2021;

53 Richard Susskind, Daniel Susskind, *The Future of the Professions: How Technology Will Transform the Work of Human Experts* (Oxford University Press 2015) 71.

jobs. It is very likely that legal tech tools will drastically change the way lawyers provide services for their clients. Technology can free lawyers from administrative and routine tasks, which will result in a decrease in their overall workload and more time for higher-value work. So, using technology will be a competitive advantage by increasing productivity and reducing human work hours. Therefore, even if technology won't replace lawyers, lawyers who use technology could replace those lawyers who don't.<sup>54</sup>

At the same time, human lawyers will always be needed for more critical, complex tasks with higher-level cognitive demands, like advising clients, formulating arguments, negotiating and representing in court. It could be argued that the consultative nature of legal work where human to human relationships matter, makes it immune to full automation.

For that reason, technology is not yet an imminent threat to legal jobs. Right now, legal tech tools could only decrease the work hours spent on more routine-oriented tasks, like contract review or document management; allowing lawyers to focus on tasks that truly add value.

However, most legal tech innovations are still in their early days, so we should not underestimate the power of technology. The legal profession is sure to change a lot in the near future.

Every business will be disrupted someday, and digital literacy will be a necessity for any of them to survive. We live in rapidly changing times, and now, we are also facing a period of fundamental and irreversible transformation in the world of law and technology.<sup>55</sup> In order to successfully cope with new challenges in the legal industry, lawyers and legal teams need to be open-minded to innovations, dismiss outdated practices and quickly adapt themselves to the fast-changing business environment by exploiting new tools and products. This means, in particular, that lawyers need to develop new competencies such as software skills, as well as understanding other disciplines of business including technology, analytics and data science. Lawyers will have to cooperate more and more with professionals from different fields to solve legal problems.

The need for disruption may not only stem from the changes inside the legal services industry, but also directly from clients' digital expectations. This includes the most trivial requests such as using videoconference applications or cloud collaboration tools as well as providing complex docu-

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<sup>54</sup> Omni Legal, ‘Artificial Intelligence Won’t Replace Lawyers—It Will Free Them’ (Law Technology Today 27 February 2018).

<sup>55</sup> Richard Susskind, *Tomorrow’s Lawyers. An Introduction to Your Future* (Oxford University Press 2nd edn, 2017).

ment automation solutions. For law firms to meet these expectations, they need to be prepared to digitize their services by creating and implementing digital transformation strategies.

Digital transformation is a thing of the present and will be a thing of the future. Undoubtedly, legal professionals must follow suit to stay afloat. Advising without understanding clients' business is impossible. Moreover, one of the law industry's success factors called *knowledge asymmetry*, is fading away. Mostly thanks to the Internet proliferation and democratization of knowledge that it brings. Content digitization, search engines, remote learning make access to knowledge easier than ever before.

The change of the law firm leaders will be a key to their success in the near future. The legal industry must open both to innovation AND disruption. Technology is changing business across the board and the pandemic is fueling that process. In 2021 we can expect even more online chatting, greater collaboration in the cloud, more emails and more data to process in general. Legal innovators out there should focus on developing more advanced NLP solutions, privacy preserving technologies for data security and improving remote work modes.

**SECTION TWO.**  
**Towards Algorithmic Legal Reasoning and Law-Making**



# Computational Legal Problem Solving. What can Legal Tech Learn from AI and Law Research, and Beyond?<sup>1</sup>

Michał Araszkiewicz

## 1. Introduction

LegalTech is one of the most rapidly growing branches of information technology.<sup>2</sup> It has become commonplace that advanced solutions, including natural language processing (NLP) algorithms based on machine learning (ML), may significantly increase the speed and accuracy of many juridical tasks performance. The digital transformation of international law firms and legal departments in corporations widely considers the application of tools used with problems that precede actual juridical work (paralegal tasks such as the retrieval of documents, systematization of information, and checking the formal structure of documents). It also concerns solutions that may support the assessment of similarities between legal cases, generate arguments from knowledge bases, or evaluate the relative strength of competing arguments (the tasks of lawyers). Nevertheless, computational tools to support the performance of lawyers' tasks on an effective level are difficult to develop.

There are many sources of this difficulty. Perhaps the most general observation in this connection is that many problems solved by lawyers are not well-defined. In the theory of problem solving, a problem is well defined if it has a clearly specified initial state and goal state (solution) as well as a set of operators that may be used in the transition from the initial state to the goal state.<sup>3</sup> Among the most important specific

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1 The article was financed by the National Centre for Sciences as part of research project agreement UMO-2018/29/B/HS5/01433.

2 See Richard Susskind, *Tomorrow's Lawyers. An Introduction to Your Future* (Oxford University Press 2nd edn, 2017); Markus Hartung, Micha-Manuel Bues, Gernot Halbleib, *Legal Tech: How Technology Is Changing the Legal World* (C. H. Beck 2018); Jens Wagner, *Legal Tech und Legal Robots. Der Wandel im Rechtswesen durch neue Technologien und Künstliche Intelligenz* (Springer 2020).

3 Kevin Dunbar, 'Problem Solving' in William Bechtel and George Graham (eds), *A Companion to Cognitive Science* (Blackwell Publishers 1999) 293–294 and a classical monograph by Allen Newell and Herbert A. Simon, *Human Problem Sol-*

issues, the following may be noted. First, it is difficult to determine the set of sources from which relevant information should be retrieved. Certain categories of sources are hardly debatable (such as statutes or, in Anglo-American legal culture, binding precedents). However, it is often unclear to what extent other sources, such as soft law or legislative materials, should be considered. Second, even if the set of relevant sources has been determined, it may be a very complex task to decide what is the structure and content of elements derived therefrom, and, in particular, how potential incompatibilities between these elements should be solved.<sup>4</sup> Third, in legal reasoning, we often must decide not only based on uncertain or contradictory information, but also incomplete information. In particular, reasoning with and about evidence often involves balancing probabilities or the resolution of problems through the application of rules concerning burden of proof.<sup>5</sup> As far as questions of law are concerned, the phenomenon of incompleteness is captured by the concept of legal gaps.<sup>6</sup> Fourth, a major part of legal sources is expressed in natural language. Therefore, legal texts are encumbered by such well-researched phenomena as syntactic and semantic ambiguity, vagueness, context sensitivity, and open texture. Some of these phenomena are not necessarily problematic (for instance, vagueness may be effectively used in drafting legal provisions that require flexibility). In general, though, they all contribute to increased complexity.<sup>7</sup> Fifth, legal reasoning often involves differences of opinion and depends on value judgments. Therefore, legal reasoning cannot be adequately reduced to a logical operation. Its adequate representation requires modeling argumentation and arguments, particularly arguments concerning values, goals, and preferences.<sup>8</sup> Both the linguistic features

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ving, (Prentice Hall 1972). See also Colin Lynch, Kevin D. Ashley, Niels Pinkwart, Vincent Aleven, ‘Concepts, Structure and Goals: Redefining Ill-Definedness’ (2009) 19 *International Journal of Artificial Intelligence in Education* 253–266.

4 cf. Carlos E. Alchourrón and Eugenio Bulygin, *Normative Systems* (Springer-Verlag 1971); Robert Alexy, *A Theory of Constitutional Rights*, transl. J. Rivers (Oxford University Press 2002); Manuel Atienza and Juan Ruiz-Manero, *A Theory of Legal Sentences* (Springer 1998).

5 See, for instance, in the context of US law: Jack Weinstein, Norman Abrams, Scott Brewer and Daniel Medwed, *Evidence* (Foundation Press 2017).

6 See, for instance Marijan Pavčnik, ‘Why Discuss Gaps in the Law?’ (1996) 9/1 *Ratio Juris* 72–84.

7 Timothy Endicott, *Vagueness in Law* (Oxford University Press 2000).

8 The theories of legal argumentation are presented in Eveline Feteris’s *Fundamentals of Legal Argumentation. A Survey of Theories on the Justification of Judicial Decisions* (Springer 2017) and in Giorgio Bongiovanni, Gerald Postema, Antonino Rotolo,

of legal text and the general context of the legal system contribute to the complexity of legal understanding, which is why legal interpretation remains the most-investigated issue in legal theory. Sixth, humans perform legal reasoning; it obviously has (neuro)psychological grounds. The minds of lawyers are human. Therefore, they operate based on fallible heuristics and are subject to biases, decisions are made on emotional grounds and rationalized *post hoc*, etc. These and other problems are investigated under the heading of the relatively recently emerged research area law and cognitive sciences.<sup>9</sup> Nonetheless, apparently, in legal practice, the only intersubjective sphere subject to evaluation is the reasoning expressed in language (in documents such as judicial opinions or lawsuits) and having a claim to rationality. It is difficult to define the rationality criteria for legal reasoning, particularly if it is our aim to develop a realistic, not idealized, model.<sup>10</sup> Even if we assume the rationality of lawyers (as human reasoners) is limited and bounded, the relationships between the psychological (factual) and the rational in legal reasoning remain complex and not entirely clear.

Having said this, it should be noted that, irrespective of these complexities, lawyers perform their tasks on a daily basis, and often their performance is evaluated as proper or even excellent. In other words, legal experts know when a legal task is performed well, even if it is sometimes difficult to agree on the criteria of evaluation or to reveal the implicit assumptions that provide the background for the reasoning explicitly given. Decades of developing legal theory have provided imperfect, yet informative, conceptual schemes and tools that enable us to, first, analyze the phenomena contributing to the complexity of legal reasoning and, second, to reduce this complexity or help resolve problems under assumed criteria. In particular, theories of legal interpretation and legal argumentation contributed importantly to the understanding of the rational aspects of the legal decision-making process. The problems of the relationship between the intuitive and deliberative, the persuasive and the reasonable, and the

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Giovanni Sartor, Chiara Valentini and Douglas Walton (eds.), *Handbook of Legal Reasoning and Argumentation* (Springer 2018).

- 9 For a recent contribution to the understanding of the relationship between law and cognitive science, see Jaap Hage. Bartosz Brożek and Nicole Vincent (eds.), *Law and Mind. A Survey of Law and the Cognitive Sciences* (Cambridge University Press 2021).
- 10 A normative model of (rational) legal reasoning is presented, for instance, in Bartosz Brożek, *Rationality and Discourse. Towards a Normative Model of Applying Law* (Wolters Kluwer 2007).

extralegal and legal features in legal decision making are the subject of vivid debates.

The question, hence, appears whether legal problems may be modeled in a manner that would justify the thesis that they are well-defined problems. A significant part of the work toward this purpose has been made in legal theory, and since the 1970s, such attempts have also been made in the broad research area called artificial intelligence and law (AI and law).<sup>11</sup> Basically, research in AI and law consists of the use of artificial intelligence (AI) tools to build models of legal reasoning and other systems that may support the performance of juridical tasks. To characterize this area of research more accurately, we must address the scope and nature of general AI research. For obvious reasons, we cannot enter into the complex philosophical debate concerning the notion of AI. For the purposes of this paper, it is sufficient to recall the recent definition provided by one of the most prominent researchers in the field, according to whom AI pursues the goal of creating intelligent machines. A machine may be considered intelligent if it “chooses the actions that are expected to achieve its objectives, given what is perceived.”<sup>12</sup> The objectives are, of course, not a machine’s own, but objectives specified by the developer or reconstructed by the machine based on initial specifications. In other words, an intelligent machine should act under the principles of instrumental rationality regarding a certain set of objectives. A machine may be developed to simulate a human’s thinking or behavior or to surpass human capabilities and performance to realize said objectives.<sup>13</sup>

There are two broad and internally differentiated streams of research in AI: symbolic AI and computational intelligence. Although the division between these streams is not rigid, and the classification of some system types into the categories is subject to debate, they may be juxtaposed, in a model account, in the following manner:<sup>14</sup>

In symbolic AI, the model of an intelligent system is typically represented explicitly. The data used by the model have a symbolic character;

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11 For a history of this scientific movement, see Trevor Bench-Capon and others ‘A History of AI and Law in 50 Papers: 25 Years of the International Conference on AI and Law’ (2012) 20 *Artificial Intelligence and Law* 215–319.

12 Stuart J. Russell, “Artificial Intelligence. A Binary Approach,” in S. Matthew Liao (ed), *Ethics of Artificial Intelligence* (Oxford University Press 2020) 327.

13 Stuart Russell and Peter Norvig, *Artificial Intelligence. A Modern Approach*, (3rd ed. Pearson 2016) 2.

14 Cf. M. Flasiński, *Introduction to Artificial Intelligence* (Springer International Publishing 2016) 15 and 23.

they are expressed in each formal language, such as the language of logic, graphs, or set theory. The operations performed by the system consist of formal operations on sets of symbols; for instance, they may have the character of deductive operations. Exemplary approaches represented in this stream are logic-based systems, rule-based systems, case-based reasoning systems, argumentation systems, and systems based on the Semantic Web architecture.

In computational intelligence, the model of an intelligent system (and the knowledge used therein) typically has implicit character. The basic type of data used by the system is numeric data. The operations performed by the system have a primarily mathematical character. The types of systems developed in this field are very diverse. For instance, we may mention support vector machines, neural networks, and evolutionary algorithms. However, the model characteristics of these models are generally applicable to all of them. In some cases, computational intelligence systems have a distributed character in that meaning cannot be ascribed to the elements of the system, but is, rather, inferred from the operations of the total system or a reasonable part thereof.

A common feature of computational intelligence mechanisms is that they can learn. The field of computational intelligence should not be identified with machine learning (ML), because there are also symbolic learning models, and not all computational intelligence models have this feature. However, most successfully applied ML systems are based on computational intelligence.<sup>15</sup> ML is one of the most rapidly developing fields of computer science. We distinguish three main categories of ML: supervised, unsupervised, and reinforcement learning (There are also intermediary categories and finer-grained distinctions.) Generally speaking, the idea of ML is that an algorithm gradually corrects its performance to achieve the expected or desired result.

During the first decades of research on AI (1950s–1980s), the symbolic approach was dominant. This led to the development of tools and approaches applicable to many areas. In the 1970s, the concept of expert systems, that is, the systems that simulate the reasoning of domain experts, rose to prominence. Frequently, expert systems are based on rules (understood here as conditional clauses of the form “IF condition THEN

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<sup>15</sup> See Ethem Alpaydin, *Machine Learning. The New AI* (The MIT Press 2016); Miroslav Kubat, *An Introduction to Machine Learning* (Springer International Publishing 2017).

action”).<sup>16</sup> Such systems may perform both forward-chaining reasoning (inferring conclusions from a given set of facts that may make the rules fire) and backward-chaining reasoning (verification of hypotheses posed by the user regarding the system’s knowledge). The development of case-based reasoning systems<sup>17</sup> and defeasible logics was initiated in the 1980s.<sup>18</sup> Subsequently, the development of argumentation systems from the 1990s on<sup>19</sup> led to the further progress of symbolic AI. Yet another direction of development was the models of structured knowledge: In this approach, engineers intended to represent knowledge not only on the level of logical formulae, but also to consider the internal structure of concepts and connections between them.<sup>20</sup> As is known, this approach was extended and elaborated in the Semantic Web—a collection of standards enabling the presentation of semantic knowledge in machine-readable form.<sup>21</sup>

Symbolic AI systems, despite the many differences between them, share certain strong and weak features. Their important advantage is their high degree of understandability for the user. In principle, symbolic AI systems may present an *explanation* of the reasoning process, both regarding the general model and particular reasoning. Moreover, the reasoning they perform, based on deductive or quasi-deductive reasoning patterns, is very reliable, although, of course, the generated conclusions concern the adopted set of premises, which may be erroneous or doubtful. Conversely, symbolic AI systems may only perform based on the knowledge stored in their knowledge base or explicitly provided by the user. The knowledge

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16 A very influential position on this subject is that of Bruce Buchanan, Edward H. Shortliffe, *Rule-based Expert Systems. The MYCIN Experiments of the Stanford Heuristic Programming Project* (Reading 1984).

17 For more recent elaborations of this topic, see David B. Leake, ‘Case-Based Reasoning,’ in William Bechtel and George Graham (ed), *A Companion to Cognitive Science* (Blackwell Publishers 1999) 465–476; Michael M. Richter, Rosina O. Weber, *Case-Based Reasoning. A Textbook* (Springer-Verlag 2013).

18 Ray Reiter, ‘A Logic for Default Reasoning,’ (1980) 13 *Artificial Intelligence* 81–132; John L. Pollock, ‘Defeasible Reasoning’ (1987), 11 *Cognitive Science* 481–518.

19 Phan Minh Dung, ‘On the Acceptability of Arguments and Its Fundamental Role in Nonmonotonic Reasoning, Logic Programming and n-person Games’ (1995) 77(2) *Artificial intelligence* 321–357.

20 Allan M. Collins and Ross M. Quillian, ‘Retrieval Time from Semantic Memory’ (1969) 8(2) *Journal of Verbal Learning & Verbal Behavior*, 240–247; Marvin Minsky, ‘A Framework for Representing Knowledge’ in Patrick H. Winston (ed) *Psychology of Computer Vision* (MIT Press 1975).

21 Liyang Liu, *Introduction to the Semantic Web and Semantic Web Services* (Chapman and Hall/CRC 2019).

base itself must be formalized, validated, and maintained, which are time-consuming and costly processes. Symbolic systems' capacity to learn and adjust their behavior to new situations is very limited. Moreover, it became apparent decades ago that, to perform in a satisfactory manner, many types of symbolic AI systems must be equipped with and process common-sense knowledge. However, the amount of common-sense knowledge required to attain the desired performance results of the systems is immensely great.<sup>22</sup> Problems regarding the preparation of relevant knowledge bases for symbolic AI systems are discussed under the heading of the *knowledge acquisition bottleneck*. These disadvantages have caused the limited applicability of symbolic AI systems, which typically solve problems in narrow, well-defined domains.

The main advantages of computational intelligence systems come from their ability to learn based on (numeric) data. The emergence of Internet technologies in the 1990s led to the creation of big data sets, which enabled the spectacular development of ML techniques and tools. Nowadays, applications based on computational intelligence are naturally called *AI* because of their capacity to adapt to the context and changing circumstances, their relative autonomy and the degree of unpredictability following from it, and their high-level performance of tasks in numerous areas including scientific discovery, finances, insurance, transportation, military applications, medicine, automated translation, or the ability to conduct a natural conversation, where the latter areas exemplify the successful application of natural language processing (NLP) technologies.<sup>23</sup> The success of these systems follows from many factors, including their overall performance level (high speed and accuracy) and the possibility of the ongoing development of the systems throughout the learning process. Moreover, appropriately trained ML systems generally do not require the preparation of the data they operate on; some may perform well based on raw data. The ubiquitous character of solutions based on ML models has led to questions concerning the ethical and legal consequences of

- 22 The most famous project developing the fullest possible base of commonsense knowledge is CYC, initiated in 1984. At first, it was assumed the task would be completed by the 1990s. As of now, the CYC database contains 25 million assertions and is still growing. See <<https://cyc.com/>> access 8 May 2021.
- 23 On the topic of NLP, see Nitin Indurkha, Fred J. Damerau, *Handbook of Natural Language Processing* (Chapman & Hall/CRC 2010). The applications and models of ML systems are discussed in a non-technical manner by Pedro Domingos, *The Master Algorithm: How the Quest for the Ultimate Learning Machine Will Remake Our World* (Brilliance Audio 2017).

their operation.<sup>24</sup> Accordingly, one of the most debated issues here is the relatively low level of these systems' explainability.<sup>25</sup> Although engineers understand principles concerning the operations of the models, in many cases, it is practically impossible to state why, in a concrete situation, the algorithm generated a given result. Moreover, if the system is used in the context of decision-making support, even obtaining a detailed explanation of the algorithm's operation cannot count as adequate justification for the decision because of its distinct nature—computational intelligence performs tasks through arithmetic operations, not symbolic reasoning. The use of ML systems also generates the risk of algorithmic bias affecting the results.<sup>26</sup>

Having briefly characterized the main approaches in the field of AI research, let us discuss the most important achievements of AI and law research, beginning with symbolic models of legal reasoning and continuing with a comment on ML applications and concepts combining the two approaches. In the final part of the chapter, we will discuss the basic conclusions that follow from these analyses for the LegalTech industry.

## 2. Modeling Legal Reasoning and Argumentation

How are legal conclusions generated and justified based on available knowledge in a computational system? As discussed above, an answer to this question requires a more precise definition of the problem being solved. The history of AI and law represents the evolution of perspectives concerning the nature of the problem solved regarding the generation and justification of legal conclusions. In many important respects, this evolution mirrors the development of the theories of legal reasoning elaborated

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24 These issues have recently been discussed, *inter alia*, in a contributed volume: María-Jesús González-Espejo and Juan Pavón (eds), *An Introductory Guide to Artificial Intelligence for Legal Professionals*, (Kluwer Law International 2020).

25 The notion of explainability and related concepts are discussed thoroughly in Alejandro Barredo Arrieta, Natalia Díaz-Rodríguez, Javier Del Ser, Adrien Bennetot, Siham Tabik, Alberto Barbado, Salvador García, Sergio Gil-López, Daniel Molina, Richard Benjamins, Raja Chatila and Francisco Herrera, 'Explainable Artificial Intelligence (XAI): Concepts, taxonomies, opportunities and challenges toward responsible AI' (2020) 58 *Information Fusion* 82-115.

26 Philipp Hacker, 'Towards a Flexible Framework for Algorithmic Fairness', in: Ralf H. Reussner, Anne Koziolek, Robert Heinrich (eds.) *50. Jahrestagung der Gesellschaft für Informatik, INFORMATIK 2020 – Back to the Future* (Karlsruhe 2020) 99-108.

in legal theory. Nevertheless, it should be emphasized that the influence of legal-theoretical work on AI and law has been rather limited.<sup>27</sup>

Considering the ordering based on historical precedence and the increasing complexity of the proposed models, the initial approach taken in AI and law concerned the representation of legal reasoning in rule-based systems. This view is generally based on the syllogistic model of the application of law and has been present in various legal expert systems and in models of statutory legal reasoning. The structure of legal knowledge is represented as a set of rules understood as conditional expressions of the form “IF ... THEN ...” or similar. The model of reasoning has often been implemented as a logic program. Therefore, the solution to a legal problem is defined as creating logical proof from a set of premises to a conclusion or verifying whether a conclusion is provable based on the premises.

The interface of a rule-based legal expert system typically enables the user to enter information as answers to the questions asked by the program: yes/no questions or questions about numeric information, such as the date of a certain event or some person’s age. Based on information provided (called *facts*), the program inferred conclusions. If a given conclusion was not provable based on available information, the program could infer a negative answer if it used the “negation as failure” solution. Importantly,

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27 Sometimes even more far-reaching claims are made, for instance Thomas F. Gordon in the presentation made at the ICAIL 2007 conference remarks that “legal philosophy failed to provide the necessary theoretical foundation for our field” (referring to the AI and Law research), Thomas F. Gordon, ‘20 Years of ICAIL – Reflections on the field of AI and Law’, 2007, <http://www.tfgordon.de/publications/> (access 10 May 2021). The causes of this limited flow of information between legal theory and AI and Law research require thorough, systematic investigation. However, there are also examples of fruitful adoption of legal-theoretical frameworks in formal and computational models, as in Jaap Hage, ‘Formalizing legal coherence’ in Ronald Prescott Loui (ed) *Proceedings of the Eighth International Conference on Artificial Intelligence and Law*, ICAIL 2001 (ACM 2001) 22-31; Kevin D. Ashley, ‘An AI model of case-based legal argument from a jurisprudential viewpoint’ (2002) 10 Artificial Intelligence and Law 163-218; Giovanni Sartor, ‘Doing justice to rights and values: teleological reasoning and proportionality’ (2010) 18(2) Artificial Intelligence and Law 175-215 or John Henderson and Trevor Bench-Capon, ‘Describing the Development of Case Law’ in Floris Bex (ed) *Proceedings of the Seventeenth International Conference on Artificial Intelligence and Law*, ICAIL 2019 (ACM 2019) 32-41.

systems of this type were often accompanied by an explanatory module that presented the reasoning for the program step by step.<sup>28</sup>

The main disadvantages of classical rule-based models of legal reasoning are as follows. They do not capture the dialectic features of legal reasoning, which often involves comparing arguments and balancing interests. Their linear account of reasoning cannot represent these aspects. Moreover, they require that the facts of cases introduced by the user be expressed in terms already used in the rules base stored by the system. This is an unrealistic feature of these models, because in real-life situations, legal cases typically are not directly describable in the highly general language of legal rules. Therefore, rule-based legal expert systems require the user to decide whether a particular legal category applies to a given case—where not only an unqualified user but also a professional lawyer may have doubts. This is particularly visible concerning the applicability of vague or open-textured legal concepts. The meaning of such concepts is typically subject to evolution in case law.

The rule-based approach to the modeling of legal reasoning was contested in the 1980s by the proponents of another approach: case-based reasoning models. In Anglo-American legal culture, the essence of legal reasoning seems to be captured in reasoning about the applicability of precedent cases to current factual situations and in arguing about the similarities and dissimilarities of cases. Nowadays, case-based reasoning is one of the most important areas in domains of AI research.<sup>29</sup> The paradigm of case-based reasoning modeling in AI and law was created in connection with the development of the HYPO system by Kevin D. Ashley and Edwina Rissland.<sup>30</sup> The program uses the knowledge base of cases

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28 The classical contributions representing this approach are Donald A. Waterman and Mark A. Peterson, 'Models of Legal Decision Making: Research Design and Methods', (Rand Corporation, The Institute for Civil Justice 1981) and Sergot (n 208) 370–386.

29 Richter, Weber, (n 17).

30 The most complete presentation of HYPO is to be found in the monograph Kevin D. Ashley, *Modeling Legal Argument. Reasoning with Cases and Hypotheticals* (MIT Press 1990). Other accounts of case-based reasoning are also present in the literature, as in the model based on the notion of prototype and its deformations, see L. Thorne McCarty, 'An Implementation of Eisner v. Macomber' in L. Thorne McCarty (ed) *Proceedings of the Fifth International Conference on Artificial Intelligence and Law, ICAIL'95* (ACM 1995) 276–286, or in the model based on the so-called exemplar-based explanations, see L. Karl Branting, 'Building explanations from rules and structured cases' (1991) 34(6) *International Journal of Man-Machine Studies* 797–837.

(in the domain of trade secret law) indexed by dimensions—knowledge representation tools representing a scale from the most pro-plaintiff to the most pro-defendant point. Dimensions represent ordered sets of general aspects of the case, and they form the foundation of the construction of arguments based on similarities and dissimilarities between the case at bar and the quoted cases. Notably, instead of suggesting one possible answer, HYPO generated a three-ply argument naturally representing the exchange of positions in the litigation process: the first ply by the plaintiff, a reply by the defendant, and a rebuttal by the plaintiff. HYPO generated arguments based on similar cases and distinguishing arguments, as well as arguments based on counterexamples. It also pointed out the hypothetical variations of the analyzed cases to show how the argumentation for each side could be strengthened.

Numerous computational models of legal reasoning were based on the basic ideas expressed in the HYPO model or developed in directions.<sup>31</sup> A particularly influential approach was proposed in CATO—a program developed to support legal education.<sup>32</sup> In CATO, the cases were characterized by binary factors as opposed to scalable dimensions. A factor may be either present or absent in the description of the case, and if it is present, it always favors a decision for the same side (defendant or plaintiff). CATO ordered factors into a hierarchy, going from base-level factors to abstract factors, connected by positive or negative links of strength. It generated argument structures like HYPO. However, it was based on a more extensive case set, yet it still comprised the same domain of law (trade secrets law).

Other developmental directions of the computational models of legal reasoning were as follows. Rule-based and case-based reasoning were combined in hybrid systems, where case law served as the basis for establishing semantics of rules' conditions.<sup>33</sup> The factor-based approach was soon supplemented by teleological considerations and led to the development of the systems, which represent not only arguments about similarities or

31 Recently, the evolution of this paradigm was summarized in Trevor Bench-Capon, 'HYPO'S legacy: introduction to the virtual special issue' (2017), 25(2) Artificial Intelligence and Law 205-250.

32 Vincent Aleven, *Teaching Case-Based Argumentation Through A Model and Examples*, (University of Pittsburgh 1997) <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.47.3347&rep=rep1&type=pdf>> access 10 May 2021.

33 Edwina L. Rissland, David B. Skalak, 'CABARET: Rule Interpretation in a Hybrid Architecture' (1991) 34(6) International Journal of Man-Machine Studies 839-887.

dissimilarities between cases, but also legal values and goals.<sup>34</sup> The factor-based approach was combined with the research on nonmonotonic logic, which led to the concept of representing legal cases as rules that connect a collection of factors (representing legally relevant information about the case's circumstances) and the case's outcome.<sup>35</sup> This latter approach has become particularly influential and led to the formalization of the models of case-based reasoning.<sup>36</sup> However, it is debated whether it represents the specific features of analogical reasoning that should be distinguished from typical rule-based reasoning.<sup>37</sup>

In summing up the above considerations, it should be observed that in the dimensions- and factor-based systems of legal reasoning the task of finding and justifying a solution to a case is defined as selecting the outcome which has the strongest support with regard to the existing case base. The case-based reasoning systems does not have to yield an unequivocal answer – some of them provide a set of arguments pro and contra without determining the final solution.

The direction of research that considered types of legal arguments led to the generalized view consisting of the representation of legal reasoning as argumentation. Even though theories of legal argumentation have been discussed in the legal literature since the 1950s,<sup>38</sup> this approach to the computational modeling of legal reasoning has become dominant in the 1990s in connection with the emergence of a new paradigm for representing ar-

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34 This discussion was initiated in AI and Law by Donald H. Berman and Carole D. Hafner in the paper titled ‘Representing Teleological Structure in Case-based Legal Reasoning: The Missing Link’ in Anja Oskamp and Kevin Ashley (eds), *Proceedings of the Fourth International Conference on Artificial intelligence and Law, ICAIL '93*, (ACM 1993) 50-59.

35 Henry Prakken, Giovanni Sartor, ‘Modelling Reasoning with Precedents in a Formal Dialogue Game’ (1998) 6(2-4) *Artificial Intelligence and Law* 231-287.

36 For instance, John F. Horty, ‘Reasoning with dimension and magnitudes’ (2019) *Artificial Intelligence and Law* 27(3), 309-345 and Henry Prakken, ‘Comparing Alternative Factor- and Precedent-Based Accounts of Precedential Constraint’, in: Michał Araszkiewicz, Víctor Rodríguez-Doncel (eds.): *Legal Knowledge and Information Systems - JURIX 2019: The Thirty-second Annual Conference*, Frontiers in Artificial Intelligence and Applications 322, (IOS Press 2019), 73-82.

37 Katie Atkinson and Trevor Bench-Capon, ‘Reasoning with Legal Cases: Analogy or Rule Application?’, in: Floris Bex (ed) *Proceedings of the Seventeenth International Conference on Artificial Intelligence and Law, ICAIL 2019* (ACM 2019), 12-21.

38 Stephen Toulmin, *The Uses of Argument*, Cambridge University Press 2003 (1<sup>st</sup> ed. 1958); Chaim Perelman, Lucie Olbrechts-Tyteca, *The New Rhetoric. A Treatise on Argumentation*, (University of Notre Dame Press 1971) (originally published in French in 1958).

gumentation in formal systems, namely, argumentation frameworks.<sup>39</sup> We distinguish between abstract and structured argumentation frameworks. In abstract argumentation frameworks, the notions of argument and attack between arguments remain undefined, but they are sufficient to define the criteria for argument acceptability (so-called semantics), which generate extensions, intuitively, sets of arguments that can be rationally accepted together. Structured argumentation frameworks enable the presentation of relationships between premises and conclusions of arguments, as well as types of attacks on arguments: undermining attacks directed against arguments' premises, rebuttal attacks that question conclusions, and undercutting attacks that aim at weakening the relationship between the premises and the conclusion.<sup>40</sup> The computational models of argumentation as abstract structures enabling the representation of any type of argument have become extremely influential in AI and law.<sup>41</sup> Certain aspects of legal argumentation have received their computational representation (not necessarily based on the concept of argumentation frameworks), such as reasoning with standards of proof in the Carneades system,<sup>42</sup> balancing reasons in reason-based logic,<sup>43</sup> or, more recently, reasoning with burden of persuasion in a model based on ASPIC+.<sup>44</sup>

To some extent, another approach was developed. As noted, legal reasoning may be represented not as a "battle of arguments" but rather as

39 Dung (n 244). See the general elaboration of the topic of formal and computational argumentation in Iyad Rawhan, Guillermo R. Simari (eds.), *Argumentation in Artificial Intelligence*, (Springer 2009) and in Pietro Baroni, Dov Gabbay, Xavier Parent, Leon van der Torre (eds.) *Handbook of Formal Argumentation*, (College Publications 2018).

40 See Henry Prakken, 'An abstract framework for argumentation with structured arguments' (2010) *Argument and Computation* 1(2), 93-124.

41 The influence of Dungian argumentation frameworks on the AI and Law research is discussed by Trevor Bench-Capon, 'Before and after Dung: Argumentation in AI and Law', *Argument and Computation* 11(1-2), 221-238.

42 Thomas F. Gordon, Henry Prakken, Douglas Walton, 'The Carneades model of argument and burden of proof' (2007) *Artificial Intelligence* 171(10-15), 875-896.

43 Jaap C. Hage, *Reasoning with Rules. An Essay in Legal Reasoning and its Underlying Logic*, (Springer 1997).

44 Roberta Calegari and Giovanni Sartor, 'A Model for the Burden of Persuasion in Argumentation', in: Serena Villata, Jakub Harašta and Petr Kremen (eds) *Legal Knowledge and Information Systems - JURIX 2020: The Thirty-third Annual Conference*, Frontiers in Artificial Intelligence and Applications 334, (IOS Press 2020), 13-22; an introduction to the ASPIC+ system: Sanjay Modgil, Henry Prakken, The ASPIC+ framework for structured argumentation: a tutorial, (2014) *Argument and Computation* 5(1), 31-62.

an endeavor to construct the most coherent set of elements (theory) that explains the solution of the case.<sup>45</sup> Models of legal reasoning based on the notion of coherence were developed earlier in legal theory,<sup>46</sup> and they influenced the coherentist approach in AI and law to a limited extent. In the computational modeling of legal reasoning, coherence-based models have been most intensively investigated in the context of case-based reasoning systems, combining reasoning based on rules, factors, and values, and introducing the external criteria enabling the comparison of theories.<sup>47</sup> The coherence-based approach has also been successfully combined with the argument-based approach in a hybrid theory of reasoning with evidence.<sup>48</sup>

Much attention has also been devoted to the problems of legal knowledge representation. As is known, logical formalisms, such as first-order logic or deontic logic, have limited expressive power, and they cannot account for the complex structure of legal concepts. In this connection, the ideas elaborated in the general research on AI in structured knowledge modeling have been applied widely in the fields of AI and law.<sup>49</sup> For instance, a frame-based approach to knowledge, representing entities as sets of slots that give information on the values of the parameters of this object, has been applied to the representation of legislation.<sup>50</sup> The development of Semantic Web technology has had a definitive impact on the representation of knowledge in the fields of AI and law.<sup>51</sup> For the sake of recall, the

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45 See L. Thorne McCarty, ‘Some Arguments About Legal Arguments’, in John Zeleznikow, Daniel Hunter, L. Karl Branting (eds.): *Proceedings of the Sixth International Conference on Artificial Intelligence and Law, ICAIL ’97*, (ACM 1997), 215-224.

46 For instance Aleksander Peczenik, *On Law and Reason*, (Springer 2008).

47 See Trevor Bench-Capon, Giovanni Sartor, ‘A model of legal reasoning with cases incorporating theories and values’, *Artificial Intelligence* 150(102), 97-143. An alternative approach based on constraint satisfaction conception of coherence as outlined by Paul Thagard, *Coherence in Thought and Action*, (The MIT Press 2000), was applied to the field of legal reasoning in Michał Araszkiewicz, ‘Limits of Constraint Satisfaction Theory of Coherence as a Theory of (Legal) Reasoning’ in Michał Araszkiewicz and Jaromír Šavelka (eds) *Coherence. Insights from Philosophy, Jurisprudence and Artificial Intelligence* (Springer 2013), 217-241.

48 Floris Bex, *Arguments, Stories and Criminal Evidence. A Formal Hybrid Theory*, (Springer 2011).

49 See Erich Schweighofer, *Legal Knowledge Representation*, (Kluwer Law International 1999).

50 See Robert van Kralingen, *Frame-based Conceptual Models of Statute Law*, (Kluwer Law International 1995).

51 See for instance Pompeu Casanovas, Monica Palmirani, Silvio Peroni, Tom van Engers and Fabio Vitali ‘Special Issue on the Semantic Web for the Legal Domain

Semantic Web is a multi-layered system of information that aims at facilitating the processing of information by machines. An important part of this framework is provided by ontologies—formal and computational representations of the relationships between concepts, and reasoners—computer programs that perform inferences based on information stored in an ontology.<sup>52</sup> Numerous legal ontologies have been developed since the 1990s, including sophisticated ontologies of causal links<sup>53</sup> or systems representing types of legal provisions and deontic modalities.<sup>54</sup> The research on legal ontologies has important connections with legal-theoretical research on legal concepts.<sup>55</sup>

In recent years, much attention has been devoted to a more natural representation of legal arguments in computational systems. Doug Walton's philosophical conception of argumentation schemes has been applied in numerous domains of AI and law research, most recently in connection with interpretive argumentation.<sup>56</sup> The topic of legal interpretation has

Guest Editors' Editorial: The Next Step' (2016) Semantic Web Journal <<http://www.semantic-web-journal.net/content/special-issue-semantic-web-legal-domain-guest-editors%E2%80%99-editorial-next-step>> access: 16 August 2021.

- 52 Nuria Casellas, *Legal Ontology Engineering. Methodologies, Modelling Trends, and the Ontology of Professional Judicial Knowledge*, (Springer 2011); Giovanni Sartor, Pompeu Casanovas, Maria Angela Biasiotti, Meritxell Fernández-Barrera (eds.), *Approaches to Legal Ontologies. Theories, Domains, Methodologies*, (Springer 2011); Johannes Scharf, *Künstliche Intelligenz und Recht. Von den Wissensrepräsentationen zur automatisierten Entscheidungsfindung*, (Weblaw 2015).
- 53 Jos Lehmann and Aldo Gangemi, 'An ontology of physical causation as a basis for assessing causation in fact and attributing legal responsibility' (2007) 15(3) Artificial Intelligence and Law, 301-321.
- 54 For instance Enrico Francesconi, 'A description logic framework for advanced accessing and reasoning over normative provision' (2014) Artificial Intelligence and Law 22(3), 291-311.
- 55 Giovanni Sartor, 'Legal concepts as inferential nodes and ontological categories' (2009) Artificial Intelligence and Law 17(3), 217-251.
- 56 The most comprehensive presentation of the argumentation schemes theory is Douglas Walton, Chris Reed and Fabrizio Macagno, *Argumentation Schemes*, (Cambridge University Press 2008). The application of this theory to interpretive argumentation in law may be found in the recent monograph by Douglas Walton, Giovanni Sartor and Fabrizio Macagno, *Statutory Interpretation: Pragmatics and Argumentation*, (Cambridge University Press 2020). The influence of Douglas Walton's theories on AI and Law has recently been discussed in Katie Atkinson, Trevor Bench-Capon, Floris Bex, Thomas F. Gordon, Henry Prakken, Giovanni Sartor, Bart Verheij, 'In memoriam Douglas N. Walton: the influence of Doug Walton on AI and law' (2020) Artificial Intelligence and Law 28(3), 281-326 and in Katie Atkinson and Trevor Bench-Capon, *Argumentation Schemes in AI and Law* (in press 2021).

become one of the most intensively debated issues in AI and law, including the strategies of agents performing the interpretation, the types of conflicts between interpretive statements, and the formal representation of interpretive disagreement in argumentation frameworks.<sup>57</sup> Generally speaking, the representation of legal reasoning in argumentation systems assumes that the correct solution is the one determined by the adopted argument acceptance criteria.

The outline of approaches present in computational models of legal reasoning (including the models of argumentation) indicates the increasing complexity of the developed approaches, as well as increasing awareness of the complexities of legal reasoning in AI and law research, even though it must be stressed again that the flow of information between this field of research and legal theory remains rather limited. There is also a visible tension between the direction focused on more informal, natural, descriptively adequate modeling (for instance, based on argumentation schemes) and strictly formal, computationally oriented modeling (as in abstract argumentation frameworks). Moreover, there is an apparent tendency to develop general, formal models as opposed to domain-dependent models that rely primarily on juridical knowledge. The fundamental question, then, emerges: Should computational models of legal reasoning simulate the bounded rationality of legal decision makers and arguers? Alternatively, should it represent legal reasoning as it would be performed by an idealized, rational entity? This problem also has a bearing on the modeling of legal prediction tasks, as discussed in what follows.

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<sup>57</sup> See for instance Michał Araszkiewicz, ‘Towards Systematic Research on Statutory Interpretation in AI and Law’, in: Kevin D. Ashley (ed.) *Legal Knowledge and Information Systems - JURIX 2013: The Twenty-Sixth Annual Conference*. Frontiers in Artificial Intelligence and Applications 259, (IOS Press 2013), 15-24; Tomasz Żurek and Michał Araszkiewicz, ‘Modeling teleological interpretation’ in Enrico Francesconi and Bart Verheij (eds), *International Conference on Artificial Intelligence and Law, ICAIL '13*, (ACM 2013), 160-168; Michał Araszkiewicz and Tomasz Żurek, ‘Interpreting Agents’ in Floris Bex and Serena Villata (eds), *Legal Knowledge and Information Systems - JURIX 2016: The Twenty-Ninth Annual Conference*. Frontiers in Artificial Intelligence and Applications 294 (IOS Press 2016) 13-22; Martín O. Moguillansky, Antonino Rotolo, Guillermo Ricardo Simari, ‘Hypotheses and their dynamics in legal argumentation’ (2019) Expert Systems and Applications 129, 37-55. General models of formal argumentation which share basic ideas of the argumentation schemes theory may be found in Bart Verheij, ‘DefLog: on the Logical Interpretation of Prima Facie Justified Assumptions’, (2003) 13 (3) Journal of Logic and Computation 319-34 and in Bart Verheij ‘Artificial Argument Assistants for Defeasible Argumentation’, (2003) 150 (1-2) Artificial Intelligence 291-324.

Notwithstanding all the important differences between the presented approaches, they all share a feature: to operate, they need a formalized knowledge base to be prepared, validated, and maintained. These processes are costly and time consuming, and they require a degree of debatable, sometimes arbitrary, decisions concerning the formalization of knowledge elements. Important choices have also been made respecting the selection of inference mechanisms performed by a system. They cannot generalize the available knowledge or analyze data that is not represented in each formal language. Therefore, the scope of their application is severely limited. What is more, as with any symbolic AI system, they may require the use of commonsense knowledge, which is the problem discussed above in the context of general AI. The advantage of systems of this type is that they can provide the reasons for the generation of a conclusion in a manner that is, in principle, understandable for a user. These reasons may have different structures, considering the diverse architectures of the systems. For instance, in classical rule-based systems, the reasons will be presented as premises of logical inference; in case-based reasoning systems, as dimension- or factor-based similarities or dissimilarities providing a basis for arguments; and in coherence-based systems, as the degrees of coherence of theories supporting given conclusions. In recent literature, it has been claimed that these systems basically generate explanations of legal decisions.<sup>58</sup> More strictly speaking, they generate justificatory reasoning (argumentation) in the first place, although many also can explain why and how such and such justificatory reasoning was generated. Despite these advantages, symbolic AI systems are not widespread in practice due to their low scalability, lack of possibility of analyzing source documents, and very limited adaptive capability. It should also be emphasized that, from the perspective of legal theory and doctrine, the computational models of legal reasoning may be assessed as too simplified on the conceptual level.

### *3. Computational Intelligence for Legal Tasks: How to Combine it with Symbolic Legal Reasoning Models*

Although computational intelligence models, including neural networks, have been investigated in connection with solving legal problems since

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58 See Katie Atkinson, Trevor Bench-Capon and Danushka Bollegala, 'Explanation in AI and law: Past, present and future' (2020) Artificial Intelligence 289: 103387.

the 1980s,<sup>59</sup> it was the unprecedented development of ML technology in the 21<sup>st</sup> century that established this approach as a dominant stream in AI and law. Nowadays, a significant part of research in AI and law focuses on developing systems aiming at the prediction of judicial decisions, classification of elements of legal texts, extraction of information from datasets, e-discovery, or enhancing the performance of retrieval systems. A substantial part of this research is based on NLP technology. The advances of this approach have been enabled by large datasets of legal documents available online.

The function of ML models is to identify a pattern in the dataset, considering the patterns of data already identified.<sup>60</sup> The general methodology for developing ML models in the field of law may be characterized as follows, taking the supervised learning approach as an example. The first step consists of the identification and gathering of a set of raw data (for instance, textual documents, such as judicial decisions). The next steps concern the preparation of the dataset, which encompasses normalization, tokenization, and annotation.<sup>61</sup> *Normalization* consists of converting all words to lower case and eliminating variations, such as conjugation. *Tokenization* involves the elimination of punctuation or hyphens and results in the treatment of certain words or sets of neighboring words as tokens (n-grams). *Annotation* consists of adding information to the source by labeling the parts thereof. These labels may indicate the grammatical function of expressions, disambiguate them, or indicate the nature of semantic or other information carried by them (for instance, if the aim of the model is to extract the argument elements from a judicial opinion, the annotation categories may be the premises of arguments, their conclusions, and the names, or types, of arguments employed by judges). Annotation may be applied to levels of granularity; it may relate to the whole document, to parts thereof, or to phrases or words. Both the elaboration of the annotation scheme and the very process of annotation require the adoption of certain principles and the resolution of differences of opinion. In many cases, annotators eventually make decisions; the scope of convergence between them is measured under the heading of interannotator agreement.

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59 See Richard K. Belew, 'A connectionist approach to conceptual information retrieval' (*Proceedings of the First International Conference on Artificial Intelligence and Law, ICAIL '87*, Boston, 27-29 May 1987) 116-126.

60 See Kevin D. Ashley, *Artificial Intelligence and Legal Analytics. New Tools for Legal Practice in the Digital Age* (Cambridge University Press 2017) 234.

61 Ashley (n 60) 236.

Once the source text is properly prepared, it is represented as a mathematical structure (for instance, a vector space) in a model. Then the model is subject to the process of training until it produces the results that satisfy the assumed criteria. Typical legal problems resolved by ML systems are classification (assigning a label to the new data) or prediction of an event or behavior (which may also be seen as a type of classification).<sup>62</sup> For instance, in information retrieval, the task may be to retrieve defined relevant information (e.g., cases decided in favor of the plaintiff). In semantic classification systems, the result may consist of classifying objects (for instance, legal provisions). ML systems may also be used for exploratory purposes, for instance, to detect repeatable patterns of data not identified yet, which may indicate non-accidental regularities not identified previously (for instance, fraud or tax evasion). The performance of an ML model is assessed against a set of standard criteria such as precision (the ratio of the amount of true positive results to the sum of true positive and false positive results), recall (the ratio of the amount of true positive results to the sum of true positive and false negative results), traditional F-measure (harmonic mean of precision and recall), and other criteria.

Computational intelligence systems may generate erroneous results by nature, especially if the target dataset differs in certain respects from the training set. Conversely, increasingly often, the performance of ML tools for certain tasks is comparable to, or even exceeds, the level of human lawyers regarding accuracy. In particular, one may enumerate the experiment concerning reviewing contracts,<sup>63</sup> applications of the question answering system to provide legal texts relevant for legal queries,<sup>64</sup> pre-

62 It should be stressed that both classification and prediction tasks may also be performed by symbolic models, in particular by case-based reasoning systems and argumentation systems. See, for instance, Kevin D. Ashley and Stefanie Brünninghaus ‘Automatically Classifying Case Texts and Predicting Outcomes’ (2009) 17(2) Artificial Intelligence and Law: 125–65 and the dissertation of Matthias Grabmair, *Modeling Purposive Legal Argumentation and Case Outcome Prediction Using Argument Schemes in the Value Judgment Formalism* (University of Pittsburgh 2016) <<http://d-scholarship.pitt.edu/27608/>>, accessed 17 August 2021. Nonetheless, in practical applications, the computational intelligence approach is prevalent, because of the possibilities concerning application of the model to the new datasets expressed in natural language.

63 See <<https://www.lawgeex.com/>> accessed 10 May 2021.

64 See <<https://www.rossintelligence.com>> accessed 10 May 2021.

dictions of European Court of Human Rights decisions,<sup>65</sup> or recent predictions concerning domain dispute decisions in the legal framework of WIPO.<sup>66</sup> The abovementioned systems are targeted to perform strictly defined tasks typically restricted to particular domains, but the constant evolution of the ML and NLP technologies creates possibilities for generalizations. In particular, the results obtained in the initial stage of the Lex Rosetta project show that similar, promising results may be obtained in the performance of tasks concerning the segmentation of judicial opinion issues in jurisdictions and drafted in languages.<sup>67</sup>

However, the efficient operation of computational intelligence ML systems in the performance of legal classification and prediction tasks does not mean that their results are readily applicable to solving such legal problems as justifying an opinion, establishing the relative weight of arguments, or explaining why a situation should be regarded as an instance of an abstract concept. Even if the results generated by the numerical model are likely to be evaluated as correct by most professional lawyers, this does not mean that they were obtained along the same line of reasoning that a human lawyer or an idealized Hercules judge would present. The contrary is the case, as the operation of such systems is typically based on dozens, hundreds, or thousands of features captured by a numeric model. Nowadays, one of the most intensively debated topics in AI is its explainability: the possibility of presenting the mechanism of algorithm operations in a manner understandable to humans.<sup>68</sup> As we have noticed above, the symbolic AI models of legal reasoning realize this postulate to a high degree. This does not hold, however, for computational intelligence systems, the level of explainability of which varies across models and is the lowest regarding multi-layered artificial neural networks. The relatively low level of their explainability means that it is difficult, in some cases practically impossible, to answer why the system generated a given result.

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65 Nikolaos Aletras, Dimitrios Tsarapatsanis, Daniel Preotiuc-Pietro, Vasileios Lampos, ‘Predicting judicial decisions of the European Court of Human Rights: a Natural Language Processing perspective’ (2016) 2 *Perrj Computer Science*, e93.

66 L. Karl Branting, Craig Pfeifer, Bradford Brown, Lisa Ferro, John Aberdeen, Brandy Weiss, Mark Pfaff, Bill Liao, ‘Scalable and explainable legal prediction’ (2020) *Artificial Intelligence and Law*, <<https://doi.org/10.1007/s10506-020-09273-1>> accessed 10 May 2021.

67 Jaromír Šavelka, Hannes Westermann and others, ‘Lex Rosetta: Transfer of Predictive Models across Languages, Jurisdictions and Legal Domains’ (*ICAIL 2021: Proceedings of the Eighteenth International Conference on Artificial Intelligence and Law*, São Paulo, 21-25 June 2021) 129-138.

68 See Arrieta and others (n 25).

The problem of the explainability of ML systems gives rise not only to epistemic problems but also to ethical and legal ones. If a system is used as an element of the decision-making process, we should be able to provide transparent reasons for the adoption of such a decision. The lack of such transparency and accountability may lead to (the risk of) legal liability.

These problems led to the emergence of a subdomain of XAI (explainable artificial intelligence) research, namely, the concept of XAILA (explainable artificial intelligence and law).<sup>69</sup> One of the main ideas discussed in this field is to bridge the gap between data-driven numerical ML systems on the one hand and the knowledge-based, symbolic AI systems on the other, and possibly to combine them in hybrid systems.<sup>70</sup> Such systems should aim to balance the performance of computational intelligence systems with the relatively high level of explainability of symbolic models of legal reasoning. One of the approaches represented in this field is to enhance the explainability of ML models by training them based on the data annotated with categories characteristic of the knowledge elements employed in the computational models of legal reasoning, such as legal norms, concepts, premises of arguments, inference links, etc. Such systems could explain their classifications and predictions through the recourse of the features specified in the annotation, which correspond to the intelligible elements of legal reasoning.<sup>71</sup> The concept of combining the ML approach and the symbolic models of reasoning approach has been elaborated at a deep level in the conception of cognitive computing legal apps (CCLA) advocated by Kevin D. Ashley.<sup>72</sup> The CCLA consists of forming legal hypotheses (such as a given set of circumstances that should or can lead to a given result) and then testing them in the environment encompassing the ML model, the computational model of legal reasoning, and the human. According to this approach, legal datasets should be annotated with schemes determined by the structure of computational models of legal reasoning. Therefore, they could serve as the source of premises for the latter models, which would then perform highly reliable reasoning based on valid or at least well-defined inference patterns. It is emphasized that the presence of a human in the loop is essential here, particularly because the set of premises retrieved by the ML models may be imperfect

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69 A series of workshops attached to the JURIX International Conference on Legal Knowledge and Information Systems, in 2018, 2019, and 2020. See <<https://www.geist.re/xailastart>> accessed 10 May 2021.

70 See Atkinson, Bench-Capon, Bollegala, (n 58).

71 See L. Karl Branting and others (n 66).

72 See the extensive elaboration of the idea of CCLA in Ashley (n 285) 350-391.

for various reasons. The reasoning performed by computational models of reasoning may also require verification. The availability of the CCLA could substantially enhance the performance of legal practitioners through the facilitation of data analysis (via the ML component) and ensuring correct reasoning (via the computational model of reasoning). Nonetheless, the tension between the limited rationality of human reasoners and the tendency of computational models of reasoning to rationalize them has its bearing on the ML-based prediction of legal decisions and the CCLA concept. Should we predict an imperfectly reasoned (even erroneous) human decision or the decision of an entity exceeding humans, regarding intellectual capabilities? Moreover, can such capabilities of the human mind as reasonable judgment be well defined in the sense of problem-solving theory?

These questions lead us to the problem of the fundamental dichotomy of ML models on the one hand and the models representing symbolic reasoning and justification on the other. The essence of ML models is that they represent the structure of existing data. Nevertheless, the substantial feature of legal reasoning is its normativity, understood here as the possibility of subjecting any legal claim to critical scrutiny. Irrespective of the existing practice (documented by the available sources), lawyers have the vocation to challenge it by asking whether this practice should be continued. In fact, arguments based on established practices or customs are only one type of argument among many used in legal discourse, and there is an ineliminable tension in legal reasoning between the value of stability and certainty, on the one hand, and flexibility and evolution, on the other hand. These dynamic tendencies may also be recorded in the available data. However, lawyers may also critically assess the character of these dynamics. In addition, in the Anglo-American legal culture where the evolution of case law is constrained by the *stare decisis* principle, lawyers may add dynamics to the evolution of the legal domain through creative distinguishing argumentation or, in certain situations, through arguing for overruling of earlier precedents. In statutory interpretation, this tension is captured by the potential conflict between linguistic arguments and purposive (teleological) arguments. The data-oriented nature of computational intelligence systems causes their inability to capture this normative, or open, character of legal argumentation. As this is a natural feature of these systems, it should not serve as the basis for their critique; it is simply not fit for the purpose of modeling normative aspects of legal argumentation. Contrarily, symbolic AI models of legal reasoning may present a line of argument similar or indirectly translatable to the line of reasoning that could be presented by lawyers in natural language, including the mechan-

isms of the construction of new arguments from the database. Of course, the relevant information must already be stored in the database, and the patterns of inference must be captured by the mechanisms implemented in the program. The limited or lack of ability of symbolic AI systems to generalize beyond available knowledge should not be the basis of critique of these systems. They are simply not fit for this purpose. However, they are designed to represent reliable, valid reasoning from a well-structured set of premises.

Therefore, the CCLA concept aims to draw benefits from the strong sides of both components (ML models and symbolic AI reasoning systems) and simultaneously relate the training process of the former to the elements considered relevant for the latter. Considering the radically different character of both components, the conception is a far-reaching attempt to align their operation. The presence of a human on the loop is an indispensable element of this conception because it is necessary to critically evaluate the input to the reasoning system provided by an ML model and to investigate whether the reasoning performed by the computational, symbolic system does not lead to oversimplifications. The output generated by the CCLA, concerning, for instance, predictions of outcomes, assessments of the strength of arguments, or indications of the relevant existing case law may and should be evaluated by human lawyers who may continue the iterative process by modifying questions posed to the system or proposed hypotheses submitted for verification. Undoubtedly, the development of any CCLA is a complex task, beginning with the preparation of an annotation scheme based on elements relevant to symbolic models of legal reasoning.

Another approach to the design of hybrid applications combining symbolic reasoning and ML-based task solutions can be outlined as follows. Generally, for any legal problem, possible answers may be deliberated, and justifications supporting these answers may be constructed. These alternative justifications could be generated automatically from the database encompassing both general jurisprudential knowledge (types of legal norms and legal concepts, interpretive canons, patterns of inference, catalogues of legally relevant values) and domain-specific knowledge. Then, the alternatives could be tested regarding their resistance to attacking arguments. Such a testing process may, in principle, be realized by the reinforcement learning algorithm, where agents compete to produce the best possible justification of a given legal solution. Then, this solution may be compared to the solution predicted by an ML mechanism trained on textual data. This type of application would also require humans on the loop to critically evaluate the generated justifications. It would also require the develop-

ment of a cross-domain corpus of legal knowledge, a task that was initiated decades ago but still requires extensive international and interdisciplinary collaboration.<sup>73</sup>

#### 4. Conclusions

The LegalTech community should become aware of the achievements of AI and law research, including the identified limitations of approaches and the obstacles hindering the wider practical application of some prototypical systems. This direction of information flow should enable LegalTech to avoid reinventing the wheel and to increase awareness of the complexities related to legal knowledge representation, legal reasoning, and models of classification and prediction. Neither is it the case that the symbolic AI tools at our disposal match the complexity of actual legal justificatory reasoning; nor does it hold that the application of ML tools, including NLP, can always lead to reliable, replicable, practically useful, and theoretically well-founded results. Yet, the legacy of almost five decades of AI and law research provides a firm foundation for the development of new types of legal applications, including the CCLA briefly commented on above. If LegalTech embraces this legacy, it may avoid entering dead ends, concerning, for instance, knowledge acquisition bottlenecks, computational tractability problems, or undue simplifications in both knowledge engineering and developing data mining models. The complexity of legal reasoning has not been completely accounted for in AI and law research. While the theoretical foundations thereof need continuous development, LegalTech should at least become aware of the problems that already have a computational implementation, such as procedural aspects of argumentation, reasoning with burdens and standards of proof, aspects of case-based reasoning, or theory construction based on the notion of coherence.

Problems related to AI's understandability, explainability, transparency, and eventually trustworthiness pose particularly pressing problems, as apparently a major part of LegalTech solutions are based—for reasons of performance level and scalability—on ML models. The developers and users

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73 In this chapter we focus on AI applications in connection with judicial decision-making and legal argument. One of the fields of AI application in the context of law, which we have not discussed here, but which is definitively worth mentioning, also due to its interdisciplinary character, is the support of dispute resolution. See John Zelezniak, 'Using Artificial Intelligence to provide Intelligent Dispute Resolution Support' (2021) 30 Group Decision and Negotiation 789–812.

of these systems should become aware of the state of debate concerning explainable AI and law and the conceptions concerning the relationship between the explanation of the algorithms' operations and the justificatory argumentation representing the reasons for accepting a given conclusion. This debate is far from concluded, and its practical importance is enhanced by the regulatory actions undertaken by EU authorities and related debates concerning the ethics of AI use and operations.<sup>74</sup> The LegalTech community should also recognize problems concerning the normative and open character of legal argumentation, which remains in tension with the data-driven approach characteristic to ML models. In this connection, it is worth analyzing for LegalTech developers where and how the role of the human reasoner is placed in the new conceptions advanced in AI and law, such as the idea of the CCLA.

The above comments are not intended to imply the informational flow between AI and law and LegalTech should be unidirectional. The contrary is the case: The practical approach of the latter may provide very valuable empirical input for the former, especially on the level of identifying the actual needs of legal practice and the processes of evaluating prototypical solutions. The LegalTech sector provides a platform for large-scale experiments of the tools and solutions that may be elaborated on the basis of or already available in the results of AI and law research. Moreover, the availability of large datasets in settings relevant to LegalTech enables the development of more realistic and generalized models, both in the field of modeling legal reasoning and computational intelligence for legal classification and prediction.

I am convinced that the actual progress of LegalTech research and applications toward enhancing the performance of actual legal problem solving involves the adoption of a more comprehensive, interdisciplinary approach. As noted, although part of AI and law research is grounded in legal-theoretical work on legal reasoning, a much more intensive, bidirectional flow of information is needed between these two fields. If such communication is absent, research on AI and law focuses on the formal

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<sup>74</sup> See for instance the Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), <<https://ec.europa.eu/newsroom/dae/items/709090>> access 10 May 2021 and the earlier documents: Ethics Guidelines for Trustworthy Artificial Intelligence, <<https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai>> access 10 May 2021 and Framework of ethical aspects of artificial intelligence, robotics and related technologies, <[https://www.europarl.europa.eu/doceo/document/TA-9-2020-0275\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0275_EN.html)> access 16 March 2021.

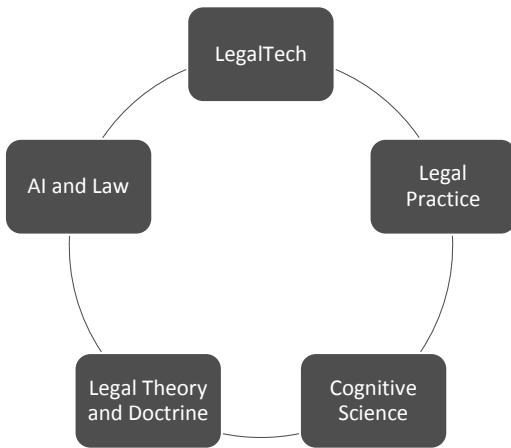
and computational aspects of the developed models, leaving the specificity of legal reasoning and, generally, the performance of legal tasks in the margin. This results in the development of (overly) idealized models or in the decreased understandability of models for the lawyers. A more intensive flow of information is needed both on the level of general jurisprudence (theories of legal validity, interpretation, applications of law, etc.) as well as on the level of doctrines related to domains of law. Conversely, legal theory should become more aware of the nuanced character of AI and law research, which should not be inadequately equaled with a revival of “mechanistic jurisprudence.”

However, to contribute to the more realistic computational models of legal reasoning, legal theory should become more integrated with the interdisciplinary field of studies on mind and cognition, that is, cognitive science.<sup>75</sup> The research area referred to as *cognitive science and the law* has attained important status in the legal–philosophical landscape, analyzing, for instance, the role of heuristics and biases in legal reasoning. Nevertheless, a significant part of the work still needs to be done, especially in the sphere of theorizing about legal reasoning in terms of mental representations and the operations performed on them. Such research may lead to a better understanding of legal concept acquisition and formation, the actual patterns of legal rule-based and case-based reasoning, as well as the relationship between the intuitive, fast system of the mind and the slow, deliberative system. The theoretical and empirical results in this field could provide feedback to both legal theory and AI and law to finally inform LegalTech about the structure of the models effectively supporting or simulating legal thinking.

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<sup>75</sup> This direction has been already elaborated in Giovanni Sartor, *Legal Reasoning*, (Springer 2005), however it definitively needs further, interdisciplinary investigations.

*Figure 1. Model of information flows between the “nearest neighbor” areas.*



The figure presented above indicates the “nearest neighbor” relationships between the indicated areas; it is presumed here that the bidirectional flow of information is perhaps the most natural between these pairs due to the overlap of conceptual schemes or shared aims. However, the direct flow of information is possible between each pair of these fields. The main subject of this paper is the possible influence of AI and law on LegalTech. Nonetheless, as noted, the opposing direction of impact is also possible and potentially fruitful. LegalTech is most naturally oriented toward providing results for legal practice. Cognitive science has occupied an important position as a subfield of contemporary legal theory, and as an empirically oriented research area, it also concerns realities of legal practice, especially through psychological investigations. AI and law research has been partially rooted in the contributions of legal theory (and domain doctrines), but as discussed, this mutual link should be strengthened to benefit the quality of LegalTech applications, and for the sake of development of AI and Law solutions which would serve the society best.<sup>76</sup>

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<sup>76</sup> See Bart Verheij, ‘Artificial intelligence as law. Presidential address to the seventeenth international conference on artificial intelligence and law’ (2020) 28 Artificial Intelligence and Law 181-206.



# Computer Aided Legislation

Wojciech Cyrul

## 1. Introduction

The effective creation and accessing of legal texts in electronic format require the development and implementation of dedicated IT tools. These tools not only make possible the publication and accessing of the official texts of legal acts on the web, but also open up entirely new possibilities for the management of legislative processes and the information processed in them. The digitization of legal acts and other normative texts is also stimulating the development of public and private electronic legal information systems and highlights the importance of new technologies in the creation, accessing, retrieval and visualization of legal information.

The new possibilities offered by technological innovation in law-making have not only given rise to the phenomenon of e-legislation, but also laid the foundations for a new technical paradigm of thinking about the law - "Law as code"<sup>1</sup>. The widespread use of IT tools in the creation and accessing of law also means that more and more initiatives are being launched that highlight the new potential of the electronic text format in these areas. Examples include the automated consolidation of the texts of legal acts<sup>2</sup>, the automated translation of regulations<sup>3</sup>, and the development of systems that allow for the automation of legal information retrieval<sup>4</sup>,

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1 Samer Hassan and Primavera De Filippi, 'The Expansion of Algorithmic Governance: From Code is Law to Law is Code' (2017) 17 Field Actions Science Reports.

2 Spinoza P. L., Giardiello G., Cherubini M., Marchi S., Venturi G., Montemagni S., 'NLP-based metadata extraction for legal text consolidation' (Proceedings of the 12th International Conference on Artificial Intelligence and Law, ACM, Barcelona 2009); Monica Palmirani, 'Legislative Change Management with Akoma-Ntoso' in G. Sartor and others (eds), *Legislative XML for the Semantic Web. Principles, Models, Standards for Document Management* (Springer 2011).

3 Atefeh Farzindar and Guy Lapalme, 'Machine Translation of Legal Information and Its Evaluation' in Nathalie Japkowicz and Yong Gao (eds) *Advances in Artificial Intelligence* (Springer 2009).

4 Jacek Petzel, *Systemy wyszukiwania informacji prawnej* (Wolters Kluwer 2017).

the automation of legal references<sup>5</sup> as well as new computer-aided methods for connecting and visualizing dispersed legal information<sup>6</sup>.

Understanding the evolution of law-making and law-sharing processes brought about by information technology (IT) requires interdisciplinary research. The use of IT in the processes of creating and accessing the law has led to multifaceted changes in the traditional practices of preparing, writing, storing and accessing legal texts, as well as in their retrieval, reading, interpretation and application. These changes require users to acquire and develop new skills as well as understand how new technologies work, including in particular in the ways in which they affect or can influence perceptions, assessments, preferences, choices, decisions and behaviours. Thus, the primary issue we are facing now is not so much the limits of the application of information technology in legislative practice, but rather the consequences of the implementation of new information tools in the creation and accessing of the law. Since a comprehensive analysis of such a wide-ranging problem goes far beyond the scope of this text, and the analysis below will focus solely on the role that IT plays in contemporary processes involving the drafting of legal texts in electronic format, the technical conditions regulating the computerization and algorithmization of legal texts as well as their on-line publication. It is on this basis that the concept of machine consumable legislation will be presented, assuming the incorporation of legal rules into the architecture of electronic systems with the aim of automating the activities described in the regulations<sup>7</sup>.

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5 Franciszek Studnicki, Andrzej Łachwa, Jarosław Fall and Ewa Stabrawa, *Odesłania w tekstach prawnych. Ku metodom ich zautomatyzowanej interpretacji* (ZNUJ 1990); Emil de Maat, Radbout Winkels and Tom van Engers, ‘Automated Detection of Reference Structures in Law’ in Tom M. van Engers (ed) *Legal Knowledge and Information Systems* (IOS Press 2006).

6 See also Wojciech Cyrul and Tomasz Pełech – Pilichowski ‘*Legislating in Hypertext*’, (2020) 118 OSAP 27; Janusz Opila. and Tomasz Pełech-Pilichowski, ‘Visual Analysis of Similarity and Relationships Between Legal Texts’ (43rd International Convention on Information, Communication and Electronic Technology -MIPRO, 2020).

7 See also Matthew Waddington, ‘Machine-consumable legislation: A legislative drafter’s perspective – human v artificial intelligence’ (2019) 2 The Loophole - Journal of Commonwealth Assoc of Legislative Counsel.

## *2. The Role of Technology in the Drafting and Accessing of Legal Texts*

Although the first attempts to use computer systems when amending the law date back to the mid-twentieth century, information technology was initially limited to the task of remedying the legislative crisis caused by the steady increase in legal texts, such as acts and case law, that was beginning to overwhelm many Western countries. Since both an efficient state administration and economic growth depend on fast, cheap, easy and safe access to applicable laws, it is not surprising that despite initial teething problems, private and public systems of legal information began to emerge from the end of the 1960s onwards. The first public solutions of this type were two American systems – LITE (Legal Information Thru Electronics) and JURIS launched in 1972. The first European system of this type was the CREDOC (Center de documentation juridique), which was launched in September 1969 and made legal information available to every Belgian lawyer in all areas of law. Other initiatives from this period include the German JURIS system, ITALGIURE-FIND in Italy and Legifrance in France, which replaced the CENIJ (Center de recherches et développement en informatique juridique) service first launched in 1970. Providing access to legal information was also the motive behind the development of legal information systems in Poland. Work on the country's Central Register of Normative Acts (CRAN) began as early as 1974, and this system later provided the basis for the Internet System of Legal Acts, now available on the website of the Chancellery of the Sejm of the Republic of Poland.

To make printed legal texts available in electronic legal information systems, they first had to be scanned using OCR (Optical Character Recognition) technology. However, with the popularization of personal computers and the development of various computer applications, including word processors, electronic databases and related search systems, draft texts of legal acts begin to be prepared in electronic format.

The role of information technology in the creation and sharing of law was further enhanced with the advent of the Internet for general use. Thanks to the development and general availability of WWW architecture, users of computers operating in graphic mode (X-Windows, Apple Macintosh, MS Windows) gained simple access to all published web resources. What is more, thanks to the launch of search engines, they also acquired the ability to search web resources effectively without the need for advanced IT knowledge. This way, space was created for the development of public and commercial legal information services. However, it is important to bear in mind that even in the 1990s and at the beginning of the 21st century, the texts of legal acts were published in HTML as files in

PDF or in other formats that only allowed them to be downloaded or viewed on the web. Only later were the texts of legal acts published in formats specially designed for legal documents, enabling not only advanced searches for such texts, but also the automation of their management and amendment. At the same time, from the very outset the specifications of digital formats were either tools developed by commercial companies or were created by public entities for their own needs, or were developed as an open standard, as was the case with Akoma Ntoso or LegalDocML.

The application of IT in the creation and accession of law has required the implementation of new solutions to ensure data security, both in terms of safeguarding the integrity of already published texts of legal acts as well as the texts of legal acts currently being drafted in the legislative process. Technical solutions are also largely entrusted with the task of ensuring the authenticity and accessibility of the texts of legal acts on the web. In particular, they are responsible for guaranteeing the integrity of legal texts, both at the database level and in their presentation, both at the legislative stage and when laws are published. IT solutions prevent, inter alia, alterations being made to the content of a document by unauthorized persons, errors occurring in the dating or versioning of individual documents, unauthorized changes to their format, inconsistencies between a presented and stored text, changes in semantic relations and changes in the syntax of the source file.<sup>8</sup>

When discussing the role of technology in the creation and accessing of the law, it is also important to note that ensuring data security required the use of different technical solutions in situations where the text of a legal act was made available in the form of a coherent, non-editable file in .Pdf format, available only for reading or download, and other solutions when the content of a legal act was generated on the basis of data selection and aggregation. In the first case, authenticity and security is ensured, on the one hand, by using the appropriate file format and software necessary to read it, and, on the other, by signing the document with a qualified electronic signature. In the latter case, providing data security is a much more complicated issue and depends to a large extent on the hardware and software infrastructure used. In both cases, however, the technological conditions for ensuring data transmission security must be taken into account. This requires not only the use of effective cryptographic solutions

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<sup>8</sup> Wojciech Cyrul, Jerzy Duda, Janusz Opila and Tomasz Pełech- Pilichowski, *Informatyzacja tekstu prawa. Perspektywy zastosowania języków znacznikowych*, (Wolters Kluwer 2014).

and key certification, but also the application of elementary security conditions for safe transmission, such as the use of packet filtration systems, intrusion detection systems and secure communication between resources, for example via dispersed database servers<sup>9</sup>.

### *3. Computerization of the Texts of Legal Acts*

From the perspective of the legislative process, WWW architecture has contributed to a paradigm shift in the way law is published and accessed on a level similar to the digitization of legal information. The use of the Internet in the law-making process has resulted not only in the proliferation and diversification of our sources of knowledge of law on an unprecedented scale, but it has elevated the role of private and public legal information systems, such as ISAP, LEX and Legalis. Moreover, a number of tools have also been specially devised to support the work of legislators and facilitate the publication of legal texts on the Internet. Besides the above-mentioned editors legal acts, such as the Polish EDAP and EAP Legislator, the Italian xmLeges<sup>10</sup>, the Dutch MetaVex<sup>11</sup>, or the American LegisPro, modern e-legislation systems, have also been developed which include not only editors supporting the preparation of the text of a legal act as well as services responsible for the electronic promulgation of approved legal acts, but also comprehensive systems managing all information flow (workflow) in the legislative process. One model example of such a solution is E-Recht, which was developed in Austria<sup>12</sup>.

Any analysis of the ongoing computerization of the law-making process must take into account the importance of public on-line consultation systems in draft legal acts. Such solutions have been successfully launched,

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9 ibid 147.

10 Tommaso Agnoloni, Enrico Francesconi, Pierluigi Spinoza, ‘xmLegesEditor: an OpenSource Visual XML Editor for supporting Legal National Standards’ in *Proceedings of the V Legislative XML Workshop* (European Press Academic Publishing 2007).

11 Saskia van de Ven, Rinke Hoekstra, Radboud Winkels, Emile de Maat, and Ádám Kollár , ‘MetaVex: Regulation Drafting meets the Semantic Web’, in Pompeu Casanovas and others (eds) *Computable Models of the Law* (Springer 2008).

12 For more on this topic, see Brigitte Barotanyi, ‘E-Recht: Law Making in a Contemporary Way’ (2007) 1 Masaryk University Journal of Law and Technology 355.

for example, in Greece, Lithuania, Luxembourg, Portugal and Hungary<sup>13</sup>. This shows that IT not only helps enhance the rationality and effectiveness of legal regulations, but also enables the creation of platforms promoting political debate and public consultations when issuing opinions on draft legal acts. Unfortunately, a planned Polish version of this type of system, initiated in 2012 by the now defunct Ministry of Economy, is currently not being supported by the Ministry of Development, Labour and Technology.

Despite the widespread use of IT in both the creation and application of the law, there is still insufficient knowledge among users with regard to how much the development, accessing and retrieval of reliable and relevant legal information depends on the application of specific standards for encoding and decoding information in a way that enables such information to be processed by machines. Failure to apply such standards may not only prevent access to information, but also affect its authenticity or integrity. Technical standards determine, among other things, the capability and methods of combining different information, as well as the ways used to describe the structure, content and displaying of individual documents. That is why it is so important that the standards used to create and access legal information are not only of a high quality but are also open in the broad sense of the term. This means, among other things, that they should be publicly accessible and understandable, as well as ensure the development and adaptation of such information to future needs. Moreover, their use should not be restricted by intellectual property rights<sup>14</sup>.

The establishment of uniform technical standards has resulted in the progressive standardization of the formats used for electronic documents containing legal information. This, in turn, has enabled in practice the automation of certain activities in the legislative process, e.g., automatic standardization of the texts of legal acts<sup>15</sup>. Thanks to these developments, it has also been possible to implement projects in the field of law based

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13 High Level Group of Independent Stakeholders on Administrative Burdens, *Europe can do better. Report on the best practice for implementing EU legislation in Member States in the least burdensome way* (European Commission, 15 November 2011).

14 See. Fabio Vitali, 'A Standard-Based Approach for the Management for Legislative Documents' in Giovanni Sartor and others, (eds) *Legislative XML for the Semantic Web. Principles, Models, Standards for Document* (Springer 2011).

15 See also Wojciech Cyrul, 'Tekst jednolity aktu normatywnego w formacie elektronicznym. W kierunku automatyzacji procesu ujednoliciania tekstów prawnych' in Marzena Laskowska (ed) *Znaczenie wyroków Trybunału Konstytucyjnego dla tekstu jednolitego ustawy* (Wydawnictwo Sejmowe 2017).

on the idea of the semantic web. The latter term is usually understood as a heteronomous set of numerous formal statements about the content of the web and the world expressed in XML-based syntax and written using an ontology in a machine-readable format<sup>16</sup>.

The development of legislative systems based on the semantic web has been paralleled by attempts to promote the idea that legal information made available on the web should be processed not only at the level of individual characters in a text, but also after taking into account the structure of legal texts and the concepts contained therein.<sup>17</sup> In other words, the purpose of the semantic web is to enable machines to process information contained in the texts of legal acts not only at the structural level, but also semantically, while maintaining determinism of action.<sup>18</sup>. Moreover, this concept is based on the assumption that any device or tool should be able to access the network, and, more importantly, that the quality of the solutions used should inspire users' trust. This means that these solutions should be safe and predictable in operation and should protect the privacy of the individuals who use them. Such an effect is possible thanks to the development and implementation of appropriate technological standards. Some of these already exist, while others are still in the preparatory or introductory stage. The first category includes, in particular, standards enabling the uniform representation of any graphic symbol based on alphanumeric codes, standards that ensure the unambiguous identification of objects available on the web, and standards that enable document structuring. Examples of the former include in particular: ASCII ISO / IEC 646, ISO 8859, EBCDIC, Windows-1250 and Unicode. Examples of the second are URI (*Uniform Resource Identifier*), URL (*Uniform Resource Locator*) and IRI (*Internationalized Resource Identifier*), URN:Lex (*Uniform*

- 16 Joost Breuker, Pompeu Casanovas, Michel C.A. Klein, Enrico Francesconi, 'The Flood, the Channels and the Dykes: Managing Legal Information in a Globalized and Digital World' in Joost Breuker, Pompeu Casanovas, Michel C.A. Klein, Enrico Francesconi (eds), *Law, Ontologies and the Semantic Web. Channeling the Legal Information Flood* (Amsterdam 2009).
- 17 This is possible thanks to the use of markup languages such as XML, OWL or RDF. The XML language or its variants allows machines to recognize individual elements of a text's structure, and thus, for example, distinguish between a title and a paragraph or article, and languages such as OWL and RDF allow a machine to analyse a text in terms of its conceptual structure, and thus support or monitor the correctness of a user's actions.
- 18 The latter requirement significantly limits the use of fuzzy algorithms in the field of law, and it also imposes significant restrictions on systems using Artificial Intelligence (AI) or Machine Learning (ML) in this area.

*Resource Name:Lex), ECLI (European Case Law Identifier) as well as ELI (European Legislation Identifier.)* Examples of standards make it possible to present the formal structure of legal texts in a way that allows for their automatic processing by machines, taking into account the meaning of statements about specific objects and their features, in particular XML, RDF, OWL, or standards specially designed for legal documents, such as, e.g., FORMEX, MetaLex, Akoma Ntoso, and LegalDocML. Standards ensuring the confidentiality, authenticity, integrity and certainty of information have also been developed and introduced. On the other hand, work is still underway on creating adequate legal ontologies, such as the LKIF, which would make it possible to provide a description of legal concepts and the relationships between them in a way that would allow machines to make complex inferences, take evidence and conduct conceptual analyses.

Bearing the above in mind, however, it should be remembered that the use of new IT tools to develop, process and publish legal texts in electronic form makes possible the automation not only of specific legislative activities, but also activities related to the provision, retrieval and application of legal information. At the same time, while the scope and possibilities of automation in this area were originally directly connected with the development of Knowledge Representation Languages (KRL) and efforts to find a way of representing legal information that is machine applicable, at the present time the majority of research has rejected this paradigm and focused instead on attempts to use Big Data and Machine Learning technologies for the purposes of creating and applying the law<sup>19</sup>. Although the new approach has great potential, it is worth recalling that it was KRLs, such as Lisp<sup>20</sup>, Smalltalk<sup>21</sup>, and above all Prolog<sup>22</sup>, that paved the way for legal knowledge to be represented in a form that allows machines to take into account the content of legal provisions. What is more, it is their limited usefulness in this area that was one of the factors behind the search for, and development of, new methods and architectures for inference systems capable of taking into account the semantic dimension of legal texts, such

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19 Zódi Zsolt, ‘Law and Legal Science in the Age of Big Data’ (2017) 3 *Intersections*. EEJSP 69; Harry Surden, ‘Machine Learning and Law’ (2014) 89 *Washington Law Review* 87.

20 Jacek Martinek, *Lisp – opis, realizacja i zastosowania* (Wydawnictwa Naukowo-Techniczne 1980).

21 Johannes Brauer, *Programming Smalltalk – Object-Orientation from the Beginning*, (Springer Vieweg 2015).

22 Robert A. Kowalski, ‘Legislation as Logic Programs’ in Zenon Bankowski and others (eds.), *Informatics and the Foundations of Legal Reasoning* (Springer 1995).

as, for example, case-based reasoning, agent systems or network services (SOA). The limitations of universal languages also meant that efforts were made to find alternative ways of writing legal knowledge. These steps, in turn, resulted in the development of dedicated solutions, such as the above-mentioned LKIF (Legal Knowledge Interchange Format), based on the OWL2 language and Argumentation Context Systems)<sup>23</sup>.

#### *4. Machine Consumable Legislation*

The idea of machine consumable legislation (MCL) is closely connected with the issue of using IT to increase legal certainty and effectiveness. Simply put, it comes down to the task of "incorporating" legal rules in digital reality. As a consequence, this strategy involves creating action space for individuals in such a way as to prevent behaviour inconsistent with certain rules. For obvious reasons, a similar approach is now quite common in business processes, where both the number, type, time and effects of activities performed by individuals can be strictly determined, controlled and supervised by a functioning information system. We can thus risk arguing that the above-presented approach is essentially based on the creative combination and transfer to the public sphere of two relatively well-known technical solutions, i.e., systems with progressive rules and markup languages that allow machines to recognize the structure and content of electronic documents. In the case of MCL, we are dealing not so much with new technology as with a new approach to creating and accessing law. It assumes the parallel preparation of draft texts of legal acts in natural language and software, which will operate in accordance with the provisions contained within them, which will be written in computer languages<sup>24</sup>. This approach thus postulates exploiting the enormous potential of publishing and accessing legislation in a contemporary electronic format, especially given the fact that nowadays legal acts are not only prepared with the use of text editors and saved in formats that allow them to be accessed online, but also as they are available in machine-readable formats.

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23 Rinke Hoekstra, Joost Breuker, Marcello Di Bello, Alexander Boer 'LKIF Core: Principled Ontology Development for the Legal Domain' (2009) 188 *Frontiers in Artificial Intelligence and Applications* 21.

24 cf Waddington (n 8) 23 ff.

In contrast to the semantic web, the MCL concept is not limited to the task of drafting legal texts in a machine-readable way, but also involves state authorities creating and sharing legally functioning software. The main purpose of such a solution is neither to enable users to find relevant legal information more easily, nor to automate the process of standardising the texts of legal acts, but rather to provide addressees of the law with software that will legally determine the consequences arising from specific circumstances specified in the law.

Despite appearances, the idea itself is not that revolutionary. In practice, public authorities currently use software for their internal needs, automating certain processes in accordance with legal requirements. Programmes of this type are used nowadays, for example, to calculate tax liabilities or pension rights<sup>25</sup>. The novelty of the discussed approach lies solely in the fact that the coded version of the law would be created by state authorities or at their request in parallel with the drafting of the text of a new legal act, and it would be publicly available to all interested entities, and not only to state offices and departments<sup>26</sup>.

There is no doubt that this approach has many advantages. Certainly, creating and ensuring access to a coded version of a legal act along with the text of the legal act will reduce the risk of errors that may arise in its absence, when the coming into force of a new law will require computer program developers to adapt to its requirements. Moreover, the availability of such a version would also make it possible to effectively test various solutions considered during the legislative process and to automatically check the consistency and completeness of a legal text. However, it remains an open question as to how and with what tools the coding process itself should function. Another important issue is to determine both the legal consequences of using such tools and their legal status. And although advocates of this approach also see it as an opportunity to introduce more "digitally friendly" legislation, it should not be forgotten that the broader application of this concept may require adapting the language of the law to the needs of computer systems. Moreover, given the political conditions shaping legislative processes, the expenditure incurred in creating coded versions of the texts of legal acts and the specific status of the law, there is little reason to believe that the above-discussed approach will become popular in the near future.

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25 Giovanni Sartor, 'Legislative Information and the Web', in Giovanni Sartor and others (eds) *Legislative XML for the Semantic Web* (Springer 2011).

26 Cf Waddington (n 8) 26.

### *Conclusions*

The above reflections lead to the conclusion that changes in the traditional paradigm of creating and publishing the law have been accompanied by the increasing role of IT in the legislative process. The fact that most countries now produce and make accessible legal texts in electronic format is due to the fact that common national and international technical standards have been developed and implemented to make this possible. It is also important to aware that the quality and efficacy of creating and making accessible legal texts in an electronic format directly depends on the availability of appropriate tools supporting the work of legislators. Nowadays, it is difficult to imagine a modern legislative process without the existence of specially designed text editors for legal acts, converters, name servers, validators, e-legislation platforms, electronic consultation systems and many other tools facilitating the general management and publication of electronic documents.

The increasingly vital role that IT plays in the creation and application of the law is also a consequence of the common belief that it is an effective means of counteracting the crisis brought on by the spiralling number of legal texts. As a result, computerization is one of the main strategies for rationalizing and optimizing the legislative process. Contrary to, for example, deregulation, computerization cannot halt the phenomenon of legal inflation. On the contrary, it can be reasonably argued that it will further accelerate the accumulation of legal provisions. This is due to at least two factors. First of all, the growing importance and universality of IT has resulted in a need to regulate the principles of their creation and application. Secondly, this trend is altering the preferences of users who increasingly expect access to detailed, precisely formulated rules that ensure satisfactory regulation of strictly defined situations. Bearing in mind the fact that IT tools enable the fulfilment of these expectations, and at the same time allow lawmakers control over a constantly growing body of legal information, it should be assumed that their role in the legislative process will continue to expand. Although this fact may be a justified cause of alarm, it is important to recall that the IT tools currently available make possible the creation of platforms for promoting political debate and more productive public consultations when issuing opinions on draft legal acts. Moreover, electronic systems improve access to legal information, while at the same time guaranteeing its integrity and security. They also enhance the transparency, effectiveness and responsiveness of legislative processes, ensuring that a legal system can adapt rapidly and in a controlled fashion to changing social and economic conditions. In other words, in modern-

*Wojciech Cyrul*

day countries IT has emerged as an important element in mechanisms safeguarding quality and legal certainty in practice.

# Two Sides of the Same Coin. Possible Interactions Between Text-written Law and Computer Code in the Near Future

*Patryk Ciurak*

## *1. Introduction*

Even though it is already the third decade of the 21st century, digitalization has touched and transformed almost every part of our lives, and the Internet has become the equivalent of mankind's nervous system, the law has not changed its form. The words that form sentences written in a specific legal language still regulate the life and functioning of societies, and their interpretation allows different meanings to be attributed to seemingly identical expressions. Alongside this established order, which is based on the human understanding of justice, a completely different, parallel reality has grown up, where the prevailing language is computer code. With increasing computerization, the code has come to describe various aspects of human activity, regulating them more efficiently than the law due to its unambiguous expressions and speed at which it is executed. However, the same features pose a problem when reality changes. This is when the law prevails (if it has been well designed), providing sufficiently flexible and interpretable rules of conduct. According to M. Hildebrandt, this is the main advantage that law (written in natural language) has over regulations written in computer code.<sup>1</sup>

The consequence of the dualism described above is the existence of countless computer systems regulating our reality and influencing our

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1 ‘The rule of law, understood as an institution ensuring that nobody is above the law, while offering sufficient foreseeability as well as contestability, requires legal norms that build on the open texture of natural language, avoiding both the over- and under-inclusiveness of disambiguated computer code. For now, that means we should foster the adaptive nature of text-driven law before exchanging it for the code-driven nature of computational law. It also means that we should welcome computational technologies that contribute to challenging legalism, authoritarian rule by law and arbitrary rule by those in power.’ Mireille Hildebrandt, ‘The adaptive nature of text-driven law’ (2021) 1(1) Journal of Cross-Disciplinary Research in Computational Law <<https://journalcrcl.org/crcl/article/view/2>> accessed 26 April 2021.

lives. Their creation was made possible, among others, by the translation of law into computer code. However, the rules of translation are not formalized anywhere, and it is not the legislator who decides on the final implementation of the law, but the programmers responsible for developing the code. Because of differences in design, systems are often incompatible with each other, even though they operate under the same law. Their maintenance also generates significant costs as there is no single source of truth that would provide an official version of code representing the current law. A possible solution to this problem may be the application of artificial intelligence that could apply the text-written law. However, whether one is thinking about contract analysis, similarity searches, or predictive analytics outcomes, at the heart of all these problems (and a few more) is the fact that computers do not understand the law written by humans and for humans to be interpreted and applied. To achieve a real fusion of the two realities - legal and IT - the law should evolve into two forms existing in parallel: rules written in natural language and computer code.

When we refer to the law in the form of computer code this can be attributed both to machine-*readable* legislation as well as legislation that is de facto a computer program ready to be executed and thus to produce legal or factual effects - machine-*consumable* legislation.<sup>2</sup> Both forms are already widely used, although only in the case of machine-readable legislation is this evident: various normative acts are being promulgated in form of .xml or .pdf files or presented in legal databases. Machine-consumable legislation, on the other hand, is a mapping of the applicable law in the code of the aforementioned applications and systems used to support the processes of law enforcement, e.g. by public administration. Importantly, while the promulgation of a normative act in electronic form may be the result of an official legal procedure (as it is in Poland)<sup>3</sup> machine-con-

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2 Accident Compensation Better Rules Discovery Team, ‘Exploring Machine Consumable Accident Compensation Legislation. Lessons for a structural rewrite of the AC Act and opportunities to make it machine consumable’ (The Service Innovation Lab, 1 July 2019) 18 <[https://serviceinnovationlab.github.io/assets/Exploring\\_Machine\\_Consumable\\_Code\\_With\\_ACC.pdf](https://serviceinnovationlab.github.io/assets/Exploring_Machine_Consumable_Code_With_ACC.pdf)> accessed 30 January 2021 ; James Mohun and Alex Roberts, ‘Cracking the code. Rulemaking for humans and machines’ (2020) 40 OECD Working Papers on Public Governance 5 <<https://doi.org/10.1787/3afe6ba5-en>> accessed 5 February 2021.

3 The obligation to promulgate a legal act in electronic form established in Article 2a of the Act of 20 July 2000 on the promulgation of normative acts and certain other legal acts (Journal of Laws of The Republic of Poland of 2019, item 1461).

sumable legislation is, in general, created by private entities without any general rules regulating the process of law-making.

In the following paper, the law existing simultaneously in the form of text and computer code will be referred to as Rules as Code (hereinafter RaC)<sup>4</sup>. Following the systematic proposed by M. W. Wong, RaC referred to in this paper will correspond to solutions placed at level 3 or level 5<sup>5</sup> which makes them similar (to a certain degree) to the concept of a smart contract.<sup>6</sup> Furthermore, the possibility of immediate execution from the moment the RaC is created has to be considered as a constitutive feature, which is another point in common with the smart contract. Human intervention should be limited only to the introduction of certain values (if they cannot be obtained from other sources) or the final approval of the proposed ruling.

The aim of the paper is to consider the possible mutual influence that code and legal text may have in the near future. Without a doubt, the development and execution of code will be influenced by the rules of working with legal text, while the process of drafting the law in natural language can be improved by the application of selected code development practices. This paper explores the possibility to automate certain phases of legal interpretation with computer code as well as adopting software testing practices to ensure the quality of legal drafting. The final effect

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4 The term Rules as Code has also been adopted in papers: Meng Weng Wong, ‘Rules as code – Seven levels of digitisation.’ (Research Collection School Of Law, April 2020) <[https://ink.library.smu.edu.sg/sol\\_research/3093/](https://ink.library.smu.edu.sg/sol_research/3093/)> accessed 17 April 2021 and Mohun and Roberts (n 2).

5 In his paper *Rules as code - Seven levels of digitisation*, M.W. Wong discusses the levels of representation of law by code. Level 3 solutions consist of three layers: rules - natural language sentences, translation of rules into a form understandable by IT systems, and a rule engine which task is to perform the above. The solutions allow (supposedly) users without programming knowledge to edit the rules, while not forcing changes to the code on the engine side. Level 5 involves parallel creation of provisions in the form of natural language and code. However, the natural language text is created from the code (rather than the other way around, as might be expected) and, depending on the sophistication of the system, may require tweaking by the legislator. It should be emphasised that the code version of legislation can be considered as an authentic text on a par with the natural language version or can even fully replace it. *ibid.*

6 A detailed description of the smart contract is provided by Dariusz Szostek, *Blockchain and the Law* (1 ed., Nomos 2019) 110-35.

should present the same meaning whether it comes to text-written law or code, which is referred to as isomorphism.<sup>7</sup>

## 2. Interpretation of Law and Interpretation of Code

Ensuring isomorphism seems to be the biggest challenge standing in the way of widespread use of RaC. Text and code must present the same information, while the way they are decoded is significantly different. Pointing out the most obvious differences (and at the same time simplifying somewhat): a legal text is subject to interpretation, while a code is (in general) unambiguous. Interpretation of a text should aim at realizing a notion of justice that is difficult to define precisely, whereas a code aims at realizing some specific goal. The code is just executed, taking inputs, transforming them, and generating outputs without referring to external axiology (moral or other). Legal language deliberately uses vague or discretionary terms, primarily to ensure an appropriate level of flexibility in the law. Meanwhile, the code should be unambiguous (as mentioned above), functioning within a certain well-defined framework. Finally, the interpretation of the text and the application of the norms are separated by a certain time interval (more or less), while the code is executed and has legal effects in principle immediately; there is no so-called hermeneutic gap, which allows for the assessment of the adequacy of the norms and the possible suspending of their implementation.<sup>8</sup>

Is it therefore possible for the law to function in the form of a code? The analysis of the problem may begin with considering what kind of regulations may take the form of a computer code? J. Mohun and A. Roberts<sup>9</sup> point to prescriptive rules, which are mostly unambiguous and thus do not require much interpretation. Moreover, they should be used frequently and by a large number of entities, and their functioning in the form of a code will bring specific, measurable benefits (e.g. reduction of the business costs).<sup>10</sup> Moreover, authors repeatedly refer in their publication to services

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7 Trevor J. Bench-Capon and Frans P. Coenen, 'Isomorphism and legal knowledge based systems.' (1992) 1 Artificial Intelligence and Law 65.

8 cf Laurence Diver, 'Digisprudence: the design of legitimate code.' (LawArXiv Papers, 14 July 2020) <<https://doi.org/10.31228/osf.io/nechu>> accessed 18 March 2021.

9 Mohun and Roberts (n 2) 92.

10 This last feature is not substantive and seems to have been added mainly to economically incentivise actors to implement RaC.

provided to i.e. citizens as the possible subject of regulation. Thus, RaC is supposed to improve the satisfaction of standard needs reported by selected categories of entities.

In the paper Better Rules for Government Discovery Report, authors working in The Service Innovation Lab in New Zealand suggest (based on their experience) the possibility of transforming into RaC provisions that:

- contain the formulas needed to carry out the calculations,
- confirm the existence of the entitlement, the constitutive features, or the opportunity to examine the application,
- regulate standardized, repeatable processes
- describe the steps in a certain process that must take place before a finding of legal compliance can be made (area of compliance)
- describe a process that can be implemented immediately in digital form.<sup>11</sup>

The importance of public services has been recognized in the proposal for a regulation of the European Parliament and of The Council laying down harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (hereinafter the proposal).<sup>12</sup> Recital 3 of the proposal points directly to public services (e.g. applying for or receiving public assistance benefits) and justice as areas of interest that can benefit from the use of AI systems. Moreover, AI systems that ‘(...) are used for determining whether such benefits and services should be denied, reduced, revoked or reclaimed by authorities (...)’ will be considered as high-risk as their use ‘(...) may have a significant impact on persons’ livelihood and may infringe their fundamental rights, such as the right to social protection, non-discrimination, human dignity or an effective remedy.’<sup>13</sup> RaC could (and should) be used to provide clear and coherent regulations to implement in high-risk AI systems. Otherwise, leaving the translation of text-written law into computer code exclusively to high-risk AI systems providers will increase the risk of emerging gaps

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11 The Service Innovation Lab (LabPlus), ‘Better Rules for Government Discovery Report’ (NZ Digital Government, March 2018) 27 <<https://www.digital.govt.nz/dmsdocument/95-better-rules-for-government-discovery-report/html#summary>> accessed 31 January 2021.

12 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:206:FIN>> accessed 31 January 2021.

13 See recital 37, Article 6(2) and Annex III(5) of the proposal.

and inconsistencies between both versions<sup>14</sup> as well as creating multiple translations. The consequence will be an incompatibility between systems, as described above, and a lower chance of meeting the requirements of accuracy and robustness as mentioned in the proposal.<sup>15</sup>

To sum up: the standardization and repeatability of the process, the mass usage, and the unambiguity of the regulations (or at least reduced need for interpretation) point to the possibility of implementing regulations in the form of RaC. Potential benefits in form of reducing operating costs or speeding up processes in an organization are an additional encouragement, important from an economic point of view. However, it should be remembered that RaC is at a very early stage of development. The aim of creating solutions according to the guidelines described above is to provide so much needed practical knowledge and to precede the preparation of more complex projects. It is necessary if RaC is ever to have a real application. Otherwise, it will remain one of the many ideas that have ended their existence at the proof-of-concept stage.

Another area where RaC can certainly find application is the regulation of cyberspace. S. Shcherbak notes that '(...) everything that one sees on the Internet is delivered by means of code. Therefore, code is the architecture of cyberspace, and pieces of code are a construction material of this architecture.'<sup>16</sup> This thought is developed by D. Szostek concerning the regulation of artificial intelligence:

The traditional way of promulgating, or enforcing, a regulation that includes orders or prohibitions that should be taken into account by AI is doomed to failure in advance, a point raised by experts who suggest that the regulation of AI is one of the more difficult challenges for modern lawyers. Assuming, however, that the regulation would be a computer code containing the orders and prohibitions necessary to be considered by AI, in technical terms it represents an organizational and logistical challenge, but not an impossible one. AI is a code that is part of cyberspace, so only by code can prohibitions and orders be imposed on AI, thereby regulating it.<sup>17</sup>

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14 The identification of such gaps has been described by The Service Innovation Lab (LabPlus) (n 11) 10.

15 See recital 49 and Article 15 of the proposal.

16 Sergii Shcherbak, 'Integrating Computer Science into Legal Discipline: The Rise of Legal Programming,' 4 (14 September 2014) <<https://ssrn.com/abstract=2496094>> accessed 5 February 2021.

17 Dariusz Szostek, 'Sztuczna inteligencja a kody. Czy rozwiązaniem dla uregulowania sztucznej inteligencji jest smart contract i blockchain?' in Lai L. and

Research on the RaC should therefore seek to set standards for law-making that will allow the effective regulation of cyberspace (understood broadly), in particular the systems and algorithms on which AI is based.

As for now, it is unlikely that the European Artificial Intelligence Act (the Regulation) will take the form of RaC. Still, the proposal mentions a quality management system as a measure to provide compliance of high-risk AI systems with the Regulation. It is possible that some of its components may refer to other regulations as well and therefore could benefit from the implementation of RaC. As a result, some of the quality management processes could be automated (to a point), as the official version of the RaC could be made publicly available i.e. through application programming protocol (API).<sup>18</sup> Making RaC available in this manner could also facilitate internal quality checks in the process of creating and maintaining a high-risk AI system.

The effectiveness of regulation, however, must not be equated with a complete lack of interpretation. The research should also cover less clear provisions that contain more discretionary elements or refer to immeasurable values, vague concepts, or general clauses. It should not be expected that the existence of law in the form of a computer code will eliminate the above-mentioned elements from legal acts.<sup>19</sup> The RaC presupposes the coexistence of the legal text and the code, rather than striving to reduce the entire law to a syllogism that requires only the substitution of relevant values. This is at odds with the idea of the RaC and is simply not feasible.

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Świerczyński M. (eds.), *Prawo sztucznej inteligencji* (C. H. Beck 2020) 21. In the text, the author refers to the regulation of artificial intelligence by means of a smart contract. Given that the constitutive feature of both RaC and smart contract is readiness for immediate execution, the quoted passage should be considered true in both cases.

18 cf Wong (n 4) 13.

19 For this would mean a return to prescribing casuistic, elaborate legislation. At the same time, it should be noted that it is not a problem for a computer to execute instructions hundreds or thousands lines of code long. Normative acts could finely regulate complex cases in an attempt to replicate reality as accurately as possible; they would not have to be simple, they just need to be consistent and suitable for writing in code (see The Service Innovation Lab (LabPlus) (n 341) 25). A negative consequence would be the difficulty in maintaining the consistency of the RaC. This can be avoided by introducing testing procedures that have been used for many years in software development. Moreover, assumption that RaC are more concise than the same rules written solely in natural language proven to be false (cf Accident Compensation Better Rules Discovery Team (n 2) 6, 30).

It is therefore necessary to identify as many common features as possible between the execution of a computer code and the interpretation (and applying) of legal rules, even if the task seems extremely difficult. Certain interpretative directives are executed based on parameters that are completely measurable and, as a result, lend themselves to a description through a code. Referring to M. Zieliński's conception of interpretation,<sup>20</sup> the interpretative moment<sup>21</sup> may be determined based on the date of the event initiating proceedings, recorded in system logs. The same date will constitute the basis for selecting the correct temporal version of the provisions (both in text and code form) requiring interpretation. Combined with version management in a manner similar to the one used in code development, it would be possible to immediately select the correct version of the legal act for the chosen interpretative moment. Therefore, the ordering phase of interpretation<sup>22</sup> would be mostly automated.<sup>23</sup>

The situation becomes slightly more complicated when one moves to the reconstructive phase of interpretation. Following M. Zieliński it should be assumed that:

The directives of the reconstructive phase are aimed at obtaining from the provisions of different syntactic form a norm-shaped expression with a structure: A, O, n/z, Z,<sup>24</sup> which is to facilitate the determination of the sense of norms expressed in this provision.<sup>25</sup>

The principle is further formulated, according to which:

The process of interpretation proceedings in the reconstruction phase should begin with the recognition of those syntactic features of the

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20 This conception of interpretation has been presented by M. Zieliński in his book *Interpretation of law. Principles - rules – guidelines* first published in Poland in 2002. Maciej Zieliński, *Wykładnia prawa. Zasady – reguły – wskazówki* (7 ed., Wolters Kluwer 2017).

21 ibid 279.

22 As described by M. Zieliński. ibid 281-258.

23 The implementation of RaC by state bodies would open the way to official assessment of the validity of legislation, similar to what is currently done in commercial legal databases (i.e. LEX or Legalis in Poland). The algorithms adopted by the editors of each system differ significantly and in consequence the same legal act may be indicated as binding in one database, while the other database will not mark it so. This solution is often a source of confusion and causes significant problems for less experienced lawyers.

24 Where A corresponds to the addressee of the norm, O to the circumstances, n/z to the order/prohibition, Z to the behaviour. Zieliński (n 20) 20.

25 ibid 286.

provision being interpreted, which determine the trends of further treatment of the provision to obtain from it a single norm or several norms.<sup>26</sup>

The measures described above have been designed for the interpretation of text written in legal language. However, their applicability to computer code initially raises doubts. Nevertheless, to execute a given piece of code, all necessary elements and their relationships must also be identified. This occurs spontaneously when the code is executed, and deficiencies in this regard are reported by the program (in general) as errors. Thus, the activities of the reconstruction phase can, to some extent, be contained directly in the logic of the code itself. It must be coherent, non-contradictory, and, like a text in legal language, it should not contain redundant expressions.<sup>27</sup>

Thus, a norm-shaped expression can be described, identified, and reconstructed using code. For example, in an object-oriented programming language such as Python,<sup>28</sup> a reconstructed norm-shaped expression could be an object created within a distinct class of objects. The attributes of this class would be the addressee of the norm (A) and the circumstances (O), while the methods in the class would be used to determine the pattern of ordered or forbidden (n/z) behaviour (Z). The modifiers described by M. Zieliński,<sup>29</sup> on the other hand, would be functions not directly connected with any class. A norm-shaped expression as an object would be reconstructed for the needs of a particular case and after its application, that is after the code is executed and legal effects are produced - it would be deleted. Also, it should not be assumed that all the mentioned elements must fit in a single provision. In the same way, as legal definitions or references are used in the text of a legal act, the Python code (and many others) refers to other fragments of code or uses so-called class inheritance, which allows creating new classes that are extensions of already existing ones.<sup>30</sup>

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26 ibid.

27 An additional benefit is that errors or loopholes can be detected by code testing if the two versions are kept equal. This issue is discussed in more detail later in the text.

28 More information about the Python language and its documentation are available at <https://docs.python.org>.

29 Zieliński (n 20) 111.

30 Please keep in mind that the above description is very much simplified and represents only an outline of the concept. Further research into the possible interactions between text and code is needed in order to develop optimal solutions.

However, to reconstruct the norm-shaped expression, a sufficiently broad set of input information necessary for the decision should be obtained at the earliest possible stage of the proceedings. Some of them will have to be provided by the entity initiating the proceedings (as it is now), others may come from the databases owned by the public administration (e.g. official registers from which data is retrieved through an appropriate interface). The scope and type of data collected would reflect the state of knowledge on a given subject (both general and specialized), the objectives of introducing a given regulation, and (if possible) other values that the legislator considered necessary to take into account at a given stage. As a result, the norm-shaped expression would be reconstructed from mostly objective information.

By far the most difficult part is to combine legal text interpretation and code execution at the final, perceptual stage.<sup>31</sup> Following linguistic or systemic directives to determine the meaning of individual phrases of a norm-shaped expression is not that difficult; it may even be facilitated by the use of a code. However, the application of functional directives presents a significant difficulty and will in principle be impossible without human intervention.

The application of the linguistic directives of the perceptual phase can be regarded as similar to the process of code execution. Determining the meanings of the individual elements of a norm-shaped expression and their relationships to each other is akin to a computer checking<sup>32</sup> that the code is complete and free of obvious errors; this stage precedes code execution. Specific values or attributes are established for specific expressions in the code, just as the meaning of individual words or clusters of words is determined when following linguistic directives. The use of references to other places in the code corresponds to the determination of the meaning of individual words by reference to legal definitions formulated earlier. These definitions, both content- and scope-related,<sup>33</sup> can also be mapped using the code, specifying the necessary input that indicates that the given expression (object) falls within the scope of the definition.

Despite the similarities between the application of linguistic interpretation directives and code enforcement described above, there still are some differences difficult to overcome. This is the case when in the course of in-

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31 Zieliński (n 20) 290-302.

32 Specifically, by an interpreter, that is, by a computer program that executes the indicated programs.

33 Zieliński (n 20) 293.

terpretation one has to take into account someone else's binding decision (e.g. a Supreme Court ruling), or when a provision contains legal language phrases with an established meaning in the legal language (e.g. property) or factual phrases (e.g. cat).<sup>34</sup> Furthermore, in the case of application of the systemic directives, it should be pointed out that the norms-rules are often formulated with the use of general, unmeasurable terms, or even do not function as separate provisions, but are derived from the legal text through interpretation.

In the case of systemic directives,<sup>35</sup> vertical consistency can be enabled by the code architecture itself. Its hierarchical composition makes it easier to ensure the compliance of higher-order norms with lower-order ones. Possible exceptions to the rules can be introduced even through a basic if/then/else instruction. The difficulty arises with the need to ensure horizontal compliance with the norms-rules<sup>36</sup> of the legal system. This poses a serious problem at the moment and should be subject to further research.

By far the most problematic application is that of functional directives, in the form in which they currently operate.<sup>37</sup> Possible, and sometimes even necessary, references to sources outside the legal act or even completely outside the legal system make it impossible to ascribe meaning to individual elements of a normative expression using the code. Therefore, one of the aims of RaC research should be to determine the optimal way to map the functional directives of interpretation.

The existence of rules in two equal forms (text and code) does not mean the exclusion of human involvement. In the initial stages of the application of the RaC, human participation in the process and its supervision of the proceedings should be assumed. Solutions involving the application of the law, including dispute resolution, by artificial intelligence are only in the testing phase.<sup>38</sup> Until satisfactory results are obtained, algorithms should not be allowed to directly shape the legal situation of entities (due to low accuracy of decisions or ethical concerns). The role of the human supervisor would be threefold. First: to compare the results of the

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34 ibid 294-295.

35 ibid 297-298.

36 More on norms-principles see ibid 34-36.

37 ibid 299-300.

38 Examples are Estonia and China. cf Maria Dymitruk, 'Sztuczna inteligencja w wymiarze sprawiedliwości?' in Luigi Lai and Marek Świerczyński (eds), *Prawo sztucznej inteligencji* (C. H. Beck 2020); Joshua Park, 'Your Honor, AI.' (*Harvard International Review*, 3 April 2020) <<https://hir.harvard.edu/your-honor-ai/>> accessed 5 February 2021.

linguistic and systemic interpretation obtained as a result of the execution of the code with the results of its functional interpretation and to make a final decision on the reconstructed norm-shaped expression. Then, to make discretionary decisions during the process, if required by the legislator,<sup>39</sup> and (finally) to come to a decision. Each of the described actions may in practice be divided into several lower-level decisions, which have their premises and adjudication. This solution may seem far from the idea of RaC, as it assumes the decisive participation of a human being in the process and resembles more the functioning of the so-called virtual assistant judges based on artificial intelligence. Nevertheless, the ordering and reconstruction phases will base on the execution of a code, just as for the determination of meanings using the directives of linguistic and systemic interpretation. These are activities at the level of data and information and (at least in part) knowledge. Describing them through code can result in significant time savings and less chance of error than if performed by a human. A supervisor will be able then to concentrate on the most human stage of the procedure - the application of functional interpretation directives requiring wisdom.<sup>40</sup> Moreover, the suggested solution aligns with the requirement of human oversight as provided by the proposal in recital 48 and Article 14. Assuming the proposal will come into force without significant changes in this matter, introducing the framework for the interpretation of RaC will be obligatory, at least for the providers of high-risk AI systems.

In parallel with subsequent decisions, a database of rulings will be created where the factual state, the legal state, the lower-level decisions described above, the final decision, and the relations between them are described in code. Such a database can be used for training machine-learning models and will provide high-quality data as mentioned in recital 44 and Article 10 of the provision. The emergence of artificial intelligence that can learn to apply law faster, more effectively, and accurately than today

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39 Paradoxically, the degree of human interference in the process of applying the law can be a measure of the quality of provisions; see Accident Compensation Better Rules Discovery Team (n 2) 33. A law that is clear and logically coherent will require minimal human intervention, and in extreme cases it may not be required at all. By contrast, regulations that rely heavily on discretion, are internally contradictory or inconsistent with the rest of the legal system will not be able to function as a code.

40 cf Jennifer Rowley, 'The wisdom hierarchy: representations of the DIKW hierarchy' (2007) 33(2) Journal of Information Science 163. By wisdom one would also mean making ethical choices.

will be a matter of time. Whether this artificial intelligence will be allowed to apply the law to humans or will be only a more accurate and robust high-risk AI system remains a matter for debate.<sup>41</sup> Nevertheless, translating the law into a language that can be understood by artificial intelligence seems like one of the biggest gains that RaC can offer.

The above considerations are only a sketch of the broader research problem of reconciling legal interpretation and its rich theoretical heritage - activities inherent in working with natural language text - with the development and execution of computer code. Without in-depth analysis, accompanied by the creation of prototypes, there is no chance of convincing a wider range of legal practitioners, let alone the legislator, of the feasibility of implementing RaC. The work should also cover other types of interpretation, in particular operative interpretation due to its role in the practice of law application.<sup>42</sup> Some attempts have already been made to outline the standards that should be met by a code carrying legal norms, although they were motivated by determining the requirements for the legality of smart contracts (primarily decentralized autonomous organization, DAO).<sup>43</sup>

### *3. Testing Code and Testing Law*

RaC can be described simply as a set of rules of conduct. Undoubtedly, before implementing any rules it must be ensured that they will work properly and thus achieve the intended purpose. It is therefore necessary to carry out appropriate testing procedures.

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41 As for now, see recital 40 of the proposal: '(...) In particular, to address the risks of potential biases, errors and opacity, it is appropriate to qualify as high-risk AI systems intended to assist judicial authorities in researching and interpreting facts and the law and in applying the law to a concrete set of facts. Such qualification should not extend, however, to AI systems intended for purely ancillary administrative activities that do not affect the actual administration of justice in individual cases, such as anonymisation or pseudonymisation of judicial decisions, documents or data, communication between personnel, administrative tasks or allocation of resources.'

42 The concept of operative interpretation is presented in detail in the articles by L. Leszczyński cf Leszek Leszczyński, 'Wykładnia operatywna (podstawowe właściwości)' (2009) 6 Państwo i Prawo 11; Leszek Leszczyński, 'O wykładni prawa i jej wymiarze praktycznym. Kontekst sądowego stosowania prawa.' (2020) 2 Archiwum Filozofii Prawa i Filozofii Społecznej 66.

43 Diver (n 338).

At present, there is no single, coherent methodology for quality assurance of draft regulations in the Polish legal system. Certain activities aimed at testing regulations take place at different stages of the process and different levels of detail. For example, for legislation initiated by the government, the quality of drafted regulations is to be ensured by the impact assessment process, which consists of regulatory impact assessment and ex-post regulatory impact assessment. These activities are complemented by public consultations.<sup>44</sup> Even though their assumptions are described in detail,<sup>45</sup> the convergence with existing guidelines and the quality of the activities undertaken is often insufficient, as confirmed by the Supreme Chamber of Control audit.<sup>46</sup> Therefore, it can be concluded that at least part of the high-level procedures for ensuring the quality of law is defective. Another precaution is the law commission appointed during the legislative work carried out on the government side. The commission is responsible, among other things, for the quality check of the legislation. Nevertheless, the possibility to exempt a draft from the commission's consideration<sup>47</sup> may be thought of as a breach in the procedure for assuring the proper quality of draft legislation.

At the same time, lawyers not connected to the government (legal counsels, attorneys, or legislators) and working on drafts of normative acts (both generally and internally binding) conduct on their own various simulations and thought experiments. These may take place both in close cooperation with the entities commissioned to draft the project and without their participation. Sometimes an iterative approach is used (assuming the existence of several rounds of tests) as well as an incremental one (consisting of gradual coverage of the draft regulations with tests); tests may

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44 Departament Oceny Skutków Regulacji, ‘Ocena wpływu w rządowym procesie legislacyjnym.’ (Gov.pl, 13 November 2020) <<https://www.gov.pl/web/premier/ocena-wplywu-w-rzadowym-procesie-legislacyjnym>> accessed 18 April 2021.

45 Ministerstwo Gospodarki i Kancelaria Prezesa Rady Ministrów, ‘Wytyczne do przeprowadzania oceny wpływu oraz konsultacji publicznych w ramach rządowego procesu legislacyjnego.’ (Rządowe Centrum Legislacji) <<http://www1.rcl.gov.pl/?q=book/wytyczne>> accessed 5 February 2021.

46 Najwyższa Izba Kontroli, ‘Dokonywanie oceny wpływu w ramach rządowego procesu legislacyjnego.’ (Najwyższa Izba Kontroli, 5 March 2018) <<https://www.nik.gov.pl/plik/id,16190,vp,18712.pdf>> accessed 5 February 2021.

47 cf Maciej Berek, ‘Rządowa procedura prawodawcza i jej znaczenie dla jakości stanowionego prawa.’ in Federczyk W. and Peszkowski S. (eds.), *Doskonalenie i standaryzacja procesu legislacyjnego – dobre praktyki opracowane w ramach projektu LEGIS (Krajowa Szkoła Administracji Publicznej im. Prezydenta Rzeczypospolitej Polskiej Lecha Kaczyńskiego 2019)*.

also be carried out gradually, as subsequent parts of the draft regulation emerge. Again, however, there is no methodology for conducting quality control; the measures taken are the know-how of individuals or entities, and testing is not obligatory.

When a gap in the law is discovered, its proper application is possible (in general) because of appropriate interpretation. It plays a role of a last line of defence, an ex-post measure taken to mitigate potential damage, and may be a premise for amending the act. Although it is a natural process, it also consists of actions that only take place when a problem arises. As a result, they may negatively affect the confidence in the state and the law it creates, and in a more tangible aspect - generate higher costs than thorough testing of the proposed regulations before they enter into force.

The introduction of RaC creates a valuable opportunity to adapt the quality assurance practices known from the development of computer code to the legislative practice. This applies both to tests carried out during code development and the subsequent stage of acceptance by end-users. At this point, it should be noted that although the scope of topics related to code quality assurance far exceeds the volume of this paper, the author would like to briefly discuss the most important issues.

Assuming that the law is drafted in parallel in two forms: code and natural language, the need for code testing would facilitate simultaneous testing of the language form. Thus, at a very early stage of work, it would be possible to detect errors, potential gaps and determine whether the proposed legislation achieves the intended purpose. As a result, the number of amendments issued to improve the law could significantly decrease, as could the overall cost of legislative activities. A positive side effect would be an increase in stability and certainty of the law in force.

Testing RaC, like any computer code, can increase consistency and reduce conflicts with previous regulations by performing so-called integration and regression tests.<sup>48</sup> Similar actions are currently undertaken during

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48 Integration testing can be divided into component integration testing which ‘(...) focuses on the interactions and interfaces between integrated components’ and system integration testing which ‘(...) focuses on the interactions and interfaces between systems, packages, and microservices. System integration testing can also cover interactions with, and interfaces provided by, external organizations (e.g., web services).’ Meanwhile ‘(...) automated component regression tests play a key role in building confidence that changes have not broken existing components.’ See International Software Testing Qualifications Board®, ‘Certified Tester Foundation Level Syllabus.’ (International Software Testing Qualifications Board, 11

impact assessment but, as mentioned above, they are not carried out according to a specific methodology. At this point, it should be stressed that integration and regression tests could initially cover only a small group of provisions created as RaC in a given branch of law. Only as the adoption of RaC becomes widespread would the integration and regression tests begin to cover an increasing number of provisions. Thus, the real benefit of conducting the tests would be postponed in time. Nor should integration tests be expected to reveal inconsistencies with legislation that did not originate as RaC. However, even a small improvement in the quality of legislation will be a significant benefit.

Along with the framework for the RaC quality assurance procedure, sets of test cases should be created like input data (factual states) which, when subsumed into the proposed regulations, would produce the expected results (output data). The test cases would gradually be extended with real-life situations. Over time, a comprehensive set of tests would emerge, which (if automated) could be carried out on a scale and at a speed unattainable by humans.<sup>49</sup> The scope of time and subject matter of the tests could be freely chosen, depending on established priorities. On the other hand, the task of curating the collection of test cases would demand a dedicated team of people to conduct reviews and updates periodically. Undoubtedly, some selection of test cases would also be necessary, as the need to maintain too rich a collection would generate significant costs.<sup>50</sup> Another disadvantage would be to limit the tests only to cases that are unambiguous or do not require complex interpretation - due to the previously described need for human involvement in the application of functional directives of the perceptual phase of interpretation.

The release of an official version of the RaC with a collection of test cases would allow certifying the software developed by private entities as compliant with the law in force. Such certification could be performed in

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November 2019) 31-32 <<https://www.istqb.org/downloads/send/2-foundation-level-documents/281-istqb-ctfl-syllabus-2018-v3-1.html>> accessed 18 April 2021.

49 Accident Compensation Better Rules Discovery Team (n 2) 21.

50 Costs will result primarily from the need to periodically review and modify test cases. ‘Continuously repeating the same tests leads to a situation where they stop detecting new defects at some point. To be able to detect new defects, it may be necessary to modify existing tests and test data, as well as to write new tests. Unmodified tests lose their ability to detect defects over time, just as pesticides are incapable of eliminating pests after a period of time. In some cases - such as automated regression testing - the pesticide paradox can be beneficial because it allows you to confirm that the number of defects associated with regression is small. International Software Testing Qualifications Board® (n 378) 17.

a highly automated way (by passing specific sets of test cases), and the revenue from it would contribute to the state budget. Such a solution would be profitable also for software developers; appropriately calculated costs of certification would be more beneficial than the necessity to transcribe regulations into code by oneself and then test the created solutions.

Software testing is divided into different levels and types. Levels<sup>51</sup> group the tests according to the complexity of the code and include tests:

- modular - checking the operation of individual components in isolation from the overall code; in the case of RaC, this would mean testing the operation of the lowest existing editorial unit,
- integration - already mentioned above, involves the interaction of a component (e.g. editorial unit) with other components, but may also concern the interaction of the whole system with other systems; in the case of RaC it could mean checking the integration of higher-level units (chapters, sections, etc.) or even entire normative acts with other provisions in the form of RaC,
- system - concerning the behaviour and capabilities of the system as a whole, in terms of functional and non-functional aspects (e.g. reliability); in the case of RaC this means testing interactions within or among individual normative acts,
- acceptance - involving a level close to the system level but carried out by the target user or system operator, e.g. the addressees of standards or law enforcement bodies.<sup>52</sup>

The division of tests into types is based on separating groups of tests that check specific characteristics of the code.<sup>53</sup> RaC test types would not differ significantly from the quality assurance of standard code and would include functional tests (whether the code can perform the desired actions), non-functional tests (whether the code is efficient, safe, etc.), and so-called white-box tests checking to what extent the code is covered by tests. However, tests related to change would be of particular importance for RaC. In addition to the previously mentioned regression tests, this includes tests confirming the removal of a previously detected defect, e.g. a logical error (in the case of RaC this could be a loophole). In their most

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51 ibidem 30.

52 It should be noted that at this stage tests are also carried out on the compliance of the product with the contract for its creation or the applicable legislation. cf ibidem 37.

53 ibidem 39-41.

basic version, they consist of re-executing the test that previously returned an error.<sup>54</sup>

RaC quality assurance can be automated to some extent, just like for any computer code. Software test creation has long been seen in the IT industry as a tedious and low-value activity that distracts professionals from their main objectives.<sup>55</sup> Systems such as Jenkins are widely used to facilitate, among other things, test execution but particular attention should be paid to the use of artificial intelligence-based solutions - due to their ability to learn quickly and be more efficient than previous applications. Some of them conduct static code analysis in real-time, which enables to detect, identify, and correct errors in code while still at the stage of development (similar to how text editor checks the correctness of spelling and grammar).<sup>56</sup> Other applications automatically create unit (module) tests for the analysed code.<sup>57</sup> This could create an interesting situation when one code (algorithm) controls another code (RaC), which in some cases would define the rules for other algorithms.

RaC quality assurance is also associated with regulatory sandboxes.<sup>58</sup> Testing of RaC may take place in special test environments, i.e. isolated programs or groups of programs simulating real-world operations. In the next step, the designed regulations should undergo a test on a selected group of addressees, who will apply them in practice and provide feedback.

The idea of regulatory sandboxes is not new. Dedicated pilot programs have been established in many countries, mostly in the FinTech sector,<sup>59</sup>

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54 The importance of frequent and early testing of code found its particular expression in a separate software development methodology Test-driven-development, which was described by Kent Beck. Kent Beck, *Test Driven Development: By Example* (1 ed., Addison-Wesley Professional 2002).

55 Matthew Lodge, ‘Software Testing Is Tedious. AI Can Help.’ (Harvard Business Review Home, 22 February 2021) <<https://hbr.org/2021/02/software-testing-is-tedious-ai-can-help#>> accessed 18 April 2021.

56 An example of this is the DeepCode tool:<https://www.deepcode.ai/>.

57 A model example is the Diffblue Cover application: <https://www.diffblue.com/>.

58 ‘Regulatory sandboxes enable a direct testing environment for innovative products, services or business models, pursuant to a specific testing plan, which usually includes some degree of regulatory leniency combined with certain safeguards.’ Radostina Parenti, ‘Regulatory Sandboxes and Innovation Hubs for FinTech’ (European Parliament Think Tank, 30 September 2020) 9 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652752/IPOL\\_STU\(2020\)652752\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652752/IPOL_STU(2020)652752_EN.pdf)> accessed 5 February 2021.

59 Examples of existing solutions for FinTech are mentioned by J. G. Jiménez and M. Hagan as well as R. Parenti. Jorge Gabriel Jiménez and Margaret Hagan, ‘A

although similar programs have also been created for other sectors of the economy, e.g. transport or energy.<sup>60</sup> So far, the main purpose of sandboxes has not been to test new regulations, but to enable the implementation of new business ventures that are difficult to classify and to make it easier for supervisory authorities to understand how they operate.<sup>61</sup> The conditions for running a venture within a sandbox are relaxed compared with reality. In return, the participating entities are obliged to cooperate closely with state authorities and comply with the established rules. New regulations are developed empirically, as a result of the experience of sandbox participants.

The model described above can, and should, be applied to RaC. Existing sandboxes could successfully serve to introduce and test regulations in the form of RaC. There is a chance to create a positive feedback loop: innovative ventures of sandbox participants would justify the creation of new regulations in the form of RaC, which during testing would inspire the creation of further innovations based also on the RaC code, which would cause further expansion and improvement of RaC. Separate regulatory sandboxes may also be established due to the specific needs of a particular area of law (e.g. tax law) or even a particular law (e.g. public procurement law). Thanks to them, interested entities would be able to test the proposed regulations and, at the same time, work on new business models or ways of providing certain services.<sup>62</sup> There are thus two possible starting points: from the venture or the draft regulation. The effect will be similar: new regulations will be based on empirical data.<sup>63</sup>

Recently a legal framework for creating AI regulatory sandboxes has been provided in Articles 53 to 55 of the proposal. This is particularly

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regulatory sandbox for the industry of law.' (Legal Executive Institute, 2019) 2 <<http://www.legalexecutiveinstitute.com/wp-content/uploads/2019/03/Regulatory-Sandbox-for-the-Industry-of-Law.pdf>> accessed 5 February 2021; ibid 9. It should be noted that the Polish Financial Supervision Authority has established a regulatory sandbox in 2018.

60 cf Deloitte Center for Government Insights, 'Future of Regulation. Case studies.' (Deloitte Center for Government Insights, 2018) <<https://www2.deloitte.com/content/dam/Deloitte/us/Documents/public-sector/us-fed-future-of-regulation.pdf>> accessed 5 February 2021.

61 cf Parenti (n 58) 9.

62 cf Jiménez and Hagan (n 59) 3.

63 Such an approach directly supports the idea of *evidence-informed policy making* supported by the OECD. cf OECD, 'Building Capacity for Evidence-Informed Policy-Making: Lessons from Country Experiences' (2020) OECD Public Governance Reviews <<https://doi.org/10.1787/86331250-en>> accessed 5 February 2021.

important to developing RaC as one of the objectives of creating regulatory sandboxes for high-risk AI systems is to conduct research on the effective way to regulate AI. The suggested approach is based on recital 71 of the proposal according to which ‘Artificial intelligence is a rapidly developing family of technologies that requires novel forms of regulatory oversight and a safe space for experimentation, while ensuring responsible innovation and integration of appropriate safeguards and risk mitigation measures.’ The statement above should be interpreted as referring not only to the meaning of the law but also to its form. Using text-written law as a sole form of regulating high-risk AI systems will have a negative impact on innovation for the reasons discussed above.

The detailed principles of regulatory sandboxes for RaC require an in-depth analysis, based on the experience for FinTech and AI sandboxes. A law tested in this way would be better adapted to the reality and expectations of the addressees and more stable compared with laws created only using consultation or impact assessment. Additionally, the way RaC is used in regulatory sandboxes can be analysed continuously, improving the identification of bottlenecks in the process, and accelerating the design of necessary improvements.<sup>64</sup>

#### *4. The Beginning of the Road*

The topics discussed above are only a small part of the RaC issue. An issue that is complex, difficult but at the same time fascinating and closely related to the everyday problems of a vast number of people.

The computer code can support the interpretation of legal text despite the ambiguity of the latter. In turn, the need for interpretation will influence the development of RaC; the necessary elements of norm-shaped expressions will have to be represented in the computer code. However, it is unlikely that human involvement will be eliminated from the process, at least in the near future. Near-complete automation of law may be introduced to only some of the most repetitive, standardized services and only in the first instance of proceedings. In the remaining cases, the application of RaC ought to be supervised by a human, mainly because of technical and ethical issues concerning artificial intelligence.

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64 Similar comments on the creation of regulatory smart contracts are raised by Dariusz Szostek. cf Szostek (n 17).

At the same time, the practice of developing code, in particular ensuring its quality, can offer proven solutions to enhance the drafting of normative acts, eliminate potential contradictions and prevent emerging gaps in the legal system. This can be conducted by humans or, to a certain extent, by artificial intelligence algorithms. Thus, errors detected in computer code will also be corrected in text written in natural language.

There is no doubt that the research on RaC must be continued and should also concern (apart from the aspects described above) the necessary changes in the principles of legislative technique, the creation of law focused on the end-user, the principles of promulgation of normative acts and finally the version management (e.g. using the Git version control system).<sup>65</sup> Regardless of which issue attracts more attention from researchers or businesses, the simultaneous existence of law in form of a text and code seems to be essential. Without RaC we accept the existence of a gap between human law and computer code, both of which define the rules for the functioning of our reality and are simply two sides of the same coin.

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65 More information about Git is available on its official website: <http://git-scm.com>.



**SECTION THREE.**  
**Possibilities of Applying LegalTech Tools in Legal Practice**



# The Changing Role of the Lawyer. The Case of Digital Accessibility.

Ewa Fabian, Przemysław Polański

## 1. Introduction

The role of the lawyer will change due to the technological revolution, additionally accelerated by the COVID-19 pandemic. While it is unlikely that a lawyer will be replaced by artificial intelligence, it is becoming more and more realistic to replace some of a lawyer's activities with more and more specialized LegalTech tools. The chapter aims to introduce the issues of ensuring digital accessibility<sup>1</sup> with the use of new tools available to a technology lawyer. These tools allow, for example, to automatically assess the compliance of public authorities' websites with the provisions of domestic and EU law. However, one should not jump to too hasty conclusions from the existence of such tools. Humans maintain the most important role in the process of ensuring compliance.

In a brilliant futurological analysis, "The Future of the Professions: How Technology Will Transform the Work of Human Experts" R. and D. Susskind propose that although artificial intelligence will not replace all lawyers, it will replace expensive lawyers. The authors predict that in the post-professional society, practical knowledge will be available on the Internet,<sup>2</sup> and this in turn will trigger not so much a violent revolution as an incremental digital transformation of the profession. Field experts will gradually be replaced by a cheaper workforce capable of handling intelligent LegalTech solutions. The model of the lawyers' work will fundamentally change, as they will be surrounded by new technologies that will help them solve current problems in a previously unknown manner.

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- 1 These findings result from empirical research on digital accessibility from the perspective of people with visual disabilities, carried out by the FREE Institute in the project "Model of making content available on the Internet to people with disabilities in accordance with applicable national and international law and WCAG 2.0 principles" NCN grant no. 2016/22/E/H5/00434, within which this chapter was prepared.
  - 2 Richard Susskind and Daniel Susskind, *The Future of the Professions* (Oxford University Press 2015), see in particular the Authors' final conclusions.

This will mean that lawyers who will be able to use new technologies to provide cheaper and faster services will survive, not the lawyers with extensive trial experience.

Can the Susskinds' new vision really come true in Poland? Nothing can be ruled out but it seems unlikely. To build AI systems that are able to replace the elite of jurists you will need the foundations of well-developed legal knowledge databases which are an indispensable component of self-learning systems. While you do not need a good deal of imagination to see the operation of document or clauses classification systems that are already quite often used in due diligence processes, the creation of autonomous systems resolving disputes between parties or recommending a cause of action in a manner consistent with generally applicable law is an incomparably more difficult task.

There is a lack of foundations in the form of perfectly developed databases of normative acts and jurisprudence, as well as a stable legal system and court judgments that would clearly apply the provisions "for a specific date" and clearly refer to the essence of previous judgments. To this day, we have not lived to see an open legal information system that would make available not only unified versions of laws, but also of regulations. This remark applies not only in the PDF versions of such acts (difficult to process automatically), but in open formats such as HTML or XML.<sup>3</sup>

We also have no databases of judgments that would allow assigning the interpretation of provisions to precisely indicated legal grounds. When analyzing the content of grounds for judgments, it is impossible to indicate the temporal version of the interpreted provision, which, taking into account the level of legal inflation, significantly hinders the creation of a state system of legal information. As a result, it is impossible to determine which version of the regulations was used by the adjudicating panel, which in turn significantly hinders the construction of intelligent legal information systems.

This does not mean that lawyers do not have access to excellent databases of legal information. Lex and Legalis have revolutionized the way legal practice functions in Poland in such a way that today's lawyers actually only need a legal information system and a mobile phone to be able to provide legal services remotely. Thanks to these systems, we can precisely determine the laws applicable for a specific date, find related judgments,

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3 Przemysław Paul Polański, (C. H. Beck LegalTech Forum conference, Warszawa, 16-17 June 2021).

and contextually delve into the reading of the doctrinal legal elite. Undoubtedly, this allows lawyers who do not belong to the juristic elite to provide services in the model described by the Susskinds today. Nevertheless, we are still a long way from the systems that automatically solve a specific legal issue.

This chapter also examines the changing role of the lawyer as a part of the digital revolution that has gained additional acceleration in the context of the COVID-19 pandemic. In order to make this chapter more specialized, we will show, on the example of digital accessibility, how the role of a lawyer is currently changing and how much will depend on the adaptation of the legal education system, where digital skills should be developed, instead of leaving this issue practically completely outside the main curriculum of young lawyers.

## *2. Case study: using LegalTech tools in measuring digital accessibility*

Digital accessibility as a legal issue is new and little known to Polish lawyers, although, over the recent months, the websites of most public sector bodies have started to provide accessibility statements. This is the result of the implementation of Directive 2016/2102<sup>4</sup> into Polish law, which obligated public authorities to adopt a new approach to serving content on websites and mobile applications in such a way that people with various types of disabilities - whether temporary or permanent - could access content. The aforementioned implementation took place in the Act of 4 April 2019 on digital accessibility of websites and mobile applications of public entities<sup>5</sup> (the Act on Digital Accessibility).

Investigating whether a public administration body actually complies with the applicable regulations requires lawyers to learn about the so-called *assistive technology* and foundations of empirical research, in line with the basic idea of social sciences (which includes legal science). The above observations should make it clear that testing the digital accessibility of websites for people with visual disabilities requires a deep understanding of new IT tools. Testing digital accessibility should not be imagined

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4 European Parliament and Council Directive 2016/2102 of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies [2016] OJ L327/1, requiring accessibility statements differing from the existing accessibility declarations, published on the websites of Polish public entities earlier.

5 Dz.U. 2019 poz. 848; see also Przemysław Paul Polański (ed.), *Ustawa o dostępnosci cyfrowej. Komentarz* (1st edn, C.H.Beck 2021).

as manual work or reading source code without an additional IT environment, but as work involving the use of various types of software. Thus, even without describing in detail the functionalities of programs used for assessing digital accessibility, which are more and more available on the market, and which may be designed basing on various presumptions,<sup>6</sup> *it can be assumed that the analysis of digital accessibility cannot be carried out by an expert in isolation from specific technology and software.*

Below, we will present the Reader with a study on the issue of ensuring digital accessibility of websites keeping in mind the needs of people with visual disabilities. This is just one, albeit very important, aspect of digital accessibility. The process in question requires the selection of software (one or several programs), the ability to use it and understanding the impact of decisions made on the measurement results, and thus the use of specific methods of working with a given program(s). We note here, however, that digital accessibility concerns good user experience for all users, which explains why the most accessible websites are also very popular (e.g. Google search engine).

### *3. Lawyer's analysis of digital accessibility - methodology*

Before we move on to discussing the IT tools used in digital accessibility research, let us first look at the legal framework regulating the process of ensuring compliance by the entities which the Act on Digital Accessibility addresses. At the outset, it is worth emphasizing that the international technical standard called WCAG (Web Content Accessibility Guidelines) has become an integral part of Polish law for many years (acts regulating digitization, the Act on Digital Accessibility). The development, testing, changes and translations of this standard are the result of the work of an international and diverse community of experts,<sup>7</sup> which in itself is another proof of the viability of the *lex mercatoria informatica* concept, i.e. custom created bottom-up by the Internet community.<sup>8</sup>

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6 See also the list maintained by the World Wide Web Consortium (W3C): <https://www.w3.org/WAI/ER/tools/> (accessed on 25/03/2021).

7 More about this process on the W3C website, Web Accessibility Initiative (WAI) - <<https://www.w3.org/WAI/standards-guidelines/wcag/>> accessed on 25 March 2021.

8 Przemysław Paul Polański, *Customary law of the Internet* (1st edn, T.M.C. Asser Press 2007) in which the author constructs the theoretical foundations of the

As the law requires public sector bodies to ensure digital accessibility, the question arises as to *how the measurement of the level of digital accessibility is to be made*. Directive 2016/2102 refers to this indirectly in several provisions, e.g. in Art. 8 Sec. 3.(f), where reference is made to a *monitoring methodology* that "may take into account expert analysis" and includes "appropriate arrangements, including where necessary examples and guidance, for automatic, manual and usability tests, in combination with the sampling settings, in a way which is compatible with the periodicity of the monitoring and reporting".<sup>9</sup>

When examining digital accessibility in the legal context, in accordance with the law of the Republic of Poland, attention should be paid to the need to conduct *empirical research*, which has so far been alien to legal science. In the very provisions of the Act on Digital Accessibility, there is a reference to the European standard,<sup>10</sup> the application of which will require the lawyers of the future to be able to use tools used for measuring accessibility compliance by the public sector bodies, and soon - also by the entities of the private sector.

Commission Implementing Decision 2018/1524<sup>11</sup> concerning the implementation of Directive 2016/2102 contains detailed provisions on monitoring to be carried out by competent local supervisory authorities across the EU.

The core monitoring methodology set out in Implementing Decision 2018/1524 includes an *in-depth monitoring methodology* that:

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custom as a source of law on the Internet and the methods of proving it with the use of information technology and social science methodology.

- 9 Directive 2016/2102 (n 399) is technology neutral (see recitals 9 and 36 thereof). Existing industry standards (WCAG) are also technology neutral. In practice, however, some aspects described in the regulations relate to specific technical solutions. For example, point 1.3.2 of Implementing Decision 2018/1524, which deals with use by blind persons, refers to assistive technology that allows a blind person to listen to the content of a website (e.g. a screen reader which is a computer program).
- 10 Currently, in the version of EN 301 549 V2.1.2, which includes Standard W3C - Web Content Accessibility Guidelines 2.1, Recommendation W3C 5.6.2018; see <https://www.w3.org/TR/WCAG21/> access 25 March2021.
- 11 Commission Implementing Decision 2018/1524 of 11 October 2018 establishing a monitoring methodology and the arrangements for reporting by Member States in accordance with Directive (EU) 2016/2102 of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies [2018] OJ L256/108.

- 1) verifies all the steps of the processes in the sample, following at least the default sequence for completing the process;
- 2) evaluates at least the interaction with forms, interface controls and dialogue boxes, the confirmations for data entry, the error messages and other feedback resulting from user interaction when possible, as well as the behaviour of the website or mobile application when applying different settings or preferences;
- 3) may include, where appropriate, usability tests such as observing and analysing how users with disabilities perceive the content of the website or mobile application and how complex it is for them to use interface components like navigation menus or forms.<sup>12</sup>

On the other hand, the Implementing Decision 2018/1524 specifies *simplified monitoring*, which is carried out using automated tests and analyzes (point 1.3.2):

- 1) usage without vision;
- 2) usage with limited vision;
- 3) usage without perception of colour;
- 4) usage without hearing;
- 5) usage with limited hearing;
- 6) usage without vocal capability;
- 7) usage with limited manipulation or strength;
- 8) the need to minimise photosensitive seizure triggers;
- 9) usage with limited cognition.

Directive 2016/2102 and Implementing Decision 2018/1524 show the conviction that IT tools for the automatic analysis of the level of digital accessibility will develop, becoming less unreliable in the future and requiring less interpretative input from the analyst. We may assume that this type of technology can also be developed with the use of *machine learning techniques* (technologies usually more broadly referred to as the so-called *artificial intelligence - AI*). We are currently in the period of technological development, when the human factor is still treated as necessary to test the level of digital accessibility, but, at the same time, the existing technologies allowing for partial automation of this process are already included in applicable regulations. The development of legislation requires resorting to technical standards and empirical research. The provisions cited above clearly show one more aspect of the changing role of the lawyer. The

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12 See point 1.2.2. - 1.2.4. of Implementing Decision 2018/1524.

lawyer of the future will have to be able to use, to a greater extent, not only the tools, but also the methodologies of ensuring compliance with the provisions expressed directly in the provisions of law.

#### *4. Assistive technology - a new weapon in the LegalTech lawyer's arsenal?*

Testing digital accessibility requires a very good knowledge of web browsers through which the content is downloaded and also the so-called screen readers which help the visually impaired people read the content, e.g. free NVDA<sup>13</sup> or paid JAWS. This means that testing the level of digital accessibility will require the skills of a digital accessibility lawyer to use such programs, not just word processors or legal information databases. Incidentally, it is worth adding that the use of such computer programs as assistive technologies raises further problems, including:

- 1) the transparency of the operation of such programs;
- 2) trust in programs on the part of law enforcement authorities and parties in court;
- 3) criteria for assessing the validity of the work of a lawyer or expert in the context of court proceedings.

Questions that can be asked in this context are whether a computer program is able to "lie", what should be the standards for examining the way the program works, or whether the related problem of the so-called black box (i.e. the impossibility to observe the internal mode of operation) differs significantly from the assessment of the reliability of e.g. expert dogs (such as in drug cases - drug dogs), as well as what level of knowledge of the program should be required from a lawyer. By introducing technologies in the work of a lawyer to the courtroom, these aspects fit into the broadly understood subject of LegalTech.

#### **Case study:**

In this context, it is worth referring to the American experience (which we will discuss in more detail later in this work). In the case of *Andrews v. Blick Art Materials*,<sup>14</sup> the judgment stated that, according to international research, the majority of Internet users used the paid JAWS technology. It cited a 2015 report according to which 30.2 % of screen reader users were

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13 See <<https://www.nvaccess.org/>> accessed 25 March 2021.

14 *Andrews v. Blick Art Materials LLC* 286 F Supp 3d 365 (NY 2017)

using JAWS, and the list also included ZoomText (22.2 %), Window-Eyes (20.7 %), NVDA (14, 6 %), VoiceOver (7.6 %), System Access or System Access To Go (1.5 %), ChromeVox (0.3 %).<sup>15</sup> It is worth adding that in 2017 the percentages for reader users included: JAWS (46.6 %), NVDA (31.9 %), VoiceOver (11.7 %), ZoomText (2.4 %), System Access or System Access To Go (1.7 %), Window-Eyes (1.5 %), ChromeVox (0.4 %), and Narrator (0.3 %).<sup>16</sup>

In 2019, NVDA outperformed JAWS in the WebAIM longitudinal study: NVDA (40.6 %), JAWS (40.1 %), VoiceOver (12.9 %), ZoomText / Fusion (2.0 %), System Access or System Access To Go (1.0 %), Narrator (1.0 %), ChromeVox (0.6 %).<sup>17</sup> These values are different when surveying blind people, not all people using screen readers. This research was performed on a fairly small sample, for an international context (sample 1224 in 2019). As reported in the 2017 *Andrews v. Blick Art Materials* judgment, the JAWS reader cost \$ 900-1,100 at the time of the trial.

NVDA is a free technology. Using it requires learning about keyboard shortcuts (tabs, arrows, letter shortcuts allowing the user to jump to specific types of page elements, etc.). These shortcuts allow people who cannot see the content of a website to navigate through the page (NVDA relies on keyboard shortcuts, but also creates a solution for blind people to use the mouse; see NVDA's documentation for more detail).<sup>18</sup>

##### *5. Tools for testing digital accessibility in American court proceedings*

Digital accessibility is an issue deeply embedded in Western legal doctrine and American courts have been settling disputes over it for a few decades. What's more, the number of digital accessibility cases in US courts is steadily increasing. According to UsableNet analyzes, in 2020, despite epidemiological problems, there was a 23 % increase in the number of court cases related to digital accessibility compared to the previous year.<sup>19</sup> The number of published judgments related to this subject is also significant. The question of the admissibility of expert testimony regarding the level of

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15 <<https://webaim.org/projects/screenreadersurvey6/>> accessed 25 March 2021.

16 <<https://webaim.org/projects/screenreadersurvey7/>> accessed 25 March 2021.

17 <<https://webaim.org/projects/screenreadersurvey8/>> (accessed 25 March 2021).

18 See reference to the relevant documentation (in original to Polish version): <<https://nvda.pl/podrecznik-uzytkownika>> accessed 25 March 2021.

19 See <<https://info.usablenet.com/2020-report-on-digital-accessibility-lawsuits>> accessed 25 March 2021.

digital accessibility of the defendant's website appeared in this jurisprudence at least twice (the cases of *Gomez v. General Nutrition*<sup>20</sup> and *Diaz v. Lobel's of New York*<sup>21</sup>. The courts mention the so-called *Daubert's Standard* (regarding Federal Rule of Evidence 702), according to which, when admitting expert evidence, the court checks whether:

- 1) the expert is qualified to testify competently;
- 2) the methodology by which the expert reaches his conclusions is sufficiently reliable;
- 3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.<sup>22</sup>

What is important in this context are features such as expertise (obtained through knowledge, skills, experience, training or education), reliability and usefulness (the relationship between an expert opinion and the case under examination) and reliability, tested on the basis of reliable principles or methods.

The measure used to assess reliability includes considering:

- 1) whether the expert's theory can be and has been tested;
- 2) whether the theory has been subjected to peer review and publication;
- 3) the known or potential rate of error of the particular scientific technique; and
- 4) whether the technique is generally accepted in the scientific community<sup>23</sup>, and similar criteria are applied to the testimony of experts who have given an opinion based on experience.

### **Case study:**

In the case of *Gomez v. General Nutrition Corp.* the expert's opinion was excluded from the evidence, the court indicating that the expert did not know the success criteria of the accessibility checking software relied upon, also taking into account the fact that the expert did not run these tests personally.

In the case of *Diaz v. LOBEL'S OF NEW YORK*, the court considered whether: 1) the testimony was grounded on sufficient facts or data; 2) the testimony was the product of reliable principles and methods; and

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20 *Gomez v. General Nutrition Corp.* 323 F Supp 3d 1368 (FL 2018)

21 *Diaz v. Lobel's of New York LLC* 16-CV-6349 (NY 2019).

22 *Gomez v. General Nutrition Corp.* and case law quoted therein.

23 *ibid.*

whether 3) the witness has applied the principles and methods reliably to the facts of the case.<sup>24</sup> It was argued in the case that the expert failed to disclose any information about the process or methodology used to conduct the 'audit' of the website. This argument was that he failed to disclose any information concerning "what the audits entailed, how they were performed, what the audits were designed to accomplish, what standards were used to conduct the audits, or whether the method by which he performed the audits is accepted within his field".<sup>25</sup> The court found insufficient the contents of the "manual" describing the audit procedure, which was to include two steps: website code analysis by programmers to test the level of meeting the WCAG 2.0 success criteria A and AA (described as the first step) and analysis using automated tools to verify the results of step one and identify other issues (step two). The screen recording videos of the party's audit process provided to the court by the expert were not a sufficient replacement for a proper explanation of overall methodology and process.

#### *6. Software used in expert witness testimony in the US and Poland*

In Poland, there have been no court cases deciding the admissibility of an expert witness testimony regarding digital accessibility so far. However, in the judgments concerning the use of software in general, certain issues worthy of careful preliminary description can be identified. In the judgment of the Court of Appeal in Katowice of 5 February 2020,<sup>26</sup> the court assessed the issue of the correctness of *vehicle valuation made with the use of specialized software*. The court was convinced by the opinion issued by the court expert, but was not convinced enough by the private expert witness submitted by a party, explaining that "the significant difference between the value of the vehicle resulting from the opinion prepared on private commission before the sale of the vehicle and its value determined by the court expert results from the adoption of a different methodology in the process of valuation performed with the use of specialized software. The expert convincingly explained that in the case of the Bank, the value of the vehicle in question should be valued according to the program in the "sale" version, as the Bank does not deal with professional trade in motor

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24 Diaz v. Lobel's of New York LLC and case law quoted therein.

25 ibid.

26 I ACa 504/19, Legalis.

vehicles and should strive to obtain the highest possible price from the sale. The situation is different in the case of an entity engaged in such trade. Such an entity must bear in mind the need to resell the vehicle and obtain a margin equal to the difference between the purchase price and the next sale price. In such a case, the prospective buyer determines the price of the vehicle by estimating it in the "purchase" version, which leads to a 10-15% lower value of the vehicle.<sup>27</sup>

The use of *software supporting the valuation process* is an issue so important in the practice of Polish courts that there are professional publications on this subject. In this context, M. Chmieliński mentions the Polish Info-Ekspert system and the Eurotax system adapted from the German market. The Author describes that the foundations of databases enabling valuation support appeared as early as 1933 in the catalog under the name "Glass's Guide to Car Values"; he also provides that expert witness opinions prepared on the basis of such programs are taken seriously: "the Eurotax system is well-known and regarded as reliable, and the Eurotax system products are tailored to the individual requirements of individual user groups. The Eurotax system includes many solutions, from databases and catalogs to integration with internal systems".<sup>27</sup>

*Modeling and computer simulations* were defined by M. Chmieliński as the third (interdisciplinary) method, next to the experimental (empirical) and theoretical procedures. This approach is useful in the context of the topic discussed in this chapter, because *digital accessibility testing* involves elements of a computer simulation (where there is an automatic analysis of potential digital accessibility errors), but at the same time an experiment (e.g. listening to a page using a screen reader) and theoretical analysis (analysis of code, e.g. in terms of the correctness of syntax or the ways of marking code fragments for readers in accordance with their actual purpose). The understanding of this multifaceted nature of tests carried out with the participation of experts is found in Polish jurisprudence. For example, in the judgment issued by the District Court in Świdnica 14 September 2018<sup>28</sup> (in a criminal case), the court emphasized that the expert must conduct experiments on the tested equipment (in this case - slot machines): "during the re-examination of the case, the Regional Court will be obliged to conduct the evidentiary proceedings in full, in

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27 Miroslaw Chmieliński, 'Możliwości wspomagania wybranych ekspertów i opinii specjalistycznych w obszarze bezpieczeństwa przy wykorzystaniu różnych programów komputerowych' (2017) 8 2(28) Problemy mechatroniki. Uzbrojenie, lotnictwo, inżynieria bezpieczeństwa 159-176.

28 IV Ka 290/18, Legalis.

particular, to admit evidence from a supplementary opinion (...) of an expert in the field of computer science and computer software. The expert should inspect the machines and installed software and, in addition to the questions presented by the Regional Court, answer the question whether and what relationship existed between the platform (...) and the running of games, in particular whether the game could be run independently of the software (...). The expert should also take an opinion on the way the experiment was carried out by customs officers on these machines and assess the correctness of their operation in this regard and the conclusions drawn. When re-examining the case, the court should make a reservation that the expert should secure the connection of the devices in question with the Internet before issuing the opinion".

As M. Szmith describes, in Poland, experts testifying in cases involving software struggle with the problem of the need to *evaluate the source code*. The Author described his experience in which he had to "comment on a computer program, the source code of which and the resulting program were not included in the presented material. Of course, formally it was probably possible to issue an inconclusive opinion, but it was much better and more reasonable from the point of view of the economy of the proceedings to ask the court to supplement the evidence and to provide the subject of the analysis". Further adding that "it is hard to consider such a request as suggesting a specific tactic for the case",<sup>29</sup> a question widely discussed in the legal doctrine on the taking of evidence, as well as in jurisprudence. The issue of the reliability of tools used by experts in computer forensics is, as the Author points out, supplemented with **standardization** (*American National Standards Institute*, which issued several standards for testing computer devices) and the *creation of industry standards and guidelines* (*The Scientific Working Group on Digital Evidence*, which develops guidelines on detailed technical aspects of computer forensics, and *The Scientific Working Group on Imaging*).<sup>30</sup> With the exception of a few historical examples, the lack of current Polish initiatives in this area shows how important the issue of reliability of software is for the American jurisdiction.

In a study related to the American jurisprudence of 2010 (*S. Bratus, A. Lembree, A. Shubina*), there appears a problem of *excessive trust in new tech-*

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29 Maciej Szmith, 'Biegły informatyk w postępowaniu cywilnym' (2010) 121/1078 *Zeszyty Naukowe Politechniki Łódzkiej* 487-501.

30 Maciej Szmith, 'O standardach informatyki śledczej' (2018) 355 *Studia Ekonomiczne* 81-91.

nology on the part of courts. The Authors emphasized the need to question the reliability of technology which in itself may in theory seem impartial (the Authors used a wording in which *the machine was treated as an objective learned fool - idiot savant*). However, the way the program is written (which is why access to the source code is so important), as well as the database used in it, can affect the operation of the program. Therefore, the Authors suggest that expert witness testimony should be conducted in such a way that the persons performing the tests with the use of such software testify before the court, and the documentation concerning the correct operation of a program or machine is available to be analysed as evidence.<sup>31</sup> A similar problem is pointed out by the Polish author *M. Chmieliński*, who calls it "illusory credibility".<sup>32</sup> Apart from the description of procedural guarantees allowing for "deep" evidence submissions and considering the reliability of expert witnesses in American jurisprudence, the results of the 2010 research on the use of software in expert witness testimony in the US provoke questions about the future of expert witness testimony where machine learning software is used.

As is well known, solutions simulating the so-called artificial intelligence (AI), in particular machine learning techniques, work in a way that is difficult to observe. They are referred to as "*black boxes*", i.e. (as already mentioned) a situation in which we may learn the data entered into the program and the result of the analysis, but *we cannot observe the inner process of the analysis*. As indicated by *P.W. Nutter*, this issue is similar to the doubts one might have about the findings of drug dogs.<sup>33</sup> The Author points out that machine learning technologies can contribute to the justice system (e.g. by performing lip reading, in the absence of an audio track; by approximating features of the perpetrator from the DNA trace analysis; mentioning that DNA analysis using TrueAllele has gained the trust of the authorities by practical elimination of the "human factor" - laboratory technician - from the test).<sup>34</sup> According to the Author, machine learning techniques can pass the Daubert Standard test (discussed above).

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31 Sergey Bratus, Ashlyn Lembree and Anna Shubina, 'Software on the witness stand: what should it take for us to trust it?' in Alessandro Acquisti, Sean W Smith, Ahmad-Reza Sadeghi (eds), *Trust and Trustworthy Computing, Third International Conference, TRUST 2010, Berlin, Germany, June 21-23, 2010, Proceedings* (Springer 2010) 396-416.

32 Chmieliński (n 27).

33 Patrick W. Nutter, 'Machine learning evidence: admissibility and weight.' 21 (2018) U. Pa. J. Const. L. 919.

34 ibid.

## *7. Summary*

The role of the lawyer will change due to the technological revolution, additionally accelerated by the COVID-19 pandemic. While it is unlikely that lawyers will be replaced by artificial intelligence, it is becoming more and more realistic to replace some of their activities with more and more specialized LegalTech tools. The chapter discussed analyses into ensuring digital accessibility with the use of new tools in the arsenal of a technology lawyer, such as NVDA. Tools such as these make it possible to assess the compliance of public authorities' websites with domestic and EU law with the use of technology. However, one should not jump to too hasty conclusions from the existence of such tools. The human factor remains the most important link in the compliance process.

# LegalTech in Law Firms and the Work of In-house Lawyers

*Iga Kurowska, Kamil Szpyt*

## *1. Introduction*

Law offices and offices of in-house lawyers seem to be the first place where - in all likelihood - you will come across the practical application of LegalTech solutions. Unlike public administration bodies whose innovation may be limited by lack of adequate funding or unnecessary bureaucracy, attorneys – as the representatives of the private sector driven by the free market economy – should strive to provide service at the highest possible level.

This, however, is just a theory. The reality, unfortunately, is quite different. It should be remembered that the vast majority of entities in the legal sector present on the market are not large corporations with impressive capital but one-person or several-person law firms, usually employing only the indispensable administrative staff. With such a balance of power, it is difficult for the aforementioned lawyers to find both the time and the resources to invest in implementing innovative technological solutions that – with fair winds - will pay off only after a longer period of use<sup>1</sup>.

Theoretically, so-called in-house lawyers - employed in large pharmaceutical, telecommunication, insurance companies, etc. - should be in a better situation. In their case, the costs of purchasing and implementing of new IT systems and software are usually borne by the employer/principal. This, in turn, involves the necessity of requesting consent for such actions, which may often be refused. Thus, the scope of freedom of decision in the case of these employees is significantly limited. In addition, there has recently been a widespread tendency to reduce the budgets of legal depart-

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1 It should be pointed out, however, that there are also opinions that in the case of smaller law firms it is easier to decide to implement new, previously unused solutions; see: Tomasz Zalewski, 'LEGALTECH – wyzwanie przyszłości' (2019) 3 Temidium 9.

ments, even though - given the circumstances described in this chapter - this issue should rather look quite different<sup>2</sup>.

Nevertheless, after the above somewhat pessimistic introduction, it should be pointed out that the situation of using LegalTech solutions in the legal services market does not look bad at all. They are becoming increasingly popular not only among large corporations, but also smaller law firms. It also seems that lawyers are increasingly willing to experiment and take the financial risk of implementing new solutions<sup>3</sup>. This is often the case when client expectations require so. However, this does not change the fact that, unfortunately, the process may involve numerous complications, which – at the very beginning - may be ignored by enthusiastic lawyers. On the other hand, in the doctrine, there is still a considerable gap as regards publications that could constitute a guide and introduction to the issues in question, which means that many lawyers have to make their adventure with LegalTech through trial and error, many of which could be avoided.

The above circumstances led to writing this chapter in an attempt to answer the question: what LegalTech solutions actually are or should be used by lawyers working in law firms and in-house lawyers<sup>4</sup>. The authors have refrained from discussing specific products available on the market in order to achieve the greatest possible universality of the present study. Such generalisation, due to the market's dynamic, will also guarantee the text to preserve its relevance<sup>5</sup>. In addition, for the sake of clarity of

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2 See Mateusz Jakubik and Tomasz Świątnicki, ‘Technologia coraz bardziej obecna w pracy prawników’ <[www.prawo.pl/prawnicy-sady/informatyka-w-pracy-prawnikow-eksperci-piszca-o-legal-tech,504169.html](http://www.prawo.pl/prawnicy-sady/informatyka-w-pracy-prawnikow-eksperci-piszca-o-legal-tech,504169.html)> accessed 25 April 2021.

3 However, it should be noted that the level of development of the LegalTech market in individual EU countries will vary. In some of them, similar solutions are slowly becoming a standard (France, Spain). In other countries, the market is just beginning to develop (e.g. Poland); see Maciej Wróblewski, ‘Gdzie zaczęła się LegalTechowa rewolucja?’, <<https://blockchainext.io/gdzie-zaczela-sie-legaltechowa-revolucja-wywiad/>> accessed 25 April 2021.

4 Due to the fact that, despite appearances, the work of lawyers employed in law firms in many areas differs significantly from the activity of in-house lawyers, which also translates into LegalTech solutions recommended for and used by these groups, it was necessary in many places of this article to limit itself to relatively general considerations, since undertaking a more detailed analysis, detailing the differences in both cases, would go far beyond the scope of this chapter.

5 This decision was all the more obvious for the authors of this chapter, as the Internet offers rankings or entire databases of LegalTech products, often grouped according to their functions – see, e.g.: Katalog LegalTech available on Fundacja

the argument, it was done taking into account the three-level division of LegalTech<sup>6</sup> presented in the first chapter.

## 2. *LegalTech 1.0*

### 2.1. *The Most Popular Tools*<sup>7</sup>

At the beginning of this discussion, it is worth pointing out that the elementary set of computer tools categorized as LegalTech 1.0 and used in everyday work of in-house and office lawyers includes software for word processing, organizing data in spreadsheets and preparing visual presentations. The tools which nowadays have an equally wide range of applications are: electronic mail, which continues to be the basis for both external and internal communication as well as video and teleconferencing tools (which gain increasing popularity as a result of the COVID-19 pandemic and travel restrictions associated therewith). Automated invoicing software can also be included in the array of commonly used solutions. Lawyers also seem to be taking more and more advantage of e-signature and public administration platforms. Although it is difficult to predict that all EU countries will introduce paperless solutions in the coming years, filing official documents in an electronic form or conducting court hearings online (although, not yet fully accepted by the entire legal community) is no longer seen as something unusual.

The above solutions have been widely implemented by almost all law firms and in-house lawyers. The implementation of these solutions is natural and not associated with major concerns or difficulties in application, except perhaps for some practical problems, however, resulting more from the slow digital transformation of public institutions rather than law firms handling lawsuits. Let us not forget, however, that obstacles of a similar nature, i.e. lengthy procedures, difficulties in communication and

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LegalTech Polska website <<https://legaltechpolska.pl/katalog-legaltech-polska/>> accessed 25 April 2021.

- 6 Oliver Goodenough, ‘Getting to Computational Jurisprudence 3.0’ in: Oliver Goodenough, Amedeo Santosuoso and Marta Tomasi (eds.), ‘The Challenge of Innovation in Law: The Impact of Technology and Science on Legal Studies and Practice’ (Pavia University Press 2015), 3.
- 7 The division into subsections introduced in this chapter is highly conventional in nature and its purpose is to allow the reader to more easily navigate through its contents rather than to set rigid boundaries between different solutions.

technical problems, have been the concern of the justice system for many years<sup>8</sup>. Therefore, it would be wrong to expect that the use of new technologies alone would result in the removal of these obstacles. LegalTech, in the broad sense of the term, is only a part of improving legal work and systems; its application should therefore go hand in hand with the modernization of structures and management methods of organizations (whether we are talking about the private or the public sector).

Among LegalTech 1.0 tools which are intended to support lawyers in their daily work, making it faster, better and, consequently, more competitive<sup>9</sup>, we can also mention the use of legal information platforms (systems) designed to collect judgments and doctrinal studies in a dematerialized form. They are usually available in the Software as a Service (SaaS) model<sup>10</sup>, sometimes divided into modules, each of them charged separately. Access to these tools seems to be a commonly recognized standard of equipment for every law firm and in-house lawyer.

## 2.2. *Best Practices in Implementing LegalTech 1.0 Solutions.*

When discussing the use of technology in improving the work of lawyers, it is important to mention that part of a law firm's digital transformation should also include, in addition to the monitoring of the LegalTech market and introducing new IT solutions, an attempt to make the widest and safest use of the technological solutions (already possessed by a law firm or

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8 See ‘Diagnoza stanu polskiego sądownictwa. Materiał RPO dla sejmowego zespołu ekspertów „okrągłego stołu”’ <[www.rpo.gov.pl/pl/content/diagnoza-sadownictwa-material-rpo-dla-sejmowego-zespolu-ekspertow](http://www.rpo.gov.pl/pl/content/diagnoza-sadownictwa-material-rpo-dla-sejmowego-zespolu-ekspertow)> accessed 25 April 2021.

9 As of 2019, the average lawyer invoices only 2.5 hours of work per day; see: ‘Legal Trends Report 2019’ (Clio 2019) <<https://www.clio.com/wp-content/uploads/2019/10/2019-Legal-Trends-Report.pdf>> accessed 25 April 2021.

10 For more on SaaS contracts, see Michał Modrzejewski, ‘Podatkowe aspekty korzystania z oprogramowania komputerowego w modelu SaaS (Software as a Service)’ (2016) 8 *Przegląd Podatkowy*15; Krzysztof Żok, ‘Prawna i ekonomiczna analiza umowy o korzystanie z programu komputerowego jako usługi (Software as a Service, SaaS)’ (2017) 4 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego* 63; Krzysztof Żok, ‘Kwalifikacja umowy o korzystanie z programu komputerowego jako usługi (Software as a Service, SaaS) – uwagi na tle prawa polskiego i wybranych zagranicznych systemów prawnych’ (2015) 3 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego* 18.

legal department) possible for all lawyers and administrative staff. In this context, it is particularly important to take care of two issues:

- 1) a high level of competence in training lawyers and administrative staff using LegalTech solutions - for example, adequate proficiency in using apparently simple and obvious word processing functions, such as change tracking, document comparison, automatic creation of tables of contents, footnotes, bibliographies, or keyboard shortcuts, can positively affect the efficiency of a law firm's work. Moreover, spreading the word about the licenses purchased by your law firm and familiarizing your team with the capabilities of the tools possessed as well as their upgrades (i.e. permitted new functionalities) is an important part of changing your work culture. Unfortunately, lawyers (focused on their day-to-day activities under time pressure), find it difficult to develop new habits and appreciate the importance of training to take full advantage of the capabilities of even the simplest legal technologies;
- 2) compatibility, legality and update of software used - however improbable it may seem, it is quite common for employees of smaller law firms to use software from an illegal source, used in violation of the principles of a license, or in trial versions. It is not uncommon for people working in a law firm to use their own (non-corporate) equipment (e.g. laptops), which they take home after work and use for private purposes; they often install software by downloading files from unverified sources.

The consequences of such behavior may be numerous and diverse in nature, including legal (e.g., use of software without a license or in violation of its rules) and organizational (incompatible versions of a file developed by a group of people in a law firm resulting in wasted time). However, it is particularly important to ensure compliance with cybersecurity rules<sup>11</sup>. As the coronavirus pandemic shows<sup>12</sup>, the use of new technologies contributes to the increase of risks related to network security and data processing. This is directly related to more frequent work at home and an increase in the amount of software used.

The key issue to which attention should be paid with regard to the above is the introduction of appropriate procedures and good practices for

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11 See Section V Chapter 26.

12 See Violet O'Gorman, 'Cybercrime during the coronavirus pandemic: what does it mean for the legal industry?' <<https://www.lexisnexis.co.uk/blog/in-house/cyber-crime-during-the-coronavirus-pandemic-what-does-it-mean-for-the-legal-industry>> accessed 25 April 2021.

keeping software up to date. This is especially important for the operating system and the elementary tools used (in principle) on a daily basis: the web browser and the antivirus program. If possible, automatic software updates or at least an alert should be set up to notify about the availability of a new update. All sorts of background programs designed for updating and maintaining operating systems, usually equipped with a built-in function of informing about a potential vulnerability in the software and the possibility of mitigating it by installing an update will be particularly helpful for more careless users.

The above issue should be regulated in the IT system management instruction applicable in a given entity. All employees should become familiar with its content. The adoption and observance of such instruction in the workplace shall undoubtedly be one of the first issues to be examined in the case of a possible personal data protection incident and control of the entity by the national supervisory authority.

One of the main conclusions from the above considerations is that before moving to more advanced solutions, lawyers who want to implement LegalTech solutions in their offices or legal departments should verify whether they use the simplest IT tools in a full and correct manner and whether the operational structure of the organization is suitable for taking another step forward in terms of modernization. It seems that lawyers falsely presume that they and their employees have the necessary competences in this area.

### *3. LegalTech 2.0*

#### *3.1. General Remarks*

LegalTech 2.0 aims to replace lawyers in many of their activities, by having the machine assimilate some of the knowledge or legal processes. Thus, the technology in question does not only serve the purpose of streamlining everyday tasks by improving the efficiency of processes and work organization, but it is also intended to utilize technological potential to perform this work. LegalTech 2.0 solutions include i.a. e-discovery, document management automation software, contract analysis by Artificial Intelligence (AI), legal expert systems (i.e. chatbots), the use of Big data analytics to formulate legal arguments, predict the outcome of a hearing, and even business intelligence. Although the current state of Natural Language Processing (NLP) technology does not allow for high-quality understanding

and processing of legal text<sup>13</sup>, it is predicted that in the future similar, activities of summarizing and editing basic legal texts will be possible. Compared to the previous LegalTech 1.0 category, these are more advanced disruptive technologies that nowadays are only partially used by law firms and legal departments due to their sometimes high cost and lack of overall trust on the part of lawyers. The second most important reason for their slow adoption is the lack of initiative on the part of lawyers themselves to implement such solutions and use them on a regular basis.

Before analyzing different solutions, it is worth noting that LegalTech 2.0 has great potential in terms of enhancing access to justice, especially for those who do not choose the services of law firms either because they cannot afford them or because the case involves a small amount of money (e.g. an unpaid invoice or unreturned deposit for an apartment). As C. Christensen points out, innovations usually fill the downstream gap in the first place<sup>14</sup>. Understanding this phenomenon usually reassures those who fear for the future of themselves and their law firm colleagues. This thesis is confirmed by the position occupied in the market by alternative legal service providers (ALSPs)<sup>15</sup>. Their services, which are massively automated and aggressively promoted, are offered at affordable prices and often do not compete directly with law firms, which prefer to engage in more complex, revenue-generating activities. However, this does not preclude that the limit of the ALSP's range of services will continue to shift to include more and more complex services. An example is a platform offering a number of contracts for start-ups, which the customers personalize themselves using a form designed for this purpose and, if necessary, seeks advice from a virtual assistant. With the arrival of a new generation of employees, including managers<sup>16</sup>, such solutions, focused on the quality of User Experience (UX), must be adopted by law firms, otherwise all

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13 Kevin D. Ashley, *Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age* (Cambridge University Press 2017) 4.

14 Clayton Christensen, *The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail*. Boston (MA: Harvard Business School Press 1997) 215.

15 An ALSP's market presence depends largely on the level of regulation of the legal profession in a particular state.

16 The U.S. Bureau of Labor Statistics predicts that by 2030, so-called millennials will make up 75% of the workforce; see: Jeff Schwartz and Bill Pelster, 'Global Human Capital Trends 2014: Engaging the 21st-century workforce' <<https://www2.deloitte.com/us/en/insights/focus/human-capital-trends/2014/hc-trends-2014-introduction.html#endnote-sup-10>> accessed 25 April 2021.

customers will turn to ALSPs, even though they may be presumed to provide services of lower quality<sup>17</sup>.

### 3.2. Document Management Automation Software

Much less popular are programs for document automation, workflow management<sup>18</sup> in a law firm or sophisticated Customer Relationship Management (CRM) systems<sup>19</sup>- tailored specifically to the needs of a given law firm. Thanks to these solutions, which have been used by entities from other sectors for over 15 years, clients have the possibility to track the progress of work on their case, including monitoring of the time spent by the law firm on assigned tasks, or exchange of documents and correspondence. In case of more advanced programs, the lawyer can manage e.g. general meetings online, send documents for electronic signature (when CRM has an integrated certified signature system), work on documents or issue invoices. Due to the fact that these types of solutions are cloud-based, multiple users can have both passive access as well as active participation in creating and editing documents at the same time, thus transforming CRM into an interactive platform. Such tools, in their more elaborated version, often are global in nature and successfully replace many other tools, such as instant messaging or e-billing<sup>20</sup>.

In the context of LegalTech 2.0, one should also not forget about an extremely important automation process in the management of the docu-

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17 It is worthwhile to refer to the considerations of R. Susskind on the right to a court in the context of the need to provide citizens with adequate tools to determine their rights and possible scenarios of action in the event of popularization of online courts; see: Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 121.

18 The term can be understood in two ways: in a broad sense (as a way of information flow between various objects involved in its processing) and in a strict sense (as a way of document flow between employees performing a certain algorithmic set of activities); see dictionary entry: Wikipedia, ‘workflow’ <<https://pl.wikipedia.org/wiki/Workflow>> accessed 25 April 2021.

19 For more on CRM, see Ahmad M. Zamil, ‘Customer Relationship Management: A Strategy to Sustain the Organization’s Name and Products in the Customers’ Minds’ (2011) 3 European Journal of Social Sciences 451–459.

20 On e-billing see more: Christine Legner and Kristin Weber, ‘Electronic bill presentation and payment’ <[www.researchgate.net/publication/221408047\\_Electronic\\_Bill\\_Presentation\\_and\\_Payment/link/55746c1f08ae7536374fee56/download](http://www.researchgate.net/publication/221408047_Electronic_Bill_Presentation_and_Payment/link/55746c1f08ae7536374fee56/download)> accessed 25 April 2021.

ments owned. Despite appearances (and some advertising slogans), it is not limited to purchasing software licenses only. In fact, the first step that law firms and legal departments should start with is to systematize their documents (knowledge management) and develop templates containing various modifications (e.g. potential contractual clauses). The law firm should also perform an audit of the documents to be automated, as it is possible that, for example, it may be sufficient to store some more untypical contracts which require a high degree of personalization and are rarely used, in a structured version, without the need to enter them into a document automation program. The aforementioned task cannot be entrusted solely to administrative staff or lower-rank lawyers but requires the involvement of more experienced law firm partners/associates as well. This allows you to place in the system the highest quality template documents, providing for all (or almost all) possible objections/modifications/comparisons. Only after this step has been completed should the work with the IT program begin.

This first step can be an opportunity for many people to reorganize their e-library of documents, rethink internal processes, unify the style of letters, or even implementation of further innovations, e.g. by using legal design techniques to simplify the form of legal communication<sup>21</sup>. The very introduction of pre-designed templates into the system can also be laborious, requiring meticulousness and equivalent training by the solution provider. Therefore, it is recommended that it be entrusted to an administrative employee familiar with law office procedures.

### *3.3. Chatbots*

The above mentioned chatbots constitute a LegalTech 2.0 solution whose implementation could be a game-changer for numerous law firms. R. Susskind defines them as computer applications containing a representation of knowledge and expertise used to solve problems, advise or perform other various activities, in a manner analogous to that of humans<sup>22</sup>. Although they were invented *de facto* in the 1980s, their potential was not

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21 On legal design see, e.g. Véronique Fraser and Jean-François Roberge, 'Legal Design Lawyering: Rebooting Legal Business Model with Design Thinking' (2016) 16 Prepperdine Dispute Resolution Law Journal 303–316; Roman M. Yankovskiy, Legal Design: New Challenges and New Opportunities (2019) 5 Zakon 76–86

22 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, (Oxford 2010), p. 120.

initially recognized in the legal sector (mainly due to the competition of the Internet era). It is only recently that the possibilities of legal expert systems have been used by both public and private organizations<sup>23</sup>. Nowadays, the application of these systems is extremely wide and easily available on the market, e.g. when evaluating compliance of company's practices with GDPR. For example, the system created by an expert in the form of a decision tree (mind mapping), asks questions directly to the client and, step by step, leads to final conclusions and recommendations<sup>24</sup>.

It should be noted that such a result can be achieved without the need for artificial intelligence. However, more complex systems that are powered by AI for the purpose of carrying out diagnosis also have promising applications, especially because of the self-learning process of the algorithms. Unfortunately, even state-of-the-art *legal expert systems* are not equal to legal analysis carried out by humans<sup>25</sup>. First, creating such a system is very laborious and requires top-level expertise, which is not financially rewarding due to rapidly changing legislation. Second, technologies developed on the basis of uncertain and incomplete information tend to be single-purpose rather than comprehensive ones. Third, manual reproduction of the law leads to a *knowledge acquisition bottleneck*, which itself is problematic as it does not reflect the complexity of legal provisions<sup>26</sup>. Moreover, the current state of technology does not allow to solve this important problem<sup>27</sup>. Therefore, nowadays we rather observe the alternative use of chatbot infrastructure to automate simple services preceding the

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23 One of the more widely described applications of legal expert systems in the literature is BNA - a program of the British government used to evaluate applications of foreigners; see: Kevin D. Ashley (n 285) 48 ; or Foley & Lardner law firm's chatbot powered by artificial intelligence to analyze international operations' compliance with U.S. anti-corruption law, the Foreign Corrupt Practices Act

- Michale Mills, 'Artificial Intelligence in Law: The State of Play, 2016, Part 3' <<https://www.neotalogic.com/wp-content/uploads/2016/04/Artificial-Intelligence-in-Law-The-State-of-Play-2016.pdf>> accessed 25 April 2021.

24 See Martin Hasal, Jana Nowaková, Khalifa Ahmed Saghair, Hussam Abdulla, Václav Snášel, Chatbots: Security, privacy, data protection, and social aspects <<https://onlinelibrary.wiley.com/doi/full/10.1002/cpe.6426>> accessed 25 July 2021.

25 Kevin D. Ashley (n 13) 8.

26 On the knowledge acquisition bottleneck (i.e., the difficulty in acquiring knowledge from human experts or other resources) see e.g.: Mihai Boicu, Gheorghe Tecuci, Bogdan Stanescu, Gabriel C. Balan and Elena Popovici, 'Ontologies and the Knowledge Acquisition Bottleneck' <[www.researchgate.net/publication/228549124\\_Ontologies\\_and\\_the\\_knowledge\\_acquisition\\_bottleneck/link/549dbfd20cf2fedbc31198ec/download](http://www.researchgate.net/publication/228549124_Ontologies_and_the_knowledge_acquisition_bottleneck/link/549dbfd20cf2fedbc31198ec/download)> accessed 25 April 2021.

27 Kevin D. Ashley (n 13). 9.

legal service and to build the brand of an innovative law firm, e.g., by locating a simple chatbot on a website, which, as a result of asking a series of questions, obtains information allowing to redirect the client to the appropriate department of the law firm.

### *3.4. Artificial Intelligence*

The legal community's hopes have been raised by the development of machine learning and AI<sup>28</sup>. Current AI-based software is successfully used to analyze large amounts of documents, e.g. in the due diligence process for mergers & acquisitions (M&A) or real estate. However, this solution is being used at the moment almost exclusively by large international law firms, due to its high cost and the large number of transactions that are necessary to leverage even partially the potential of AI. It is estimated that in order to teach the algorithm to properly distinguish the clauses (taking into account the differences in editing and terminology), 180-200 training contracts are needed. Lack of availability of multilingual training material for algorithms is one of the major obstacles for the development of these technologies on a larger scale, both geographically (so that they are applicable in other than English speaking markets) as well as by increasing the availability of ready-made solutions also to smaller law firms (reducing the cost of the solution through the economies of scale). Currently, the pioneers of such solutions, in order to enable their own development, most often start cooperation with law firms, providing them with a "semi-finished product", i.e. software with limited functionality of algorithms, counting on the improvement of algorithms along with their use, and justifying the price with other functionalities based on traditional programming, e.g. systematization and labeling of documents, possibility to co-edit and compare documents, operation management by assigning tasks (workflow management). However, despite the exclusivity of this solution, M&A departments, due to, i.a., the use of popular data rooms, which force them to make the first step necessary to enable the use of the discussed software, such as dematerialization of documents, are still considered as the so called 'early adopters' in the use of LegalTech 2.0.

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28 See Section VII Chapter 4 and 7.

### 3.5. Blockchain

Blockchain<sup>29</sup> – depending on the way of use - can be divided into three categories: 1.0, 2.0, and 3.0, and categorized accordingly within the respective *LegalTech* categories. Currently, this technology although promptly replaced but Blockchain 3.0, seems to be most often used in LegalTech 2.0 (which led to its inclusion in this subchapter). Regardless of this, it should be pointed out that due to its properties (i.e. security, transparency, preservation of chronology, immediacy, proof of work), it is a breakthrough technology for lawyers<sup>30</sup>. There are many initiatives aimed at leveraging blockchain capabilities for legal services. The best known and closest to law are definitely smart contracts - computerized transaction protocols executing the terms of a contract<sup>31</sup>. As these are addressed in separate chapters in this book, the applications that will be cited are of more niche character, yet they can still provide real convenience for lawyers.

This category includes the use of blockchain to maintain books and update entries in business registers - a legal obligation that entails numerous formalities involving the participation of a lawyer. The creation of dematerialized business registers covers in practice all sorts of company activities that are required to be recorded by national law, such as the register of shareholders, decisions of company bodies (e.g. the board of directors), or the register of employees<sup>32</sup>. In addition, company documents such as minutes of general meetings or written consultations of shareholders can be created and stored in a digital form.

Furthermore, blockchain can be used in a similar way to manage and protect intellectual property in which law firms are currently involved. It is possible to use this technology to record intellectual property rights,

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29 For more on blockchain technology, see, e.g. Dariusz Szostek, *Blockchain and the Law* (1 ed., Nomos 2019).

30 See Yves Poulet and Hervé Jacquemin, ‘Blockchain: une révolution pour le droit?’ (2018) 6748 *Journal des tribunaux* 801.

31 Nick Szabo, ‘Smart Contracts’, <[www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html](http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html)> accessed 25 April 2021.

32 Such obligations are required by French company law and their recording in blockchain technology has been enabled by law gradually in 2017 and 2019 - *Ordonnance n° 2017-1674 du 8 décembre 2017*, also known as *Ordonnance "blockchain"*, *décret n°2019-1118 du 31 octobre 2019 relatif à la dématérialisation des registres, des procès -verbaux et des décisions des sociétés et des registres comptables de certains commerçants*

as well as transactions involving works<sup>33</sup>. On the other hand, recording inventions by means of transcription in blockchain would solve a number of problems currently encountered, i.e. proof of priority. Moreover, blockchain would solve the problem of possible misappropriation attempts by a uniform traceability system that remains intact throughout the whole period of evolution and existence of the invention<sup>34</sup>.

#### *4. LegalTech 3.0*

Tools included in the most recent (for the time being) level of LegalTech are characterized by much greater independence than in the previous two categories. In their case, we are no longer dealing with mere automation, but with far-reaching autonomy of decisions. For obvious reasons, these solutions raise as much concern as hope. On the one hand, there is a futuristic vision of replacing lawyers with computer programs or the risk of uncontrolled operation of IT solutions that affect our lives. On the other hand, there is a chance for jurists to focus on really complicated cases requiring experience and to leave the simple and repetitive ones to digital assistants.

LegalTech 3.0 means, above all, solutions based on artificial intelligence and advanced algorithms using machine learning. However, as it has already been indicated in the opening chapter of this monograph, in these cases, the decisions are made by the system on the basis of independently acquired data and self-learning, while the final decision may be made directly by the IT system, without any control, as well as previously accepted by a human.

At this stage, only experiments and first attempts to implement similar solutions are being carried out. Most likely, however, the real boom will

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33 Monika A. Górska and Lena Marcinowska, 'Czy blockchain namiesza w umowach dotyczących własności intelektualnej?' <<https://newtech.law/pl/blockchain-namiesza-umowach-dotyczacych-wlasnosci-intelektualnej/>> accessed: 25 April 2021; for more on the use of blockchain for the protection and management of intellectual property rights, see B. P. Singh and Anand Kumar Tripathi, 'Blockchain Technology and Intellectual Property Rights' (2019) 24 Journal of Intellectual Property Rights 41–44; Gonenc Gürkaynak, İlay Yılmaz, Burak Yeşilaltay and Berk Bengi, 'Intellectual Property Law and Practice in the Blockchain Realm' (2018) 34 Computer Law & Security Review 847–862.

34 Guy Canivet, '«Preuve et Blockchain», présentation de la table ronde' (2019) 2 Dalloz IP/IT 201973.

come only with the development of the so-called strong (general) artificial intelligence, i.e. one characterized by self-awareness<sup>35</sup>.

It seems that lawyers will (and should) approach the implementation of solutions based on LegalTech 3.0 with extreme caution. Due to the significant degree of their independence, full control of these solutions will be impracticable, which in practice will translate into a number of legal and ethical problems: from liability for the actions of the said software, through potential difficulties in respecting professional secrecy (attorneys, notaries, etc.), to the validity of such actions, for example: if the law restricts the group of persons entitled to lodge a cassation appeal to professional attorneys, does its preparation, affixing a secure electronic signature (assuming that the law of a given state allows such a solution) and sending by an AI, which was, however, launched by a professional attorney, meet the above-mentioned requirements?

### *5. Summary*

The use of LegalTech solutions on a daily basis, although they are intended to facilitate and streamline the work of lawyers, also raises and will undoubtedly raise many doubts and challenges. The source of these doubts will often be hidden in the lack of prior consideration of the legitimacy of implementing certain solutions or misunderstanding of their actual nature and purpose. As a result, there are a few general reflections summarizing the previous considerations, which at the same time can serve as a kind of guidance at the stage of implementing such solutions in modern law firms.

First and foremost, all lawyers using LegalTech systems should start implementing any new solution by analyzing their needs and deciding whether this solution will actually be useful. For example, in the case of a law firm whose business is based primarily on court cases, the priority will be to systematize and automate letters rather than to invest in tools for conducting remote meetings of shareholders of companies. In practice, it may turn out that such a tool will not be used at all, and the money spent, objectively speaking, will be wasted. Ultimately, this may even discourage a given lawyer from using LegalTech solutions in the future.

Second, it is essential to learn the basics of any software being used before implementing new, more advanced solutions. A lawyer who is not

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35 Aleksander Chłopecki, *Sztuczna inteligencja - szkice prawnicze i futurologiczne* (2nd edn, Wydawnictwo C.H. Beck 2021) 5.

proficient in using a "traditional" text editor is unlikely to be able to take full advantage of the potential of cloud solutions that allow real-time document sharing and editing. The digitization of a law firm should therefore be adapted both to the real level of its employees and to the expectations of clients.

Third, it's important to remember that technological deployment is only a part of the way to modernizing law firms and in-house offices. An innovative approach should become a certain standard rather than just a passing trend. Therefore, it is advisable to match technology solutions to real needs and to place emphasis on engaging the entire team to promote participation in finding solutions to the concerns of a given team, i.e. sub-optimal management of knowledge or time. Naturally, keeping abreast of technology trends, raising curiosity about its real applications in the legal sector, as well as experimentation are encouraged. It is the commitment of the entire law firm team, not the occasional initiatives of individual Legal-Tech enthusiasts, that will lead to a more efficient digital transformation of the law firm and the firm's legal department.

Lastly, using even the most advanced IT solutions does not relieve us, lawyers, from the obligation to constantly improve our skills and qualifications. LegalTech in a law firm should be a motivation to take the quality of our services to the next level, but not an excuse for future laziness.



# Implementation of LegalTech Solutions in a Law Firm – Methodology of Risk Assessment and Risk Management

*Małgorzata Kurowska*

## 1. Introduction

LegalTech solutions – due to the automated information processing operations, as well as the generally significant level of technical complexity – trigger potential risks from the perspective of the core values associated with the legal profession. The values at stake here are ensuring the confidentiality of information covered by professional secrecy, trust between client and lawyer, or ensuring the highest possible level of service. Violation of these values – as indicated in the chapter *Legal Tech vs Data in Organisation* – involves potential disciplinary liability, and in certain cases may also constitute a civil tort or, still worse, a criminal offence.

A lawyer should therefore take a systematic approach to the project of implementing LegalTech solutions in a law firm – including ensuring accountability of the process of selecting and deciding on implementation in the context of risks related to implementation process.

This section describes such proposals for approaching the above-mentioned project as are intended to mitigate the risk of an alleged failure to exercise due diligence in this context. It should be noted here that the proposals refer to LegalTech solutions that are defined in this paper on several occasions. The proposed model will also be successful in projects involving new information technologies, qualified as LegalTech 1.0. (e.g. implementation of a document repository in a public cloud in a Law Firm), but also more advanced tools of Legaltech 2.0. or 3.0.

It should also be noted that this chapter's perspective is focused only on information security and legal/organisational/technical risks management, resulting from specifics of Legaltech tools. Such issues as business analysis of implementation process, operational aspects or principles internal communication are outside the scope of below considerations.

The basic implementation principles are described at the outset. These principles will serve as a reference for interpreting further steps discussed in the following parts of the section, i.e. information classification and

preliminary assessment of the acceptability of solution implementation, through risk estimation to risk monitoring.

Naturally, the size of this paper does not allow for these issues to be broadly discussed and, as such, the following considerations should be considered as a starting point for developing an optimal approach – in the case of an individual lawyer and his or her practice – that ensures compliance with the ethical standards of the legal profession and mitigates the risk of disciplinary liability or liability for damages.

## *2. General Principles*

### *2.1. Principle of Proportionality*

When implementing a new LegalTech solution, one should take account of the principle of proportionality, both balancing the associated risk and defining the necessary conditions for its use. One should take into account both the type of information to be processed as part of the solution (information classification) as well as its scale and processing context. Measures for safeguarding information handled in the process should match the conditions so defined.

On the other hand, the real possibilities of action on the part of a lawyer (Law Firm) must also be taken into account. In the case of an individual law firm or a law firm employing several or more individuals, extensive paperwork and internal requirements might deter the team and impede the use of LegalTech solutions, thus undermining the efficiency and quality of work.

When balancing sometimes conflicting arguments and making an ultimate decision, a lawyer should bear in mind liability attached to a violation of professional rules, in particular with regard to the protection of information covered by professional secrecy. As such, the principle of proportionality should not be relied on to justify a decision not to conduct an analysis or to apply measures that provide merely an apparent safeguard against the risks identified.

### *2.2. Principle of Transparency*

The implementation of modern LegalTech solutions should take into account the subsequent transparency of actions of a lawyer who will use the

solutions, in the context of his or her relationship with the client. Trust between client and lawyer is a core ethical value of a legal profession and a practical use of the solution should only be allowed where such trust is preserved.

In certain cases, the duty to inform the client will be an explicit legal requirement. This will be the case, for example, for the processing of personal data using profiling – cf. Article 5(1)(a) in conjunction with Article 21(4) of the General Data Protection Regulation (GDPR), or automated decision-making<sup>1</sup> – Article 22 GDPR. Principles of transparency may also be set out in a lawyer's code of ethics or derive from the case law of commercial courts.

However, even in cases where no personal data are processed via the solution used, a lawyer should assess to what extent it is reasonable to inform the client of the use of a particular technology, bearing in mind the crucial importance of trust for the lawyer-client relationship. In practice, a different assessment will apply to solutions that support legal research or the drafting of standard documents, that are subsequently reviewed by a lawyer, and a different assessment will apply to tools whose use may entail specific risks to the confidentiality of client-related information: be it personal data of an individual, data of corporate clients, or data constituting business secrets, etc.

Methods of ensuring transparency may also vary, ranging from individualised information provided at the contract stage to privacy policies posted on a Law Firm's website.

### *2.3. Principle of Accountability*

When implementing LegalTech tools, a lawyer should be able to demonstrate that he or she has exercised due diligence when selecting and implementing the solution (accountability).

It is therefore important to ensure that:

- *all activities related to the selection and implementation of the solution are documented.*
- The activities should be documented in such a manner that makes it possible to establish what steps have been taken, when, by whom and in what order.

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1 In the latter case, a lawyer must, in addition to informing the client of personal data processing, provide a specific legal basis set out in this provision.

- For this purpose, the analyses should be recorded in the form of a document – either a hard copy or an electronic version; depending on the specific needs and circumstances, such a document may additionally be protected against subsequent modifications (e.g. by means of an appropriate electronic signature).
- *roles have been clearly defined for the processes of implementation and use of the solution, i.e. specific responsibilities or authorisations have been clearly assigned to them.*
- This approach makes it possible to avoid both positive and negative conflicts of competence and to clearly allocate intra-corporate responsibility. On the other hand, it improves the comfort of work for the Law Firm's employees and associates whose tasks and responsibilities are clearly defined.
- In defining these competencies, a lawyer should take into account the different roles performed in a Law Firm, associated with different levels of disciplinary liability depending on the professional status, as well as the liability of the owner or manager(s) of the Law Firm for acts and omissions of its employees or associates. In this context, it is particularly important to consider:
- the specific role of managing partners or other persons performing managerial functions. Depending on the organisational model, these may not only be partners, but also team coordinators or other senior staff;
- the position of lawyers who are not yet fully licensed but who are required to comply with the relevant code of ethics (trainees);
- the situation of lawyers that are not subject to codes of ethics. In this case, the need to impose certain contractual obligations must in particular be assessed;
- the specific nature of work of those who support the provision of legal services – such as administrative staff, assistants or trainees.

In practice, it is a good solution, especially in the case of teams composed of several dozen or more individuals, to designate a person responsible for all activities related to the use of LegalTech solutions. Such a project manager manages the selection and operation of tools, and ensures that tasks assigned to various risk owners (cf. below) are properly carried out.

#### *2.4. Due Diligence*

We have looked in detail at the principles of lawyer's liability in the chapter Legal Tech vs Data in Organisation. At this point, it is worth recalling that the central importance of protecting professional secrecy and promoting trust between lawyer and client is an essential element of the legal profession. Violation of these ethical principles may give rise to disciplinary liability, and civil liability may also be involved if the client additionally suffers damage. In view of the foregoing, a lawyer should exercise due professional care not only to protect himself or herself against such liability, but above all to avoid causing damage to the client (whether in the form of a tangible financial loss or a moral loss). In practice, this diligence will be reflected in conducting a detailed analysis of the solution to be implemented, learning how it works and identifying the risks associated with its use. In order to structure this process, it is possible – based on the standard information security management model set out in ISO 27 001 – to define the following scheme of action for a lawyer embarking on the implementation of a new LegalTech tool:

<p><b>1. PRELIMINARY ASSESSMENT</b> PURPOSE: Determining the features of the LegalTech tool, identifying the purpose of the process and the information resources processed by the LegalTech tool.</p> <ul style="list-style-type: none"> <li>a. Determining the process flow.</li> <li>b. Collecting information on the currently applied information classification and risk estimation principles.</li> <li>c. Collecting documents to be reviewed (provider agreements, policies, internal procedures).</li> </ul>	<p><b>2. INFORMATION CLASSIFICATION AND ASSESSMENT</b> PURPOSE: Determining the features of the LegalTech tool, identifying the purpose of the process and the information resources processed by the LegalTech tool.</p> <ul style="list-style-type: none"> <li>a. Determining the process flow.</li> <li>b. Collecting information on the currently applied information classification and risk estimation principles.</li> <li>c. Collecting documents to be reviewed (provider agreements, policies, internal procedures).</li> </ul>	<p><b>3. PRELIMINARY DECISION TO USE THE LEGALTECH TOOL</b></p> <ul style="list-style-type: none"> <li>a. Assigning information resources used in the process to classes.</li> <li>b. Assessment of whether there are any limiting or excluding grounds.</li> <li>c. Assessment of the relevance of the information and its nature.</li> </ul>	<p><b>4. RISK ESTIMATION</b> PURPOSE: Risk identification and management.</p> <ul style="list-style-type: none"> <li>a. Identification of risks associated with the use of LegalTech tool.</li> <li>b. Determining the impact of the risk materialisation and the likelihood of its occurrence.</li> <li>c. Estimating initial risk and identifying countermeasures.</li> <li>d. Identifying residual risk and risk response strategy.</li> </ul>
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5. RISK RESPONSE DECISION	<p>d. Estimating the scale of the process.</p> <p>6. IMPLEMENTATION AND APPLICATION OF COUNTERMEASURES PURPOSE: Mitigation of identified risks, process accountability.</p> <p>a. Designating individuals responsible for risk management.</p> <p>b. Conducting ongoing risk monitoring.</p> <p>c. Evidencing actions taken.</p> <p>7. LAUNCHING LEGALTECH TOOL</p> <p>8. RISK MONITORING</p>
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Detailed comments on the individual elements of the above scheme are described below.

### *3. Information Classification and Process Evaluation*

#### *3.1. Preliminary Analysis and Classification of Information*

In view of the liability implications, a lawyer, when opting for a specific solution, should select, in addition to the tool itself, the types of information to be processed as part of the contemplated operations and the manner of processing. This step helps to structure the project assumptions and is the starting point for the risk analysis that follows.

Information classification is nothing more than the assignment of individual pieces of information to categories, singled out as per criteria defined by the organisation. Information classification should be regarded as the first step in implementing information security risk management. Information classification handled on an ongoing basis provides the organisation with up-to-date knowledge of information resources and how they are used, and consequently allows the organisation to respond to changes in its environment.

#### *How to classify information*

On the practical side, classification should begin with an inventory of the Law Firm's information resources. A record of processing activities (so-called RPA), maintained pursuant to Article 30 of the GDPR, may be a helpful, albeit not an exclusive, source of information in this respect. However, the Law Firm's internal records (such as RPA, or other records) are sometimes obsolete or incomplete in practice. Therefore, the information inventory should be based on arrangements made directly with those involved in information processing. For small organisations, such as law firms employing a few individuals or so, it is most practical to collect information directly, at meetings; for larger entities, audit questionnaires can be a functional solution.

The inventory should result in a list of information resources, set in the specific context of the organisation.

*Example:*

Type of information	Scope of information	Context (description)
Client contact information (B2B)	Business name, email address, telephone number, mailing address	Contact details in the team's CRM, used to contact and send marketing information
Information – client matters	Assignment-related correspondence, content of legal opinions, pleadings, documentation provided by the client	Information covered by professional secrecy which constitutes the content of legal assistance
HR information	Full name, type of agreement, amount of remuneration,	Information on employees – team members

It is worth bearing in mind that at this stage the breakdown of data is based solely on a mainly intuitive functional separation. Only at the next stage – the classification – will the inventoried information be assigned to a specific category (class). However, this requires a **decision on the classification criteria**.

The selection of each classification criterion always remains at the discretion of the organisation (a lawyer). In the context of the objective of ensuring information security, it is reasonable to rely on the criterion of information confidentiality, i.e. the criterion relating to the consequences of disclosing information to an unauthorised individual or individuals).

*Example:*

Class designation	Description	Examples of information
<i>Class A</i>	<i>Public data – no confidentiality measures are required</i>	<i>Contact details of the Law Firm Full names of team members</i>
<i>Class B</i>	<i>Internal use information – information that may be disclosed to individuals within the organisation and, if necessary, to specific third parties</i>	<i>Contact details of the Law Firm's employees Procedure for reporting security incidents</i>
<i>Class C</i>	<i>Restricted information – information that may be disclosed to individuals other than its owner only subject to certain conditions, that do not fall under Class D</i>	<i>Information on the Law Firm's financial performance Information contained in personnel files</i>
<i>Class D</i>	<i>Information covered by professional secrecy – accessible only to a lawyer and persons assisted by him/her</i>	<i>Information on the subject matter of legal assistance, content of pleadings drafted</i>

One of the common mistakes made at this stage is to single out an excessive number of classes. This is due to the temptation to describe the information in the organisation as precisely as possible, but this results in losing sight of the fundamental objective of simplifying information management. Singling out a number of classes has no practical consequences as it would not be possible to implement different security rules for so many categories of information.

Another solution is the use of hybrid criteria, i.e. criteria that are attributes of information security (e.g. confidentiality) coupled with normative criteria (e.g. personal data). This type of classification, although encouraging at first sight, turns out to be of little practical use.

*Example:*

*In X Law Firm, “Personal Data” has been singled out as a separate class and a principle has been put in place that no information constituting personal data may be processed with the use of cloud computing.*

*No one has noticed that the Law Firm uses Jira – in this particular case in a SaaS model – for project management; therefore, full names of team members and project names are recorded in the cloud. The Law Firm also uses Gmail to handle emails.*

### *Context of Solution Implementation*

Once the information has been classified by reference to technically neutral criteria (standards) adopted by the organisation, we move on to the selection of LegalTech tools. This is always done in a specific context, which should be properly described before making a decision to implement the solution.

The basic elements to be considered by a lawyer include:

a) **Nature of Information**

This is the element most closely related to the classification of information and involves establishing whether the information processed with the use of the selected tool, or as part of the assumed operation, constitutes professional secrecy. In certain jurisdictions, professional secrecy related to the provision of legal services in a criminal case (secrecy of defence) may also require additional distinction.

b) **Scale of Information Processing (planned scale of use of the tool)**

The scale should be established taking into account both an objective factor (the actual volume of data processed by the tool or the processes it implements) and a subjective factor (the scale of the process in relation to the scale of the Law Firm’s operations).

c) **Legal Constraints**

A lawyer should make a search for legal constraints that may affect the acceptability of implementing a specific solution. These constraints can:

- take the form of a specific provision of law

*Example:*

*no legal basis (Article 22 of the GDPR) for the automated processing of contractual or organisational data for the purpose of making relevant decisions concerning an individual.*

- have a contractual nature

*Example:*

*Law Firm's client – a financial sector entity – has expressly stipulated in a legal services agreement that it is not possible to process the information concerning it in a public computing cloud.*

- have an intra-organisational nature

*Example:*

*The Law Firm's corporate requirements, which apply globally, mandate prior notification to head office of any intended implementation of AI-based tools.*

d) **Relevance of information**

In order to assess whether it is acceptable to use the selected Legal Tech tool, it is reasonable to take into account, in addition, an attribute which, for the purposes of this paper, will be referred to as relevance of information.

Relevance should be understood as the adequacy of information, taking into account primarily the impact of potential security breaches related to the use of the LegalTech tool on the elements that are most important from the point of view of the legal profession – both from an ethical and a purely practical (organisational) perspective. It is therefore advisable, when determining the relevance of information, for a lawyer to take into account aspects such as security threats related to information constituting professional secrecy and continuity of provision of legal assistance (ethical aspects), as well as to a lawyer's financial situation and reputation – as aspects affecting the practical possibility of practising law.

*Assessing the Acceptability of Implementing the LegalTech Solution*

The final step of this stage should be a preliminary assessment of the acceptability of implementing the selected LegalTech solution. This assess-

ment should be based on confirmed information – both concerning the tool itself and the context of its use across the organisation. It is worth bearing in mind that in this model the initial assessment precedes the risk analysis, which may result in the identification of additional conditions or qualifications related to implementation.

Depending on the model adopted, the assessment may also indicate the extent to which a risk analysis will be carried out – in particular whether the Law Firm allows for a simplified risk analysis in a given case, in accordance with the standards it has defined.

#### *4. Risk Assessment*

##### *4.1. Risk-based Approach*

The risk-based approach is one of the concepts that have in recent years been used by legislators and regulators in the area of information protection (including personal data or other sensitive information). This is justified by rapid technological change, requiring a complete change of an approach to the obligation to protect information. Instead of defining, as previously, only “hard” technical and organisational requirements, the legislator now expects an entity responsible for protecting information to analyse the risks to information security itself and to select adequate security measures. At the same time, while regulations such as e.g. the GDPR expressly encourage a “pure” risk-based approach, for specific sectors or areas of law – both the EU legislator and the legislator in the Member States – supplements the risk-based approach by defining a certain standard as a minimum set of functionalities or features that need to be implemented.

**ISO 31000 Risk management – Principles and guidelines** is a global standard on risk management. The approach set out below takes into account the above standard while respecting the principle of proportionality.

##### *Risk-based Approach in Implementing LegalTech*

When implementing LegalTech solutions in a Law Firm, while a key element, risk assessment requires a well-thought, case-by-case approach. The principle of proportionality requires that both the scope of analytical activities and the safeguards to be implemented be adequate – both in

the context of the Law Firm's day-to-day operations and the planned implementation process.

For this reason, it is worth taking into account the possibility of grading the complexity of the analytical process and defining principles for **simplified risk analysis** in the solutions adopted. Such a simplified risk analysis may in particular consist in verifying the fulfilment of the conditions considered to be the minimum acceptable standard for the Law Firm (cf. comments below).

In any event, when deciding to implement a structured approach to risk management, a lawyer should consider elements such as:

- a) precise definition of the process and a good understanding of the Legal-Tech tool under analysis;
- b) definition of the context of the process (what information will be processed, whether the information is sensitive, the scale of the processing, its purpose, etc.).

As can easily be seen, clauses a) and b) are comprised in the step above referred to as classification of information and assessment of the acceptability of implementation.

In addition to these elements, as part of risk management, and regardless of the methodology chosen for its assessment, it is necessary:

- c) to decide **which areas will be relevant in the context of risk**

For example, such areas may include the security of professional secrecy, continuity of provision of legal assistance, the financial situation or reputation of the Law Firm.

- d) to identify, according to the method selected, **the risks associated with the selected solution**;

Risks can be identified, for example, on the basis of a standard risk "checklist", based on brainstorming, the expertise of those involved in the process, or by analysing the so-called "worst case scenario"<sup>2</sup>.

- e) To carry out a risk assessment in the context of the above areas – in line with the method selected.

A proposal on how to carry out steps from c) to e) is described below under "Risk analysis". It should be stipulated here that there are numerous risk assessment methods – the ISO 31000 standard is adopted below. At the outset of the risk assessment method decision stage, it is important to look at the standards indicated, including **31010:2019 Risk Management –**

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2 31010:2019 Risk Management – Risk Assessment Techniques.

**Risk Assessment Techniques**, which contains a comprehensive discussion of the assessment methods. An ultimate decision should take into account the circumstances of the Law Firm, including its organisational capacity and ease of implementation.

f) Defining the risk response strategy and the risk monitoring rules

However, the risk assessment alone should not put an end to the process. The next step in the risk management process is to define a risk response strategy, the rules for risk monitoring and reporting the results of such monitoring (see below).

#### *4.2. Risk Analysis*

##### *Identification of Risk Areas*

The first assumption under this approach is based on the identification of areas for which risk will be assessed. It should be noted that a single event can generate different types of risks. From the perspective of implementing the LegalTech solution, we consider at least the following risk areas to be reasonable:

- Risk to the security of information covered by professional secrecy,
- Risk of compromising the continuity of provision of legal services,
- Risk to the financial situation of the organisation (Law Firm),
- Reputational risk.

While the first two areas of risk are closely related to the ethical principles of the legal profession and as such are of paramount importance, especially from the perspective of disciplinary or civil liability, financial or reputational risks are essential from the perspective of the overall situation of the Law Firm as a business entity and workplace.

It should be noted that the above list is by no means exhaustive. Indeed, the obligation to carry out a risk analysis may arise directly from the law – the most typical example in this respect being the obligation to assess the risk to the rights and freedoms of natural persons, as set out in the provisions of the GDPR.

### *Risk Identification*

For a standard risk analysis (leaving aside a simplified analysis here, as discussed below), each of the above areas should be reviewed for the risks they carry.

A **risk** is to be construed as *an event which may result in negative consequences, connected with a potential event (circumstances), concerning a given area* (e.g. security of professional secrecy, continuity of provision of legal services, financial situation or reputation of the Law Firm).

*Example: geographical dispersion of data processing using BigData analytics based on cloud computing.*

It is natural for a lawyer to identify **legal risks** – such as, for example, the “take-it-or-leave-it” nature of a contract based on a contractual template and subject to changes that are virtually beyond the user’s control, absence of guarantees relating to professional secrecy as required by law to which the lawyer is subject – particularly when the provider is located in another jurisdiction and the contract is governed by the law of the provider’s country.

However, it is important to remember that when identifying the risks associated with the selected LegalTech solution, one should not limit their analysis to legal risks alone. Factors of a non-legal nature may also be a source of risk – most notably these include:

- **Organisational factors:** e.g. no effective security incident response procedures; no training for tool users;
- **Technical factors:** e.g. no encryption of data subject to professional secrecy, no adequate authentication mechanisms.

For each defined risk, it is then possible to define basic parameters for risk estimation:

- Relevance of the impact (**consequences**) of the risk on the area(s) identified, and
- **Likelihood** of its occurrence.

### *Risk Impact Assessment*

In a lawyer’s practice, the impact of a particular risk will be assessed at an expert level – with an “expert level” to be construed not only as a lawyer’s professional judgement, but also as the need, in certain cases, to use the assistance and judgement of a technical expert. When designing a risk

assessment tool, in order to increase the transparency of the assessment, one may consider breaking down the impact assessment into an analysis of the consequences of a given risk for each risk area separately. With this approach, it is only in the next step that an aggregate risk impact assessment is made.

*Example:*

A	B	C	D	E
Risk	Impact on the security of professional secrecy (1–4)	Impact on the continuity of provision of legal services (1–4)	Impact on the financial situation (1–4)	<b>Impact assessment</b> – the highest of the values specified in headings B to D
<i>geographical dispersion of data processing using BigData analytics based on cloud computing</i>	2	1	3	3

Whichever approach is selected, the widest possible range of information sources – such as industry portals, results of security tests carried out, independent calculations, etc. – should be taken into account to estimate the size of the risk.

#### *Determination of the Likelihood of a Risk Occurring*

The likelihood of a particular risk occurring may be assessed by taking into account, in particular, factors such as:

- a) The attractiveness of the “resource” – primarily the information processed by the tool, or all the information processed in the Law Firm that is accessible by exploiting the vulnerabilities of the tool under analysis;
- b) Known vulnerabilities of the tool or vulnerabilities identifiable based on technical expertise;

- c) Historical data on similar past events, such as incident data relating to a given LegalTech solution or service provider;
- d) Environmental and social factors that determine the possibility of a risk occurring, such as weather conditions or the political situation in the country where the information is processed.

**Similarly to the assessment of impact of risk, likelihood can be assessed at an expert level.**

#### *Estimation of Overall Risk Value*

The overall risk value is an ordered set of risk measures (numbers) for individual risk factors. A lawyer, managing risk at the Law Firm, will set priorities of preventive actions in a descending order of the individual measures once the overall risk value is obtained. This will ensure that the organisation does not waste resources on irrelevant issues and instead focuses on those relevant for its particular situation.

The simplest way to obtain the risk value is to use the following formula:

$$\sum E_1 = I_1 \times L_1$$

where:

$E_i$  – means the risk value for the risk factor

$I_1$  - means the impact of the consequences of the risk factor

$L_1$  – means the likelihood of the occurrence of the risk factor

Once the risk value have been determined for all identified factors, i.e.  $E_1$ ,  $E_2$ ,  $E_3$  , etc. we rank them – as described above – in a descending order, indicating the significance of the factor.

Assigning values (for example – from 1 to 4) to the impact and likelihood parameters, we obtain the following standard risk matrix:

Likelihood Impact	Likelihood of risk occurrence			
	low (1)	medium (2)	high (3)	very high (4)
<b>low (1)</b>	1	2	3	4
<b>medium (2)</b>	2	4	6	8
<b>high (3)</b>	3	6	9	12
<b>very high (4)</b>	4	8	12	16
<hr/>				
<b>Risk value</b>	<b>1–3 (low)</b>	<b>4–8 (medi-um)</b>	<b>9–16 (high)</b>	

The above approach – necessarily presented above in a simplified and abbreviated manner – is subject to certain limitations; such as the sometimes strongly subjective evaluation of individual factors (impact and likelihood). However, it also has very important advantages; first of all, it allows risks to be presented in a numerical way, and consequently the results of the estimation are easily **comparable** – both among themselves and also over time. It is also relatively simple to implement in practice.

### *Issues to be Analysed*

As mentioned above, risk assessment methods can vary and the complexity of the assessment method can vary as well. However, a lawyer should in any event consider and analyse the following aspects related to the implemented tool:

- **Legal requirements** related to the implemented tool in the area of:
  - Principles governing the protection of information constituting professional secrecy and personal data;
  - Intellectual property rights to the deliverables of the implemented LegalTech solution;
  - Access rights to the databases used in the solution and acceptability of their use for the intended purpose;
- **Professional conduct requirements**, including:

- Assessment of the compliance of the solution with the ethical requirements applicable to a lawyer, in particular with regard to the protection of professional secrecy;
- In the case of cross-border provision of services, the principles expected to be followed by the client;
- **Technical competence** in:
  - Verifying to what extent the organisation (the Law Firm, the users of the tool) has the resources to ensure the correct configuration of the solution and the monitoring of any irregularities;
  - Verifying the resources of potential business partners (solution implementer, maintenance provider, etc.);
- **Law Firm's organisational skills**, including:
  - Verifying that the necessary roles and responsibilities are defined so as to minimise the risk of conflicts of competence when using the solution;
  - Evaluating procedures to ensure the correct application of internal rules for the use of LegalTech solutions (compliance enforcement mechanism);
  - Maturity of the organisation understood as its readiness for a new solution with the possibility of effective implementation (level of awareness of employees and associates);
- **Technical and organisational security offered by solution provider:**
  - Assessment of declared technical and organisational safeguards;
  - Compliance with international norms or standards; or possession of cybersecurity certification from any EU Member State;
  - Use of data encryption, which is the source of information covered by professional secrecy, in any situation where the information would be stored or transmitted to a third party (provider). In the event that a provider were to have access to unencrypted information (e.g. for analytical purposes), the legal permissibility should be verified and the extent of such disclosure documented;
- **Location of data processing resources**
  - Irrespective of the legal requirements related to data localisation (primarily GDPR and client-specific requirements, e.g. cybersecurity requirements or requirements specific to the financial sector), a lawyer should also consider other risks relating to the location of processing centres and its consequences, e.g. the possibility of an actual on-site audit, the possibility of enforcing surveillance by public authorities, etc.;
- **Terms of a solution provider agreement:**

- In a prevailing number of cases, the terms of use of the LegalTech solution purchased are “take-it-or-leave-it” terms. This does not relieve a lawyer of his or her liability for assessing these conditions and balancing the risks;
- A lawyer should focus in particular on issues relating to:
  - a) Rules for changing the terms of service and technical aspects of the solution offered;
  - b) Commitments (guarantees) to comply with the standards described above (e.g. a contractual guarantee not to use the data for own purposes);
  - c) offered SLA (service availability, incident recovery);
  - d) Rules for communication (including notification of potential security incidents);
  - e) Jurisdiction and applicable law.

#### *4.3. Simplified Risk Analysis*

A simplified risk analysis may be considered in certain situations. The criteria allowing for such an assumption should be established and justified by the Law Firm. However, a simplified risk analysis can, as a rule, be carried out especially when:

- The scale of information processing or intended use of the LegalTech solution is insignificant;
- The relevance of information (as defined above) is low;
- LegalTech solution has been granted a cybersecurity certificate based on the national law of the Member State, within the framework set out in the Cybersecurity Act<sup>3</sup>;
- There are other specific documented circumstances that justify a simplified risk analysis.

Naturally, the mere possibility of applying the simplified approach in accordance with internal procedures **does not oblige** a lawyer to do so. Conversely, a lawyer **is obliged** to carry out a full-scale risk analysis in a situation where, despite the formal fulfilment of the prerequisites set out

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<sup>3</sup> Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 [2019] OJ L151.

by the Law Firm for relying on a simplified approach, there are specific circumstances that indicate the grounds for such an in-depth analysis.

The scope of the simplified risk analysis should be defined by the Law Firm, but should always refer to the risk areas indicated above. A simplified risk analysis may – for instance – take the form of a checklist in which the actual situation is compared with the minimum acceptable standard applicable in the Law Firm.

*Example:*

Issue	Minimum acceptable standard	How the standard is complied with	Comment; information source
<p><i>Compliance with GDPR (including as regards a personal data processing agreement, if applicable)</i></p> <p><i>Legal requirements related to data processing</i></p>	<p><i>The processing agreement fulfils the conditions of Article 28 of the GDPR</i></p> <p><i>An impact assessment of the information provision has been carried out</i></p> <p><i>It has been ensured that data subjects are properly informed in accordance with the GDPR</i></p>	<p><i>Draft provider agreement dated XXXX - Clause 3, Clause 5</i></p> <p><i>Processing impact assessment document – available on the web drive [link].</i></p> <p><i>Draft email to clients containing an information notice [link].</i></p>	<p><i>Draft provider agreement dated XXXX, Clause 8.3</i></p> <p><i>In the agreement the provider undertakes to keep confidential any information processed and not to use the same for other purposes</i></p>

Issue	Minimum acceptable standard	How the standard is complied with	Comment; information source
<i>Processing territory</i>	No transfer of information covered by professional secrecy outside the European Economic Area In other cases, ensuring GDPR-compliant mechanisms for transferring personal data outside the EEA	Data will be processed in a data centre in the EEA (Frankfurt am Main)	Order No. XXXXX
<i>Technical security</i>	Encryption of information covered by professional secrecy in transit and at rest The provider has an ISO 27001 certificate of conformity or a declaration of conformity with the standard	<b>No information provided:</b> The provider has informed the law firm that it has an up-to-date ISO 27001 certificate of compliance, but fails to provide the same at the time of the assessment	The missing document must be received before the agreement is entered into
<i>Competences</i>	Guarantee of adequate technical competence on the part of the provider (if applicable)	Guarantees provided in the provider agreement	Provider agreement dated XXX, Clause 9
	Providing necessary training or manuals to the Law Firm's team	Training on the tool is planned in the Law Firm within 2 weeks after the tool has been launched	Information received from XYZ; Necessary monitoring of whether training has been provided

#### *4.4. Risk Response Strategy*

For each risk identified, it is necessary for a lawyer to define a *risk response strategy*. Typically, four such strategies are distinguished:

- Risk Acceptance

There are situations where a lawyer can accept the risk. However, such a decision should be informed and justified. For example, as a rule the Law Firm may consider *Acceptance* for all circumstances for which the designated risk measure indicates a low level. A higher-level risk may be accepted in particularly justified cases where the benefits of the implemented solution outweigh the identified risk. It is also recommended to adopt the principle of non-acceptability of risk at a specific highest level, or in relation to a specific area.

Whenever the risk is accepted, it should be ensured that it is monitored to identify any new circumstances affecting its level.

- Risk Mitigation

Risk mitigation is the implementation of solutions that ultimately reduce the defined level of risk. This effect can be achieved by:

- **Modifications to the safeguards applied** (technical, organisational, contractual countermeasures) to reduce the likelihood of a particular risk occurring

Example:

*The provider agreement stipulates that incident alerts will be directed to the client administration panel. In order to minimise the probability of an alert being omitted, the Law Firm designates a specific person required to log into the user panel on a daily basis to verify the status of alerts.*

- **Modifications to the processes in which LegalTech is used**

Example:

*The selected solution reviews court judgements in a specific region of the country to identify case law and generates a simplified description of the recommended litigation strategy. In order to minimise the risk of errors, all lawyers using the tool are required to independently review at least 20 % of randomly selected judgements indicated by the solution in order to analyse the usefulness of the tool in achieving its objective on an ongoing basis.*

- **Risk Transfer**

Risk transfer is the transfer of the burden associated with a risk occurring to another entity.

Example:

- *Recourse clauses in a solution provider agreement*
- *Insurance policy for third party liability in connection with the use of the solution*

- **Risk Avoidance**

Risk avoidance is the abandonment of an intended action (in whole or in part). The strategy to be applied when identified risks go beyond the acceptable levels.

Example:

*The ambiguous wording of a model provider agreement suggests that the provider may use the information covered by professional secrecy for its own purposes in order to improve the solution offered. Provision of data for these purposes is in direct violation of the Law Firm's ethical principles.*

### *Designation of Responsible Persons*

Defining a risk response strategy – that is not all. Risk management also requires that specific operations be defined.

Examples of countermeasures in the risk management process may include:

- putting in place internal procedures – in particular as regards communication and analysis of potential incidents;
- training of team members using the implemented tools;
- setting out necessary guarantees in a provider agreement;
- defining internal mechanisms for periodic verification of the effects of the implemented tools.

It is also recommended to document properly appointment of a specific person (or persons, which, however, undermines the effectiveness of the approach) responsible for carrying out specific activities. Apparently, this does not mean that the designated employees will in each and every case personally carry out the tasks assigned to them – rather, it is a question of clearly indicating the ownership of the individual risks. As such, the Law

Firm is able to efficiently verify and periodically account for risk owners, keeping the status of the risk management process under review.

#### *4.5. Identification of Countermeasures*

Unless an identified risk is accepted, a lawyer – intending to pursue the process – should identify countermeasures to minimise the level of identified risk.

As is the case with risks, countermeasures can be not only of legal, but also organisational nature.

Example:

*Where a risk has been identified relating to a lack of adequate communication regarding security incidents, the following may be identified as countermeasures:*

- *Monitoring mailbox designed to receive notifications;*
- *Monitoring publicly available information on security incidents related to a specific solution or provider;*
- *Defining an internal incident response procedure;*
- *Designing persons responsible for carrying out specific tasks related to security incident management.*

The identification of countermeasures then makes it possible to assess how the level of risk changes as a result of the application of countermeasures, and thus to determine whether the proposed countermeasures have been selected correctly, i.e. whether they lead to a reduction in the level of risk originally identified. It should be stressed here that the mere existence of a residual risk (which persists after countermeasures have been applied) is a principle and cannot by itself constitute an obstacle to the implementation of a solution. It is a lawyer (Law Firm) that assesses, based on the analysis carried out, whether such residual risk is acceptable to him or her.

#### *4.6. Risk Monitoring*

Regardless of the adopted strategy, risk monitoring is an extremely important element of risk management, including the risks identified as negligible. This ensures that if there is any change in circumstances likely to affect the level of risk, we can respond appropriately and put in place additional countermeasures, if necessary.

In order to monitor risk effectively, it is necessary to designate a specific person in the organisation to whom employees responsible for applying the countermeasures or monitoring process parameters report the results of their activities in this respect on an ongoing basis.

Risk monitoring can be done on an ongoing (regular reporting on individual risks, based on a uniform reporting scheme to ensure comparability over time) or ad hoc basis (ad hoc monitoring, e.g. by internal control in a selected area). Like the other steps in the process, the activities undertaken in relation to risk monitoring should be documented to ensure accountability.

### *5. Conclusion*

This section discusses the basic principles that should apply to a LegalTech implementation project, as well as a proposed approach to estimating the associated risks. The aim of the presented actions is to minimise the risk of disciplinary, civil and, in the most extreme cases, even criminal liability that may attach to a lawyer if he or she violates professional rules. Above all, however, the proposed approach sets out a framework of conduct that allows for compliance with the ethics of the profession, which should underpin every decision taken by a lawyer.

# LegalTech and Cloud Computing

Katarzyna Biczysko-Pudełko

## 1. Introduction

When R.Susskind's book The Future of Law: Facing the Challenges of Information Technology was published in 1996, in which he made a bold claim that in the future lawyers would communicate with their clients via e-mail, for many this thesis was abstract, just like the technology and the very concept of cloud computing. It was not until 1996<sup>1</sup> that the latter appeared for the first time in the document<sup>2</sup>.

However, less than a quarter of a century later, the fact that lawyers use e-mail is already undisputed, which also makes the thesis about the use of cloud computing services, i.e. computing in the cloud, undisputed. The level of interest in cloud computing services among the representatives of le-

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- 1 In 1996, two Compaq specialists, G.Favaloro and S. O'Sullivan, came to the conclusion that in the near future both software, storage and computing power of computers will be accessed through actions undertaken on the Internet, the above phenomenon describing in more detail within the framework of a business plan prepared for their form and calling it cloud computing. Nozar Daylami, 'The origin and Construct of Cloud Computing' (2015) 9, 2 International Journal of the Academic Business World, 39; Suryanarayanan Srinivasan, *Cloud Computing Basics*, (Springer 2014,4); 'The era of cloud computing' <<https://www.matillion.com/cloud-computing-era>> accessed 13 January 2021.
  - 2 It should be noted that in scientific studies devoted to the origins of the very concept of cloud computing there are also such views, according to which the term was used for the first time by Professor R. Chellappa from the University of Texas in his publication entitled "Intermediaries on cloud computing". Intermediaries on cloud computing". In resolving this dispute, it should be pointed out that in the case of Compaq specialists, we were dealing not so much with a scientific publication as with an internal document of the company in the form of a business plan. Thus, none of the above events should be depreciated and both Compaq specialists and Professor Chellappa should be credited with influencing the concept of cloudcomputing. Antonio Regaldo, 'Who Coined "Cloud Computing"?' , (*MIT Technology Review*, 31 October 2011) <<https://www.technologyreview.com/s/425970/who-coined-cloud-computing>> accessed 9 March2021.

gal professions is perfectly illustrated by a survey conducted in 2020<sup>3</sup> by The International Legal Technology Association (ILTA), in which as many as 89 % of lawyers<sup>4</sup> declared that they would consider using cloud computing services<sup>5</sup>. The above trend is also followed by Polish representatives of the legal industry, where as recently as in 2013 there were discussions whether to include the issue of using cloud computing technology in the rules of ethics<sup>6</sup>, but already today: "using cloud computing is like breathing. We just don't think about it. From the users' point of view, current solutions are almost transparent"<sup>7</sup>.

However, it would be insufficient to say that lawyers are using cloud computing quite extensively today, because as cloud technology itself evolves, so does the way it is used. While initially the use of cloud computing was limited mainly to email, currently, there is a growing trend towards greater interest among lawyers in more complex and technologically advanced solutions offered by cloud computing - which is directly related to the desire to optimie costs and working time, but is also a natural consequence of the development of the IT industry. Therefore, just as in the case of LegalTech we can talk about a division into three levels, i.e. LegalTech 1.0, 2.0 and 3.0, so it seems justified - at least for the purposes of this analysis - to distinguish cloud computing 1.0, 2.0 and 3.0, each of which, reflecting the individual stages of its development, will imply various doubts as to the admissibility of its use, in the context of personal data processing<sup>8</sup>, by lawyers within their organisations. The following part of the work will therefore signal those aspects that are of the most sensitive nature with regard to particular cloud tools - in the context of personal data protection law.

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3 ILTA's, '2020 Technology Survey' <[www.iltanet.org/resources/publications/surveys/2020ts?ssopc=1](http://www.iltanet.org/resources/publications/surveys/2020ts?ssopc=1)> accessed 9 March 2021 r.

4 The survey involved 470 entities representing over 103,000 lawyers and 208,000 users.

5 Latest ILTA Survey Suggests Security Has Taken a Back Seat to Productivity in Firms. Here's How to Fix it, (*Netdocuments*, 23 November 2020) <<https://www.netdocuments.com/blog/latest-ita-survey-suggests-security-has-taken-a-back-seat-to-productivity-in-firms-heres-how-to-fix-it>> accessed 9 January 2021.

6 Katarzyna Źaczkiewicz-Zborska, 'Kancelaria w chmurze obliczeniowej naraża na szwank tajemnicę zawodową', <[www.prawo.pl/prawnicy-sady/kancelaria-w-chmurze-obliczeniowej-naraza-na-szwank-tajemnice,175923.html](http://www.prawo.pl/prawnicy-sady/kancelaria-w-chmurze-obliczeniowej-naraza-na-szwank-tajemnice,175923.html)> accessed 9 March 2021.

7 Anna Klimczuk, 'Chmura jak powietrze: cyfrowa transformacja kancelarii prawnej Magnusson' <[news.microsoft.com/pl-pl/2016/12/13/chmura-jak-powietrze-cyfrowa-transformacja-kancelarii-prawnej-magnusson/](http://news.microsoft.com/pl-pl/2016/12/13/chmura-jak-powietrze-cyfrowa-transformacja-kancelarii-prawnej-magnusson/)> accessed 9 March 2021.

8 More on the concept of personal data in part IV chapter 5.

## *2. Cloud Computing 1.0*

The concept of cloud computing, for which the term "cloudcomputing" or "cloud computing" is used alternately in the literature as well as in everyday speech, has not yet been reflected in a single commonly used definition. However, the one most often quoted is the one proposed by the US National Institute of Standards and Technology (NIST), according to which cloud computing is a model enabling ubiquitous, convenient and on-demand network access to shared computing resources (i.e. network, servers, storage, applications and services) that can be rapidly provisioned and released with minimal management or provider intervention<sup>9</sup>.

According to another, slightly more simplified definition, cloud computing "allows access to data from any device, anywhere, as long as there is an Internet connection"<sup>10</sup>.

In practice, the use of cloud computing by a lawyer, as referred to above, will include within its conceptual scope the possibility to use electronic mail, file storage and processing (e.g. Dropbox, Google Drive), or even online office packages (e.g. Microsoft Office 365), i.e. services that are already common today, both in the case of large legal corporations and individual entities. This state of affairs is not surprising, if we take into account a number of benefits that cloud computing brings (can bring), i.e. from cost minimisation, through flexibility (which in practice works out to automatic access to resources of almost unlimited scale), to increased work efficiency.

Nevertheless, cloud computing also poses a number of challenges of various types, with one of the biggest threats being that related to the broadly understood security of data<sup>11</sup>, including personal data stored and

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9 Peter M. Mell and Timothy Grance, 'The NIST Definition of Cloud Computing Recommendations of National Institute of Standards and Technology', (2011) No. 800-145 Computer Security Division, Information Technology Laboratory, National Institute of Standards and Technology, ,2, <csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf> accessed 9 January 2021, Commission 'Unleashing the Potential of Cloud Computing in Europe', (Communication) COM (2012) 529 final, 2, <https://eur-lex.europa.eu/legal-content/pl/TXT/?uri=CELEX%3A52012DC0529> access: 9 March 2021); Kenneth L. Bostick, 'Pie in the Sky: Cloud Computing Brings an End to the Professionalism Paradigm in the Practice of Law', (2012) 60, 5 Buffalo Law Review, 1375.

10 Kenneth L. Bostick, (n 9) 1382.

11 While understanding the essence of this technology, one cannot help but ask a number of questions concerning not so much the technological processes of data processing in a computing cloud, but their security, bearing in mind the

processed in it, which in the case of representatives of the legal industry, as those obliged to maintain professional secrecy, seems to be even greater. Therefore, as rightly indicated in the documents prepared by the Council of Bars and Law Societies of Europe (CCBE), i.e. in 2012 Guide - Electronic Communications and the Internet<sup>12</sup> and the Guidelines on the Use of Cloud Computing Services by Lawyers<sup>13</sup>, when considering the possibility to use cloud computing technology, a lawyer should first examine whether the laws and rules of professional ethics in force in his or her country allow the storage of data off-site. In the case of investigating the possibility to process personal data in cloud computing, the answers to the above questions, in relation to a huge number of lawyers, will be shaped by the provisions of GDPR.

First of all, a lawyer using cloud computing tools must be aware that as a rule - in the light of the provisions of the above mentioned GDPR - he acts as a data controller, i.e. as the one who alone or together with others determines the purposes and means of the processing of personal data, while the provider of services in cloud computing as a processor. The consequence of the above will be, therefore, the requirement for the lawyer to fulfil a number of duties, as well as the scope of his or her responsibility

Often, it is worth emphasizing that the EU legislator, when regulating the scope and distribution of controllers' duties, relied on two concepts that significantly differ from the hitherto rigid and non-relative protection frameworks, i.e. the risk-based approach and the concept of technological neutrality of the regulation.

The first concept, i.e. risk-based approach, assumes that a legal decision regarding the processing is based on a risk assessment of the processing, which is nothing more than a regulation based on shaping the controllers' obligations *ad casum* through the prism of a risk assessment<sup>14</sup>. This assessment should take into account the state of the art, the cost of imple-

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whole spectrum of threats, from the so-called "data leakage", through data loss, to unauthorised access to data.

- 12 CCBE, 'Komunikacja elektroniczna i Internet –przewodnik CCBE' (2013) 142 Radca Prawny Dodatek Naukowy 5D.
- 13 Council of Bars and Law Societies of Europe, 'CCBE Guidelines on the Use of cloud Computing Services by Lawyers', (CCBE, 7 September 2012), <[http://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/IT\\_LAW/ITL\\_Positio\\_n\\_papers/EN\\_ITL\\_20120907\\_CCBE\\_guidelines\\_on\\_the\\_use\\_of\\_cloud\\_computin\\_g\\_services\\_by\\_lawyers.pdf](http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Positio_n_papers/EN_ITL_20120907_CCBE_guidelines_on_the_use_of_cloud_computin_g_services_by_lawyers.pdf)> accessed 21 January2018.
- 14 Dominik Lubasz, in: Edyta Bielak-Jomaa and Dominik Lubasz (eds), *RODO. Ogólne Rozporządzenie o Ochronie Danych. komentarz* (Wolters Kluwer 2017) 586.

menting security measures, the nature, scope, context and purposes of the processing and the risk of violation of the rights or freedoms of natural persons with varying degrees of probability and seriousness arising from the processing.

On the other hand, the second concept, i.e. the technological neutrality of the GDPR, boils down to the lack of indication in its provisions of specific technical or IT solutions that the controller should implement to ensure compliance. Indeed, as stated in Recital 15 of the GDPR, in order to prevent a serious risk of circumvention, the protection of individuals should be technologically neutral and should not depend on the techniques used. Thus, the data protection regime should be tailored to risks of varying likelihood and relevance to the rights and freedoms of individuals and linked precisely to a risk assessment by a lawyer and a data protection impact assessment, while the instruments should be adequate and chosen by the controller itself.

In the spirit of the concepts referred to above, a lawyer must fulfil a number of individual obligations imposed on him/her by the provisions of GDPR, i.e. both those provided for in the content of Chapter IV and those resulting from the need to guarantee natural persons the implementation of their rights provided for in Chapter III of GDPR. In particular, it is important that a lawyer, when selecting a cloud computing provider, should be guided by the content of Article 28(1) of the GDPR, i.e. use only services of such entities that provide sufficient guarantees of implementing appropriate technical and organisational measures so that the processing meets the requirements of the GDPR and protects the rights of data subjects. In this context, as pointed out in the CCBE Guide mentioned earlier, it seems indispensable to examine the experience, reputation and credibility of such a provider, but also to verify whether the provider operates under procedures compliant with international IT risk management standards, such as e.g. ISO 27001:2005.

Inseparably connected with the above obligation is also the issue of appropriate construction of the contract concluded with the cloud computing provider and ensuring the possibility to control the performance of contractual obligations by the provider<sup>15</sup>. In addition to determining the law applicable and the competent court for resolving disputes, the

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15 Fédération Suisse des Avocats, ‘Indications et recommandations de la FSA pour la sous-traitance informatique et l’utilisation de services cloud’ <[https://www.sav-fsa.ch/fr/documents/dynamiccontent/190408-sav-guidelines-outsourcing\\_f-\(4\).pdf](https://www.sav-fsa.ch/fr/documents/dynamiccontent/190408-sav-guidelines-outsourcing_f-(4).pdf)> accessed 9 January 2021.

contract should also contain provisions on data ownership and the exclusive right of access, on the prohibition to use subcontractors without the prior consent of the recipient, on the physical location of the servers, on the right to control and audit compliance with the contract, on data processing rules in accordance with national requirements applicable to the recipient, on contractual penalties and on the recipient's liability in the event of a breach of confidentiality.

Moreover, in the context of ensuring compliance of the processing of personal data in cloud computing by a lawyer with the provisions of the GDPR the lawyer should take into account the issues related to the transfer of data to third countries, which due to the specificity of cloud computing is not an incidental situation. In the case of cloud computing, the phenomenon of cross-border data processing becomes particularly visible, which results, *inter alia*, from such factors as service providers' provision of services on the basis of servers located in the so-called third countries or the use of services of sub-processors not only not having their registered office or organisational unit in EU countries, but also performing processing in third countries. However, in accordance with the provisions of GDPR, the transfer of data to another country is permitted, provided that it belongs to the European Economic Area (EEA). However, when data is transferred outside the EEA, the possibility of such a transfer should be analysed individually and in accordance with Articles 45-49 of the GDPR.

In this context, the issue of data transfer based on the so-called standard contractual clauses that constitute part of the provider's terms and conditions deserves particular attention, due to the ruling of the CJEU of 16 July 2020, C-311/18 (Schrems II)<sup>16</sup>. In the framework of this ruling, the CJEU held that the transfer of data to the US on the basis of an EC decision called the "Privacy Shield"<sup>17</sup> is not possible, as this decision is invalid. Therefore, if a lawyer (acting as the data controller) processes data in computing resources located in the USA, it should always assess whether the standard contractual clauses ensure a sufficient level of personal data protection (a situation where the legislation of the country in which the data importer is located does not ensure a level of protection equivalent to the level set by the provisions of GDPR cannot be deemed as such).

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16 Case C-311/18 *Data Protection Commissioner v. Facebook Ireland Limited and Maximilian Schrems* [2020] EU:C:2020:559.

17 Commission Implementing Regulation (EU) 2016/1250 of 12.7.2016 adopted pursuant to Directive 95/46 of the European Parliament and of the Council, on the adequacy of the protection provided by the EU-US Privacy Shield.

Therefore, it would be beneficial for the lawyer to limit the processing to the EEA.

### *3. Cloud Computing 2.0 - or Multi-Cloud in the Work of Lawyers.*

Multi-cloud (in.multi-cloud computing), just like cloud computing, may be defined in various ways, and the variable in this respect is primarily the defining entity. It is obvious that a representative of the IT or business sector will have a different understanding of the term, while a user (client) will have a different one. For example, while for representatives of the first of the above-mentioned industries multi-cloud will be a kind of process of integration of IT resources, more precisely<sup>18</sup>, for representatives of the business industry it will be a strategy<sup>19</sup>. On the other hand, individual (single) users of the multi-cloud will associate it either with the possibility to use multiple platforms provided and managed by different public cloud providers, or with the possibility to combine their own computing resources with those of external entities, or with the possibility of simultaneous use of the resources of a cloud.

However one defines the term it is important to distinguish mulit-cloud from hybrid cloud. As pointed out in the literature, in the case of multi-cloud all its components are unique cloud computing systems, not methods of implementation, as it is the case under hybrid cloud<sup>20</sup>. Moreover, in the case of hybrid cloud, unlike within multi-cloud, there is also interference of the hardware layer.<sup>21</sup> Furthermore, multi-cloud is sometimes mistakenly identified with a virtual IT environment that is based on different operating system platforms, i.e. with the so-called multi-cloud platform.

For the purposes of this study, however, the term multi-cloud should be understood as the serial or simultaneous use of multiple data processing

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18 Ana Juan Ferrer, Davi García Pérez, Román Sosa González, ‘Multi-Cloud Platform-as-a-Service Model’ (2016) 97 *Functionalities and Approaches Procedia Computer Science* 65.

19 Alan R. Earls, ‘Multi-cloud strategy’, <<https://searchcloudcomputing.techtarget.com/definition/multi-cloud-strategy>> accessed 9 March 2021.

20 Jianngshui Hong, Thomas Dreibholz, Joseph Adam Schenkel, Jiaxi Alessia Hu, ‘An Overview of Multi-Cloud Computing’ in Leonard. Barolli, Makoto Takizawa, Fatos. Xhafa, Tomoya Enokido (eds), *Web, Artificial Intelligence and Network Applications. Proceedings of the Workshops of the 33rd International Conference on Advanced Information Networking and Applications (WAINA-2019)* 7.

21 Ibid.

and storage services provided by different providers in a public or private cloud, and integrated within a single IT environment (architecture).

To illustrate the above in the context of LegalTech, we can use an example where a lawyer, for the purposes of his daily work, will simultaneously use computing resources made available by provider "X" (e.g. for document storage) and others made available by provider "Y". (e.g., for document storage), while at the same time using computing resources provided by provider "Y" (for data processing) (for data processing), and others by provider , "Z" (e.g. for data analysis). As you can imagine, the use of multi-cloud by a lawyer can bring many benefits and be a great tool to facilitate daily work.

First multi-cloud allows for optimisation of labour costs and improvement of effectiveness, for example by providing lawyers with tools that can significantly streamline billing processes and reduce the working time associated with administrative tasks. Another unquestionable advantage of using this solution is the high availability of computing resources and services tailored to the individual needs of an organisation<sup>22</sup>. In addition, multi-cloud, as indicated in the literature, creates better conditions than classic cloud computing for the possible recovery of IT resources and data in the event of failure or other unforeseen events<sup>23</sup>. Finally, what fundamentally distinguishes multi-cloud from classic computing cloud is the fact that it allows avoiding the phenomenon of vendor lock-in, i.e. dependence on a single provider of this type of service.

The above, just an example of the benefits that the use of multi-cloud can bring, seem to highlight the circumstance why this technology has already been evaluated as a solution worthy of attention and use by lawyers. However, quite understandably, alongside a number of advantages and potential benefits, multi-cloud is also a whole new set of challenges and risks, which, although they find their origin in the technological dimension, ultimately also lead to a number of different types of legal challenges, including those focused on data protection, and in particular personal data processed in multi-cloud.

First making some general remarks with regard to the challenges created by the multi-cloud already at the IT level, it should be noted that the very implementation of the solution in question may prove problematic in

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22 Giuseppe Di Modica, Antonella Di Stefano, Giovanni Morana, Orazio Tomarchio, 'On the Cost of the Management of user Applications in a Multicloud Environment', (7th International Conference on Future Internet of Things and Cloud (FiCloud), Istanbul, 2019).

23 Hong, Dreibholz, Schenkel, Hu. (n 20) 6.

practice, i.e. the collection of data processed so far under a classic cloud, and then their integration with the environment of another computing cloud, so that from a functional point of view, it is possible to create one coherent multi-cloud infrastructure<sup>24</sup>. Another challenge may turn out to be the skilful management of complex infrastructure and the implementation of consistent rules for the management of data processed by several cloud computing providers simultaneously, so that the multi-cloud potential is not lost in the form of increased efficiency in comparison to classic cloud computing. Incompetent use of multi-cloud solutions may also lead to the problem of duplication of data in the computing resources of individual providers, which, apart from the risk of increasing the costs of such processing, may negatively affect the level of data security<sup>25</sup>. The issue of data security is undoubtedly one of the biggest challenges in multi-cloud solutions. While in the case of classic cloud computing ensuring security required a number of measures and the development of a certain methodology, in the case of multi-cloud this task becomes even more complicated. Each provider of cloud services, which constitute the "components" of the multi-cloud, implements its own security policy and information flow, which directly implies potential problems in terms of ensuring the integrity of the security policy for the entire multi-cloud architecture. Moreover, in the case of multi-cloud it is very likely that one process running in a particular computing cloud will be inextricably linked with a process already running in another provider's infrastructure. This in turn, as indicated in the literature, makes the use of a single access control mechanism impossible and creates a potential risk in the area of data transfer from the resources of one computing cloud to another, which often takes place on a large scale and in an automated manner<sup>26</sup>.

These general remarks on the potential challenges of multi-cloud technology may, in the reality of everyday work of lawyers, boil down to the need to find answers to a number of individual questions, i.e. in

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24 Faktion, 'What is Multi-Cloud? Everything You Need to Know', <<https://www.factiioninc.com/blog/what-is-multi-cloud/>> accessed 28 December 2020.

25 CIO, 'Defining your data strategy for a multi-cloud world' <<https://www.cio.com/playlist/the-cloud-control-room/collection/cloud-operations-and-management/article/defining-your-data-strategy-for-a-multi-cloud-world>> accessed 18 December 2020.

26 Piotr Waszczuk, 'Trend Micro: W jaki sposób zapewnić bezpieczeństwo infrastruktury IT w modelu multicloud? ', <<https://www.itwiz.pl/trend-micro-jaki-sposob-zapewnic-bezpieczenstwo-infrastruktury-modelu-multicloud/>> access 8 December 2020.

particular: where is the data (including personal data) located today and will it be located in the resources of the same provider in the future? How to manage a multi-cloud environment while maintaining full control over data processing? How to minimise the risk of data security breaches, which may increase especially when transferring data from one provider's resources to another's infrastructure? The search for answers to the last of these questions also seems to be complicated by the fact that often the interoperability of the individual computing clouds that make up the multi-cloud architecture must be coordinated and automated, which is often done using an additional IT tool (platform), the use of which may imply further questions about data security.

Paraphrasing the words of P. Miller, in order to summarize the above, it can therefore be said that a lawyer, before using a multi-cloud, must map its complexity before it becomes impossible to map it<sup>27</sup>. Doing so may increase the likelihood of satisfying legal requirements which, as mentioned above, in the case of multi-cloud environments seem to revolve particularly around data protection law. Since already today a large part of the legal profession uses a classic computing cloud for data processing, including data of a personal nature, this will undoubtedly also be the case in the multi-cloud, with the difference that in the case of the latter the legal challenges will both multiply, and completely new ones will appear, directly implied by the complexity of the multi-cloud environment.

In principle, one can risk a claim that all those obligations, which a lawyer identified (as it was established earlier) as a data controller in the light of the provisions of the GDPR must fulfil when using a classic computing cloud, will be obliged to fulfil also in the case of a multi-cloud, i.e. from the obligation to carefully select providers of individual services, through the appropriate risk assessment, to at least the implementation of data subjects' rights.

In the context of the obligation to carefully select providers of particular services, it seems particularly important, apart from the need for the provider to ensure an adequate level of availability of the service, as well as an adequate level of security assurance, to verify whether the cloud computing provider meets the conditions for the legality of its service, including the provisions of the General Regulation on the protection of personal data, which in turn involves, for instance, the need to analyse the content of particular cloud computing service contracts. Thus, a lawyer wishing to use multi-cloud in his or her everyday activity faces a challenge

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27 CIO (n 26)

in the form of familiarising himself or herself with the content of individual contracts for the provision of services in computing clouds concluded with individual providers in order to ensure the compliance of each of the contracts with the requirements specified in Article 28 of the GDPR, which on the one hand is a challenge due to the lack of standards or commonly applied best practices in this respect, and on the other hand, may prove to be problematic in the context of the practical possibility to select individual cloud computing service providers who ensure not only an adequate, but also similar level of services. In practice, the above will involve, for example, the necessity to analyse Service Level Agreements (SLA), under which the minimum level of service is defined, starting with issues related to its availability or performance, and ending with provisions concerning the level of provider support. If, in a multi-cloud environment, at least one of the providers does not provide sufficient guarantees that appropriate technical and organisational measures are implemented to ensure that the processing complies with the requirements of the GDPR, a lawyer should not be able to include the services of this provider in the multi-cloud architecture being developed. In this context, the obligations that a lawyer as a data controller should fulfil will thus multiply in relation to those whose fulfilment is related to the use of the classic computing cloud.

On the other hand, the obligation of a lawyer, as a data controller, to exercise the data subject's right to erasure may be regarded as a completely new challenge, which will be directly implied by the multi-cloud character. It should be reminded that pursuant to Article 17 of GDPR the data subject has the right to demand from the controller immediate erasure of data relating to him/her, and the controller is obliged to erase such personal data without undue delay, if one of the circumstances indicated in the aforementioned Article 17 of GDPR occurs. As it has already been indicated above, one of the "derivatives" of multi-cloud use may be the phenomenon of duplication of the same personal data in the resources of various cloud computing providers, which - as it is not difficult to imagine - may later be connected to the challenge of exercising the right to erasure. Undoubtedly, whether the data controller will be able to meet this obligation will depend on whether it has sufficient knowledge as to where, i.e. in the resources of which provider personal data of a given data subject have been and are being processed.

However, for the same reasons as in the case of exercising the right to erasure, it may turn out problematic to fulfil the obligation to notify the data subject about the personal data breach, which is provided for in Article 34 of the GDPR. In case of a personal data breach under

circumstances which indicate that the breach may result in a high risk of violation of rights or freedoms of natural persons, the controller shall notify the data subject of the breach without undue delay. In the case of multi-cloud, the fulfilment of the above obligation will be possible, if the lawyer has knowledge as to which personal data of which subjects were actually processed in the particular computing cloud, where the breach occurred. Mere knowledge about a possible security incident within the resources of a specific computing cloud, without the possibility to identify whose data were processed in its resources, may turn out to be insufficient for the fulfilment of the above obligation.

An analogous challenge, i.e. connected with the controller's lack of knowledge as to whose data were processed exactly in the resources of the computing cloud in which the breach has occurred, will also appear in the situation of the necessity to notify the personal data protection breach to the supervisory authority, to which the data controller is obliged by Article 33 of the GDPR.

As a kind of countermeasure to minimise the risk of controller's failure to meet the obligations described above, the literature, following a proposal made earlier by L. DalleMulle and T.H. Devenport in Harvard Business Review<sup>28</sup>, suggests that in case of willingness to use a multi-cloud solution, a "compromise" between defensive and offensive data strategies should be considered. In the case of an offensive strategy, the priority would be to support business objectives, e.g. increasing the efficiency and profitability of the business, and thus to process the data that could be used to achieve these objectives within the computing resources of a single provider. A defensive strategy, on the other hand, would boil down to processing within a computing cloud offered by another provider those data which are of a personal nature and are covered by legal protection. Subsequently, the computing resources provided by the various cloud computing providers should be integrated in a single virtualised and automated platform that will facilitate and simplify the management of data in the various clouds<sup>29</sup>.

The above strategy, however interesting, in certain situations, especially when the processing operations concern large amounts of data and the resources of which increase rapidly, may turn out to be an insufficient tool to minimize the risk of personal data breach. That is why it is commonly

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28 Leonardo. DalleMulle and Thomas H. Devenport, 'What's Your Data Strategy? The key is to balance offense and defense', <<https://www.hbr.org/2017/05/whats-your-data-strategy>> accesed 18 December 2020.

29 CIO (n 26).

suggested in the literature<sup>30</sup> that in the case of multi-cloud data processing personal data should be encrypted. It should be noted that pursuant to Article 32 of the GDPR, encryption of personal data was indicated as one of the technical and organisational measures which may contribute to ensuring an appropriate level of security of processing.

The very notion of encryption is a process of converting data into an unreadable sequence of characters without the knowledge of the relevant key and - so far - has not been reflected in a single legal definition. The provisions of the GDPR do not provide any further guidance as to the details and requirements of the process, but in practice there are certain variables that should be taken into account when implementing encryption processes - also by lawyers - and which may largely affect the level of data security.

Above all, it is important that encryption covers both so-called "data at rest" and data "in transit", i.e. during transmission, as well as data in use.

The first category includes data stored in databases, files or mass storage infrastructure. They usually constitute a certain logical whole and structure, hence gaining access to them for unauthorised persons seems to be particularly desirable and attractive, while for a lawyer (as an administrator) particularly dangerous. Meanwhile, statistics show that only 9 % of the 12,000 cryptographic service providers encrypt data at rest<sup>31</sup>. For this reason, it is important for lawyers wishing to use this security measure to recognise the need to select a provider that will provide encryption of data at rest - which can prove to be quite a challenge.

Moreover, it is equally important to adequately encrypt the second of the indicated data categories, i.e. data "on the move", i.e. during its transmission, movement through any network. In this case, however, apart from the encryption itself, it seems inevitable to implement robust and adequate security control mechanisms for the network through which the data are transmitted, such as firewalls, network access control, etc<sup>32</sup>.

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30 Ramya Srikanthswara and others 'Data security using encryption on multi-cloud' (2018) 5, 6 International Research Journal of Engineering and Technology 2969 HYTrust, 'Protecting sensitive data and achieving compliance in a multi-cloud world', <[https://www.hytrust.com/uploads/Compliance-in-a-Multi-Cloud-World\\_WP.pdf](https://www.hytrust.com/uploads/Compliance-in-a-Multi-Cloud-World_WP.pdf)> accessed 11January 2021.

31 HYTrust (n 31)

32 Nate Lord, 'Data Protection: Data In transit vs. Data At Rest', <<https://www.digitalguardian.com/blog/data-protection-data-in-transit-vs-data-at-rest>> accessed 13 January 2021.

Finally, the third category, data in use, refers to information that is currently being updated, processed, deleted, accessed or read by the system. This type of data is not passively stored, but actively moves through elements of the IT infrastructure<sup>33</sup>. Here, in addition to encryption, important data protection measures such as user authentication at all stages, including data access monitoring (e.g. login history) should be implemented<sup>34</sup>.

Although the above-described need to categorise data and include in the encryption process both data at rest and "en route" as well as data in use is an important element of security, encryption alone is nevertheless insufficient. In the context of the aforementioned concept of encryption, it seems indisputable that it is the above-mentioned key - to put it figuratively - which is the equivalent of the combination of a series of numbers opening a safe's combination lock, that is the most important element of the whole process. If an unauthorised person knows this combination of numbers, he will be able to open every safe, and thus - returning to the multi-cloud case - will gain access to data processed within the cloud computing resources. Hence, once encryption begins, the most important aspect becomes the organisation's ability to manage these keys, especially as this very management is often a process so operationally complex that it is sometimes referred to as the "Achilles' heel of encryption".

For a lawyer wishing to use a multi-cloud, it is therefore important not so much that he implements the encryption process itself, but that he manages the encryption keys in an appropriate way, which should be comprehensive and include the possibility to generate, distribute, store or revoke or destroy keys if necessary. Of course, in the case of a multi-cloud environment, this key management seems to present a much higher degree of complexity than in the case of a classical cloud. In practice, the greater the amount of computing resources of individual providers used by a lawyer, the greater the number of keys in use and the more complex their management becomes. Hence, a certain remedy for this state of affairs may turn out to be the use of management solutions that allow for the automation of all critical tasks related to the key management cycle, and this without disrupting or affecting the daily processing<sup>35</sup>.

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33 Laura Fitzgibbons, 'Data in use. Definition', <<https://www.whatis.techtarget.com/definition/data-in-use>> accessed 15 January 2021.

34 ibid.

35 HYTrust (n 31).

Finally, apart from data encryption and key management, indicated earlier, a sine qua non condition for increasing the level of data security is also its control and, more broadly, ownership. Well, when data were processed within the entity's own IT structure, the question of key ownership did not raise any doubts. However, in the cloudcomputing environment, and even more so in the case of multi-cloud architecture, the question of ownership of the key is no longer so obvious. Indeed, even when data at rest are strongly encrypted, it is still necessary to avoid that the cloud provider has control over the key. Firstly, this reduces the risk of a data security breach, since - hypothetically - if an unauthorised person learns the user's credentials and gains access to resources stored in the computing cloud, he or she will gain access to data that will be nothing more than an incomprehensible string of characters. Secondly, the issue of key ownership may also play an important role in the context of enhanced data access monitoring.

In conclusion, in order for encryption to play its role, it must take an appropriate - i.e. actually ensuring an adequate level of security of the processing - form, and be perceived as a certain component of a broader process, in which, apart from the fact of encryption itself, what seems to be more important is the management and possession of encryption keys. Only an encryption process identified in this way may significantly affect the security level of data processed in a multi-cloud environment by a lawyer. At the same time, however, there should be no doubt that the encryption in question is, first and foremost, a method of securing data, and not a process leading to the deprivation of personal characteristics of the information, which further leads to the conclusion, which every lawyer using this method in the multi-cloud environment must remember, that encrypted data remains personal data, and encryption itself is not a method of performing only a specific operation on encrypted data within the scope of application of the GDPR.

#### *4. Cloud Computing 3.0*

##### *4.1 General Remarks*

Finally, when analysing issues related to the admissibility of the processing of personal data by a lawyer in a computing cloud, reference should also be made to the case of cloud computing 3.0, mentioned in the intro-

duction to this work, i.e. the one based on blockchain technologies<sup>36</sup>. A natural consequence of the constant expansion of both these technologies, i.e. cloud computing on the one hand and blockchain technology on the other, is their integration<sup>37</sup>, especially that the latter turns out to be an excellent tool where cloud computing may fail, i.e. for example in terms of increasing the security of processing. This, in turn, makes it a legitimate conclusion that also in the work of lawyers using cloud computing technology, the percentage of such "cloud" processing based on blockchain will increase year by year, which, in addition to the undoubted benefits arising from it again - as in the case of classic cloud or cloud 2. 0 - will imply questions about the mutual relationship between personal data protection regulations, i.e. the GDPR in particular, and cloud computing 3.0. At the same time, it is necessary to underline the fact that compliance with the GDPR may be discussed not so much in relation to the technological solution itself, but the way it is used. Therefore, ultimately, the legitimacy of the methodologies applied should always be assessed by the lawyer through the prism of his or her own organisation, i.e. on a case-by-case basis<sup>38</sup>.

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- 36 Due to the fact that both the very notion of blockchain, as well as issues related to its use in the work of a lawyer have been discussed in more detail in part IV, chapter 6, the author will limit herself only to pointing out the problems that may arise in the case of use of cloud computing based on the said blockchain by a lawyer, and only in the context of the problems that may arise in this respect from the data protection law.
- 37 The purpose of this analysis is the use by lawyers of cloud computing, which is based on blockchain. However, it should be noted that in practice, in addition to the mentioned correlation, there may also be a correlation between cloud computing and the mentioned technology, in which the blockchain technology will be based on cloud computing. Simanta Shekhar 'Sarmah, Application of Blockchain in Cloud Computing' (2019) Vol. 8 Issue 12 International Journal of Innovative Technology and Exploring Engineering. 4968.
- 38 Ministerstwo Cyfryzacji, Grupa robocza ds. rejestrów rozproszonych i blockchain, 'GDPR a technologia blockchain', <<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwj1rtT-scTvAhVmsYsKHcsTA C8QFjAAegQIARAD&url=https%3A%2F%2Fwww.gov.pl%2Fattachment%2Fd3 9a05b8-f04c-4e7c-93ac-3b5b9946ed0c&usg=AOvVaw2Ngh2B3Pcf1XAUCdeplnn C9>> accessed 19 Ferbruaty 2021

In the case of assessing that the provisions of the GDPR, due to their territorial<sup>39</sup> and material scope<sup>40</sup>, will apply to cloud 3.0<sup>41</sup> processing, a lawyer using it must be able to identify (in the light of the provisions of the GDPR) his status, i.e. whether he plays the role of a data controller or perhaps a processor<sup>42</sup>. The answer to this question, although quite clear in the case of cloud 1.0 or cloud 2.0, seems to require a bit more commentary.

According to the Commission Nationale Informatique & Libertés (CNIL), and therefore the French supervisory authority, those users who use blockchain and have the right to decide to transmit data and place it on the blockchain for validation should be considered as data controllers. In particular, the CNIL takes the position that a user will be a data controller when:

- 1) is a natural person and the processing operation is not strictly personal;
- 2) he/she is a legal person and enters personal data into the blockchain.

Transferring the above to the LegalTech area, by way of example, it may be pointed out that if a notary registers his client's property deed in a

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39 According to Article 3, the GDPR will apply to the processing of personal data in connection with the activities of an establishment of the controller or processor in the EU, regardless of whether the processing takes place in the EU. Further, as stated in paragraph 2, the GDPR applies to the processing of personal data of data subjects residing in the EU by a controller or processor that does not have an establishment in the EU, if the processing activities involve: (1) offering goods or services to such data subjects in the EU, whether or not they are required to pay; or  
(2) the monitoring of their behaviour, insofar as that behaviour takes place in the EU. Finally, according to paragraph 3, the GDPR applies to the processing of personal data by a controller that does not have an establishment in the EU but has an establishment in a place where the law of a Member State is applicable under public international law.

40 The GDPR applies to the processing of personal data by fully or partly automated means and to the processing otherwise than by automated means of personal data which form part of a filing system or are intended to form part of a filing system (Article 2).

41 Michèle Finck, 'Blockchain and the General Data Protection Regulation, Can distributed ledgers be squared with European data protection law? ', (2019) Study. European Parliament,

42 Luiz-Daniel Ibáñez, Kieron O'Hara, Eelena Simperl, 'On Blockchains and the General Data Protection Regulation' <[www.eublockchainforum.eu/sites/default/files/research-paper/blockchains-general-data\\_4.pdf](http://www.eublockchainforum.eu/sites/default/files/research-paper/blockchains-general-data_4.pdf)> accessed 9January 2021.

blockchain, he will be identified as the data controller<sup>43</sup>. At the same time, the literature on the subject does not lack the opinion that due to the decentralised nature of blockchain and activity based mostly on P2P relations, each user is a controller with regard to the data they enter. Resolving the above, it should be pointed out that the determination of who is the data controller in a given situation will require an individual assessment for each case<sup>44</sup>.

In the situation when, within the framework of the assessment of a particular processing process in cloud computing 3.0, there will be grounds to consider that the provisions of the GDPR (due to their territorial and material scope) are applicable and, further, that the lawyer will play the role of a data controller, he will thus be obliged to fulfil a number of obligations that arise from the regulation in question and will further be held liable in the event of their breach.

With regard to the first of the above-mentioned implications, i.e. the necessity to meet the obligations imposed on the administrator, in the case of cloud computing 3.0 satisfying some of them, while not proving impossible, is certainly extremely difficult to achieve in practice. This is because cloud 3.0 will focus, as if through a lens, all those problems and challenges that, on the one hand, are characteristic of cloud 1.0 and, on the other, are characteristic of blockchain, and it is the latter that will be the subject of further considerations.

The first fundamental difficulty seems to be the ability of the lawyer (data controller) to comply with the principle of retention limitation resulting from Article 5.1.e GDPR, according to which data must be kept in a form which permits the identification of the data subject for no longer than is necessary for the purposes for which the data are processed. If this is combined with the feature of blockchain, which implies that data, once stored in blocks, cannot be deleted or modified<sup>45</sup>, compliance with the aforementioned obligation seems doubtful. Furthermore, it is not clear how the 'purpose' of the processing of personal data should be understood in the context of blockchain, in particular whether this only includes the initial transaction or whether it also includes further processing of

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43 CNIL, 'Blockchain:Solutions for a responsible use of the blockchain in the context of personal data' <[https://www.cnil.fr/sites/default/files/atoms/files/blockchain\\_en.pdf](https://www.cnil.fr/sites/default/files/atoms/files/blockchain_en.pdf)> accessed 11 December 2020.

44 Michał Dymiński, Dominik Ferenc, 'GDPR w łańcuchu bloków' (2020) 6 Przegląd Prawa Publicznego 202061.

45 See more: Part IV chapter. 6

personal data (such as their storage and consensus use) once it has been introduced in the chain<sup>46</sup>.

In the light of the above statements, it seems obvious to assume that under cloud computing 3.0 it will be difficult to meet the data minimisation principle, which is set out in Article 5(1)(c) of the GDPR and further specified in Article 11. In accordance with them, data should be adequate, used and limited to what is necessary for the purposes for which they are processed. This principle is often associated with the need to quantitatively limit data collection, and in this sense it is difficult to assume that there is a possibility of its implementation in the case of cloud computing 3.0. Alternatively, however, it could be assumed that data minimisation is not so much about the quantity but rather about the quality of data, which means that it would be required that no special categories of data are processed unless absolutely necessary, and that data are pseudonymised or even anonymised whenever possible. However, the possibility of such an interpretation seems irreconcilable in light of Article 25(2) of the GDPR, which provides that the controller shall implement appropriate technical and organisational measures so that, by default, only those personal data are processed which are necessary for each specific purpose of the processing. This obligation relates to the amount of personal data collected, the extent of their processing, their storage period and their availability<sup>47</sup>.

The possibility for a lawyer to exercise the right to rectify data referred to in Article 16 of GDPR should also be assessed in an analogous way. How, in the case of the processing of personal data in a computing cloud that operates on the basis of blockchain, would a lawyer exercise this right, since in blockchain it is practically possible to modify the information contained in the blocks? Well, a certain answer to this type of question may be the fact that in certain situations, private or public blockchains nevertheless allow for the possibility of modifying data by, for example, mixing blocks, which should be possible by appropriate technical configuration. Then each user has specific write rights and is entitled to add new blocks which should correct previously placed information<sup>48</sup>.

Going further, similar concerns as before may also imply the need for the controller to satisfy the right set out in Article 17 GDPR, i.e. the right to erasure (right to be forgotten). Assuming that the prerequisites of Article 17 GDPR for the admissibility of exercising the right to be for-

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46 Finck (n 42) II

47 *ibid.*

48 Dymiński, Ferenc (n 45)

gotten by the data subject are met, due to both the previously mentioned technical factors characterising blockchain and its governance structure, the possibility of its fulfilment comes into question<sup>49</sup>.

Taking into account the above, only exemplarily indicated problems that, in the light of the provisions of the GDPR, may cause the use of cloud computing based on blockchain by a lawyer, it seems justified to pose the question of whether a lawyer should process personal data under cloud 3.0 at all, precisely due to these problems, at least with the implementation of data subjects' rights and, more broadly, compliance with the provisions of the GDPR? It seems that if possible, personal data should be processed off-chain. The chain itself should contain links (hashes) to the document, allowing to verify its authenticity and correctness<sup>50</sup>. This procedure allows avoiding difficulties with the use of dispersed databases in accordance with GDPR, and also simplifies the management of personal data, because the data processed off-chain are stored in a centralised database, which further facilitates the identification of the data controller, which will be the entity storing the data off-chain, or at least enables the rectification and erasure of personal data in the light of Articles 16 and 17 of GDPR. Importantly, such register still needs to comply with the GDPR and every lawyer should bear this in mind.

However, if the rights referred to in Articles 16 and 17 GDPR are exercised in the framework of centralised data outside the blockchain, the question of what status will be given to the remaining hash, which after all will still remain in the blockchain, is still open. In this regard, it will need to be determined whether this hash will fall within the category of personal data and enable the identification of the data subject. However, as indicated in the literature, determining the above is an extremely complicated process today. Therefore, until at least a guideline or recommendation is issued on this subject, a lawyer should be aware of the existence of this doubt<sup>51</sup>.

Moreover, it should be noted that the previously mentioned possibility to store data off-chain does not apply to public keys.

Although storing personal data outside the blockchain seems to be a certain remedy for the previously mentioned potential risks of non-compliance with GDPR, it should be realised that this solution is not without its drawbacks. The consequence of applying this solution will be a situation

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49 Fábio Coelho and George Younes, 'The GDPR-Blockchain paradox: a work around' (W-GCS'18 2018: 1st workshop on GDPR compliant systems, co-located with 19th ACM international middleware conference, Rennes, 2018).

50 Dariusz Szostek, *Blockchain and the Law* (1 ed., Nomos 2019)109-110.

51 Michèle. Finck (n 42) 32.

in which it is the personal data that will be centralised. Thus, if a failure occurs, the data may be irretrievably lost, as it will not be possible to reconstruct them on the basis of a hash. Moreover, the availability failure (intentional or not) may disrupt the entire data processing, bringing us back to the problem whose solution motivated the blockchain developers<sup>52</sup>.

#### 4.2. Smart Contract and Personal Data

The previously presented considerations concerning the processing of personal data in blockchain-based cloud computing would not be complete without reference to issues related to smart contract<sup>53</sup>. Indeed, the combination of blockchain and smart contract is the most classic model of their functioning<sup>54</sup>. This in turn, from a lawyer's perspective, implies questions about the correlation between the provisions of GDPR and the smart contract. And although, as rightly pointed out in Part IV, Chapter 7, for most lawyers dealing with the machine language in which the smart contract is written may involve the need to cooperate with programmers, nevertheless, the need to know what legal consequences - including those related to the protection of personal data - will be triggered by running an algorithm in a smart contract will be on the side of the lawyer. And these consequences are not lacking.

Above all, practitioners need to be aware that it is the European data protection framework shaped by the GDPR provisions that will be one of the decisive factors in determining the extent to which smart contracts can be used in the EU<sup>55</sup>. Although smart contracts have so far attracted the attention of legal practitioners mainly in the context of contract law, it should be noted that although a smart contract is not always a contract in the legal sense, it may - and this will be further analysed - more often than not involve the automated processing of data, including personal data, which directly raises various implications under the GDPR<sup>56</sup>.

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52 Luiz Daniel Ibáñez, Kieron O'Hara, Eelena Simperl (n 43)

53 More on smart contracts in Section Three 'Smart Contracts, Blockchain and Distributed Ledger Technology' (DLT) in the Work of a Lawyer.

54 Marlena Pecyna, Adam Behan, 'Smart contracts — nowa technologia prawa umów?' (2020) 3 Transformacje prawa prywatnego 189.

55 Michèle Finck, 'Smart Contracts as a Form of Solely Automated Processing under the GDPR', (2019) 9(2) International Data Privacy Law 78.

56 ibid.

Article 22(1) of the GDPR provides that the data subject has the right not to be subject to a decision which is based solely on automated processing, including profiling, and which produces legal effects concerning him or her or significantly affects him or her in a similar manner. Thus, as aptly assumed by Ms Finck, in order to assess whether smart contracts are covered by this provision, it must be determined whether they are considered a decision based solely on automated processing and whether the decision produces legal effects on the data subject or otherwise significantly affects the data subject<sup>57</sup>.

With regard to the question of understanding how - in the context of smart contracts and for the purposes of Article 22 GDPR - 'decision making' should be interpreted, the literature proposes two alternative possibilities. Firstly, the execution of a smart contract code following the occurrence of a predetermined event may be considered as a 'decision'. According to the nature of smart contracts, there is no human involvement at the 'decision' stage, which means that Article 22(1) applies in this situation. Secondly, it is also possible to consider that the concept of 'decision' will encompass a broader time scale and thus the initial decisions that led to the smart contract. Indeed, in many circumstances people will agree on the purpose and configuration of the smart contract. Sometimes a human will act as an , "oracle", giving the smart contract the inputs needed to make it work. In addition, a human agent is also needed to translate human intentions into computer code. When the smart contract is combined with a contract, the 'decision' can also be equated with preliminary contractual negotiations. Such an understanding of the concept of decision in the context of Article 22 GDPR would certainly be accepted by those who care about excluding the application of the said GDPR standard. However, this scenario is unlikely if one considers that Article 22(2) contains an explicit exemption from the prohibition in Article 22(1) where a smart contract is used for the performance of a contract. If human involvement in the development of the contract were to be taken into account for the purposes of paragraph 1, there would be no need for an explicit exemption to this effect in paragraph 2. Hence, taking into account the wording of Article 22 of the GDPR, it can be concluded that the , "decision" for the purposes of Article 22(1) is probably only the final execution of the code, which actually takes place without direct human involvement. It can therefore be concluded that smart contracts, at least in certain circumstances, fall under Article 22(1) GDPR. On the other hand,

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57 ibid.

as regards the determination of whether the decision produces legal effects for the data subject or otherwise significantly affects the data subject, it is worth emphasising, on the basis of the meticulously conducted analysis by M. Finck, that such a scenario is not excluded either, if only when smart contracts decide whether an insurance premium is paid, consumer rights are enforced or payment for goods or services is made<sup>58</sup>. According to the author, this leads to the conclusion that smart contracts may not comply with the GDPR in this respect and that this fact should be taken into account when designing them.

Moreover, when analysing possible correlations between GDPR provisions and smart contracts, the lawyer should take into account the fact that the scope of application of these provisions will be determined by the ecosystem in which the smart contract operates. If we are dealing with an open ecosystem, the specificity of which is the transfer of data from external sources, then questions may arise in the context of personal data protection law, i.e. in particular whether an agreement on entrustment of processing should be concluded, subcontracting or perhaps we are dealing with co-management. Obviously, giving an unambiguous answer to this question seems to go far beyond the framework of this paper, and moreover, it depends on the factual circumstances, nevertheless, it is important for a lawyer to be aware of this type of coincidences

In the light of the above mentioned implications, which may arise at the junction of data protection law and smart contracts, the question of how a lawyer should find himself in this "reality" seems to be without a single exhaustive answer. Nevertheless, it seems interesting to draw attention to an idea presented by M. Corrales, P. Jurčys and G. Kousiouris, who proposed to apply the so-called smart disclosure strategy<sup>59</sup>. These authors point out that while a typical contract is written using natural language, smart contracts are written in computer code using special programming languages. Such languages use strict algorithms and can be very complicated for non-programmers, including lawyers. Therefore, as a solution, they proposed a pseudo-code process, which is an intermediate step between planning and programming. It is basically a step-by-step code outline that can later be rewritten into any programming language. The purpose of pseudo-code is to simplify operations, instead of using a real programming

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58 *ibid.*

59 Marcelo Corrales, Paulius Jurčys and George Kousiouris, 'Smart Contracts and Smart Disclosure: Coding a GDPR Compliance Framework' in Marcelo Corrales, Mark Fenwick and Helena Haapio (eds), *Legal Tech, Smart Contracts and Blockchain* (Springer 2019) 189.

language with a complex syntax. The proposed pseudocode follows a programming logic that allows the implementation of legal concepts in the user interface and related systems. It has been developed to comply with the requirements of the GDPR, as the pseudo-code project includes a set of specific legal and technical questions.

And it is the need to answer these questions that aims to , "intelligently disclose" the relevant information so that, in effect, cloud service providers make the necessary changes to SLAs and the underlying software, compliant with GDPR, which could further be used in the blockchain sphere as a piece of code along with the normal blockchain code. M. Corrales, P. Jurcys and G. Kousiourisza proposed a list of the following questions:

- 1) are personal data/special category data referred to in Article 9 of the GDPR subject to processing?
- 2) is the processing subject to encryption/authentication?
- 3) is it possible to choose the location where the data will be processed?
- 4) is the processing (e.g. within a SaaS service) dynamically configured to use IaaS/PaaS services?
- 5) are the "ownership" rights of the data or metadata clearly defined and explained in the contract/SLA?
- 6) does the provider undertake to notify if the terms of the contract change?
- 7) does the provider commit to notify in case its underlying PaaS/IaaS provider changes the terms of the contract?
- 8) does the provider enable "greater virtual control" of the data, ensuring data portability and interoperability within the cloud?
- 9) does the provider commit to exercise the right to erasure of data in the originally used service?
- 10) does the provider declare that its subcontractor offering PaaS/IaaS services applies standard contractual clauses?
- 11) does the provider apply measures to prevent data loss (regular backups, etc.)?
- 12) does the provider use its own resources to run the application?

#### *4.2 Cloud Computing and Electronic Communications*

The issue of using cloud computing services by a lawyer in his or her daily practice is inextricably linked with the subject of electronic communication. This is because cloud computing is an excellent tool for changing the mode of communication from "on paper" to electronic. While initially

the above was associated mainly with the use of electronic mail in the communication process, currently, due to the increasingly advanced communication tools based on cloud computing, there is a paradigm shift in this respect. If the subject of such communication is also personal data, and other prerequisites are met (e.g. territorial or substantive scope of the GDPR), then the provisions of the GDPR will be applicable, which will thus create obligations on the part of the lawyer, first of all, to identify in which role (in the light of the provisions of the GDPR) he/she acts, and further, what obligations, scope of responsibility, etc. he/she will have in connection with it. And the possible scenarios in this context can be multiplied.

As already mentioned in Part VI, Chapter 1, it is becoming more and more common to use cloud computing not for data transmission, but for making data available to authorised or entitled entities. Moreover, this is also increasingly taking place using cloud computing 3.0

Although the provisions of GDPR lack the legal definition of making available, there should be no doubt that it is one of the forms of personal data processing. The disclosure shall take place whenever the data are taken into possession by the data recipient, who then becomes the controller of personal data, whereas it is essential that the controller of data allows another person or entity, which will act as the data controller, to get familiar with such data. The very "making available" of the data shall be of a factual nature and may be effected in any way, as long as the result of the activity is to enable another entity to gain an actual access to and authority over the data<sup>60</sup>.

Thus, in the case where, for example, between lawyers there will be a sharing of data just within the framework of electronic communication undertaken with the use of cloud tools, the lawyer (both the one who shares personal data and the one to whom the data have been shared) should consider the legal consequences of that. The lawyer who makes the data available must fulfil the obligation to have an appropriate legal basis to make the data available, verify whether the entity to which the data is made available has been specified within the information obligation referred to in Article 13 of the GDPR. Moreover, also the form in which such personal data will be made available should meet the requirements of personal data security referred to in GDPR, for example through the

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60 Paweł Barta and Maciej Kawecki in Paweł Litwiński (ed), *Rozporządzenie UE w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i swobodnym przepływem takich danych. Komentarz* (C. H. Beck 2018) 202-203.

aforementioned encryption. On the other hand, the lawyer who gains access to such data and has 'authority' over it, will - in the light of the provisions of the GDPR - act as a personal data controller, with all the implications of this that have already been mentioned above, such as the need to fulfil a number of duties, or to guarantee the data subjects the exercise of their rights<sup>61</sup>.

In the event that cloud computing tools are used by lawyers to communicate within the organisational structure of which they are a part, then there will be no sharing of personal data in the shape discussed earlier. Thus, if, for example, lawyers - employed in different departments, but within the same organisation - communicate with one another and share data under the cloud computing, then not they themselves, but their organisation will still act as a data controller. Moreover, the situation of transferring data to the entity to which the processing of personal data has been commissioned cannot be treated as sharing either, because in such a case it will be the processor. Therefore, with regard to the use of cloud computing by lawyers, it should be concluded that the provider of the services we are interested in will be the procesor.

The above scenario should be distinguished from the situation, where in the process of personal data processing there are involved at least two lawyers (from other organisations), who for the purposes of communication interact with each other and who jointly determine the purposes and means of the processing<sup>62</sup>. Then, in accordance with Article 26 of GDPR, we will be dealing with co-management of personal data - which will furthermore give rise to various legal obligations on their side, both in a purely internal relationship (i.e. between them) and in an external context (i.e. in relation to the data subject, but also to the supervisory authority)<sup>63</sup>.

First of all, pursuant to Article 26 of GDPR, the lawyers should, by way of joint arrangements, clearly determine the scope of their responsibility for the performance of obligations under GDPR, as well as set out the principles for the exercise of data subjects' rights. And although the GDPR provisions do not provide guidance on the form of the arrangements in question, it is worth emphasising that the form should be such that the

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61 *ibid.*

62 It is the joint formulation of the purposes and means of processing that will be the sine qua non for it to be possible to speak of co-management rather than entrustment of processing.

63 Katarzyna Witkowska-Nowakowska in Edyta Bielak-Jomaa and Dominik Lubasz (eds), *RODO. Ogólne rozporządzenie o ochronie danych. Komentarz* (Wolters Kluwer 2018) 612-622.

obligation to make the contents of those arrangements available to the data subject can be implemented. Therefore, it is reasonable to assume that it should be a written form, including an electronic one. On the other hand, the division of duties made by them - as postulated in the doctrine - should be as transparent and clear as possible<sup>64</sup>.

### *5. Summary*

The analysis conducted above makes it necessary to conclude that just as it is natural nowadays for lawyers to use cloud computing solutions in their everyday activity, it should also be natural to identify the above with the provisions of the personal data protection law. And although it may also be assumed that in certain factual situations the aforementioned processing processes will not be covered by the provisions of GDPR, the very fact that such an assumption cannot be excluded a priori in relation to all situations requires the lawyer to be very careful when using these tools within his or her own activity. This task, as demonstrated earlier, appears to be difficult for at least two reasons. First and foremost, with the evolution of cloud technology itself, the challenges that any lawyer will face under data protection law have changed and, it is fair to assume, will continue to change. This is perfectly illustrated by the example of cloud computing 1.0 or 3.0.

Moreover, due to a number of different types of variables (such as the categories of personal data to be processed, the purpose of the processing, etc.) the legitimacy of the methodologies applied should always be assessed by the lawyer through the prism of his/her own organisation, i.e. on a case-by-case basis. This makes it impossible to indicate one "golden mean" in this respect.

It seems, however, that if a lawyer is familiar enough with the specificity of cloud computing technology to be able to identify the problems that its application may pose in the light of the GDPR regulations (as discussed above) and juxtaposes that with the methodology of implementing Legal-Tech solutions as such (as discussed in Part V), the risk of violating GDPR regulations, and thus being exposed to liability, will be lower.

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64 ibid..



# Legal Tech in the Law Enforcement Agencies

*Maria Dymitruk*

## *1. Introduction*

The tasks of the law enforcement agencies are primarily concerned with crime prevention, maintaining public order and security as well as detecting and prosecuting offences through pre-trial investigations. Their activities are largely coercive, and they deal not only with the criminal offence and its perpetrators, but also with a wide range of cases in which it is not known whether a given act constitutes a criminal offence or who the actual perpetrator is, as well as cases in which the aim of the authorities' actions is not to detect a crime but to ensure that it is not committed (e.g. in securing the order of public demonstrations). In this way, the activities of the law enforcement authorities concern an indefinite circle of people, including citizens whose activity is in no way directed towards actions of a criminal nature.

The work performed by law enforcement agencies is significantly facilitated (and often improved) by technological development<sup>1</sup>. Of course, the intensification of the use of more and more advanced IT solutions is a double-edged weapon: on the one hand it provides law enforcement agencies with tools enabling faster, more efficient and more reliable detection of crime and prosecution of its perpetrators, and on the other hand it allows the use of highly developed IT solutions for criminal purposes. The issue of identifying the right technological response to 'innovative crime' by law enforcement agencies remains therefore of utmost importance. It should also be noted that technological tools can be used by the law enforcement agencies to detect traditionally committed criminal acts. A good example of such application of the technology is a system recognizing a potential thief face in a crowd, based on a facial recognition system, i.e. a system for

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1 This thesis is valid not only in the 21st century. The influence of technological development on the activities of police authorities is a constant phenomenon - see Mathieu Deflem and Stephen Chicoine, 'History of Technology in Policing' in Gerben Bruinsma and David Weisburd (eds), *Encyclopedia of Criminology and Criminal Justice* (Springer 2017) 2269 – 2277.

automatic identification of individuals based on individual facial characteristics through pattern recognition algorithms.

Legal Tech, which covers the three levels discussed in Chapter One of the monograph: 1.0, 2.0 and 3.0, refers to an extremely broad spectrum of applications within the legal sphere. Due to the fact that information technologies understood as Legal Tech 1.0., most often referring to the software supporting non-lawyer activities, have been used by both law firms and public entities (including law enforcement agencies) for a long time, the focus in this chapter will be on Legal Tech 2.0 and Legal Tech 3.0 tools, of which main guiding element is automation, and which differ mainly from one another by the level of the technological system autonomy.

## *2. Possible Legal Tech Application by the Law Enforcement Agencies*

The indicated diversity of applications of technological tools would not allow conducting a legal analysis on their exploitation in the context of the law enforcement agencies work without making the necessary systematization. For this purpose, it should be pointed out that Legal Tech can be used by the law enforcement agencies for: 1) administrative and organisational activities and 2) substantive activities. The criterion for distinguishing between the above types of the services' activities results from their nature. The first group of activities relates to non-substantive, clerical activities, serving to improve the performance of the relevant tasks of law enforcement agencies. The second group includes overt and covert activities of the services aimed at the performance of tasks connected with the prevention and detection of criminal acts both in the course of preparatory proceedings as well as in an out-of-trial mode.

### *2.1. Legal Tech on Administrative and Organisational Activities*

Application of Legal Tech with regard to the first type of law enforcement activity, i.e. administrative and organisational activities, can take various forms: from improving communication between entities involved in the criminal process (e.g. remote communication between the public prosecutor and the criminal court), through ensuring electronic circulation of documentation issued and processed by the services (paperless document management), to introducing tools that automate certain law enforcement ac-

tivities (such as drafting pleadings or dealing with notifications of crimes). Legal document automation software on the technological market<sup>2</sup> could easily be used in the administrative work of services to speed up and facilitate the preparation of standard and routine pleadings, statements or standard elements of records. Similarly, the work of law enforcement agencies would be facilitated by the widespread use of automatic speech recognition (ASR)<sup>3</sup> and optical character recognition (OCR)<sup>4</sup> systems, which would considerably speed up routine law enforcement activities, such as taking witness statements or processing information contained in historically produced paper documents. Some countries have also already embarked on innovative AI implementation projects within the law enforcement tasks: they have introduced police chatbots to provide security information and enable people to inform law enforcement agencies of suspected crimes, they have also developed mobile applications to reduce crime or started patrolling cities using robots<sup>5</sup>.

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2 Examples of this type of software include LISA (<<http://robotlawyerlisa.com/>>, accessed 08 February 2021) or InteliLex (<<https://www.intelilex.net/en>>, accessed 08 February 2021).

3 For more on this subject see also: Dong Yu and Deng Li, *Automatic Speech Recognition* (Springer London Limited 2016); Biing-Hwang Juang and Lawrence R Rabiner, 'Automatic speech recognition – a brief history of the technology development' (2005) Georgia Institute of Technology. Atlanta Rutgers University and the University of California. Santa Barbara 67; Yi Ren, Xu Tan, Tao Qin, Sheng Zhao, Zhou Zhao and Tie-Yan Liu, 'Almost Unsupervised Text to Speech and Automatic Speech Recognition' (Volume 97: International Conference on Machine Learning, Long Beach, 9-15 June 2019) 5410.

4 For more on this subject see also: Arindam Chaudhuri, Krupa Mandaviya, Pratixa Badelia and Soumya K. Ghosh, 'Optical Character Recognition Systems' in: Arindam Chaudhuri, Krupa Mandaviya, Pratixa Badelia and Soumya K. Ghosh (eds), *Optical Character Recognition Systems for Different Languages with Soft Computing, Studies in Fuzziness and Soft Computing Vol. 352* (Springer 2017) 9 – 41; No-man Islam, Zeeshan Islam and Nazia Noor, 'A Survey on Optical Character Recognition System' (2016) 10 Journal of Information & Communication Technology -JICT <<https://arxiv.org/abs/1710.05703>> accessed 8 February 2021.

5 Many examples of innovative applications of AI in the police operations are provided by the Dubai10X project, which is undergoing a technological transformation using artificial intelligence tools in the United Arab Emirates police force, among others (see Amira Agarib, 'Dubai Police unveil Artificial Intelligence projects, Smart Tech' (Khaleej Times, 12 March 2018) <<https://www.khaleejtimes.com/nation/dubai/dubai-police-unveil-artificial-intelligence-projects-smart-tec>>, accessed 08 February 2021; Rory Cellan-Jones, 'Dubai Police Unveil Robot Officer' (BBC, 24 May 2017) <https://www.bbc.com/news/technology-40026940>, accessed 08 February 2021).

All applications of technological tools in the field of administrative and organisational activities are intended to streamline and speed up the processing of cases. While changing the nature of traditionally efforts- and time-consuming activities, as a rule they do not change the basic way in which services perform their functions. The use of IT tools in the course of extra-legal activities, although important from the point of view of streamlining the functioning of services (and as a result valuable from the perspective of security of the whole society), does not revolutionise the philosophy of law enforcement agencies, and from the IT point of view does not differ from general technological trends prevailing in other sectors.

Business-oriented and non-legal applications may be here advantageously implemented by the law enforcement agencies without a significant risk of violating the basic legal and ethical principles governing the functioning of services. On the other hand, automation of substantive activities, including first of all investigative activities, which are within the core of law enforcement activities, takes on a completely different character.

## 2.2. *Legal Tech in Substantive Activities*

While in the case of technological tools used in office activities it is rather impossible to state that such systems are dedicated to lawyers only and are characteristic solely for the legal industry (thus, this is not Legal Tech sensu stricto, but tech in general that is used just for the purpose of practicing law), within the scope of investigative activities at least some of the tools will be strictly dedicated for legal purposes or even the need to create them will arise directly from a specific demand of the services.

Although it is not possible - if only due to the constantly advancing technological development - to list exhaustively the areas in which law enforcement agencies currently use advanced Legal Tech tools in the course of their substantive work<sup>6</sup>, it is required to divide them into four main categories of activities. These are: 1) crime prediction, 2) automation of the detection of crimes and their perpetrators, 3) automated analysis of

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6 See also Ephraim Nissan's review of the tools (Ephraim Nissan, 'Digital technologies and artificial intelligence's present and foreseeable impact on lawyering, judging, policing and law enforcement' (2017) 32 *AI & Society* 441 – 464, more broadly on this subject Ephraim Nissan, *Computer Applications for Handling Legal Evidence, Police Investigation and Case Argumentation* (Springer 2012).

evidence, and 4) automation of decision-making processes in the course of investigations conducted by services.

### *2.2.1. Crime Prediction*

The idea of crime prediction is well known to the average citizen thanks to pop culture's ideas about punishing offenders before they commit a crime<sup>7</sup>. Modern predictive policing techniques primarily aim to automatically identify certain characteristics, events or persons, mainly to prevent crime, and often also to use the results of predictive policing in criminal proceedings<sup>8</sup>. Predictive policing includes four main categories of predictions based on advanced analytical techniques: methods for predicting crime (places and time periods with a higher risk of crime), methods for predicting offenders (people at risk of committing crime in the future), methods for predicting offender identity (matching likely offenders to past offences based on profiling), and methods for predicting victims of crime (identifying people potentially at risk of becoming a victim as a

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<sup>7</sup> The most famous example from the mass culture is the 2002 film „Minority Report”, directed by Steven Spielberg, based on the short story of the same name by Philip K. Dick published in Fantastic Universe magazine in January 1956. Clearly, the predictions generated by modern systems have little in common with the predictions on which the story of "Minority Report" was based. Nowadays these are software based on statistical methods producing estimates of the future based on data from the past (collected by information services or publicly available databases). Prediction results are always probabilistic, never certain. For more on predictive policing see Andrew Ferguson, 'Predictive Policing' (2017) 94 Washington University Law Review 1109; Albert Meijer and Martijn Wessels, 'Predictive Policing: Review of Benefits and Drawbacks' (2019) 42 International Journal of Public Administration 1031.

<sup>8</sup> See the case of Loomis v. Wisconsin, pending before the Supreme Court of the State of Wisconsin, United States of America (<<https://caselaw.findlaw.com/wi-supreme-court/1742124.html>>, accessed 08 February 2021). Eric L. Loomis in 2013 was arrested while driving a car that had been used earlier during the shooting. When he applied for parole, his profile was assessed by software called COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) used by US courts to assess the likelihood of recidivism (for more on how the system works, see the software developer's guide available at <https://assets.documentcloud.org/documents/2840784/Practitioner-s-Guide-to-COMPAS-Core.pdf>, accessed February 2021). As the system indicated a high risk of recidivism against Eric L. Loomis, the court denied the possibility of parole and sentenced the applicant to six years in prison.

result of a criminal act)<sup>9</sup>. Crime mapping based on advanced risk analysis techniques is useful both from the point of view of resolving an individual case, as well as from the broader perspective of allocating human resources in service activities and determining overall law enforcement strategies. However, it is quite clear from this example that the use of certain IT tools by services is not only targeted at a small group of persons already identified as involved in criminal activities, but also - and perhaps above all - at the general public, from which cases with a specific criminal risk are "picked up"<sup>10</sup>. Recent, widely discussed cases of discovered discriminatory tendencies of predictive tools based on machine learning raise legitimate questions about the acceptability of using such tools in criminal cases<sup>11</sup>.

### *2.2.2. Automated Detection of Crime and Offenders*

The second highlighted area of application of Legal Tech within the field of the law enforcement, i.e. automation of the detection of crimes and

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- 9 Walter L Perry, Brian McInnis, Carter C Price, Susan C Smith and John S Hollywood, 'Predictive Policing: The Role of Crime Forecasting in Law Enforcement Operations' (2013) National Institute of Justice, Safety and Justice Program, RAND Corporation research report series XIV <[https://www.rand.org/pubs/research\\_reports/RR233.html](https://www.rand.org/pubs/research_reports/RR233.html)> accessed 8 February 2021.
- 10 Citing Rodney Monroe, currently retired police commissioner in Charlotte-Mecklenburg, North Carolina, United States: "We're not just looking for crime. We're looking for people" - quoted in Robert L. Mitchell, 'Predictive policing gets personal' (ComputerWorld, 24 October 2013) <<https://www.computerworld.com/article/2486424/predictive-policing-gets-personal.html>>, accessed 8 February 2021.
- 11 See the report of the NGO ProPublica regarding the abovementioned COMPAS (Julia Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, 'Machine Bias' (ProPublica, 23 May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>>accessed 8 February 2021), a takze Ninareh Mehrabi, Fred Morstatter, Nripsuta Saxena, Kristina Lerman and Aram Galstyan, 'A Survey on Bias and Fairness in Machine Learning' (2019) arXiv preprint arXiv:1908.09635; Xue Songkai, Mikhail Yurochkin and Yuekai Sun, 'Auditing ML Models for Individual Bias and Unfairness' (2020) 108 (PMLR 108/2020) Proceedings of the Twenty Third International Conference on Artificial Intelligence and Statistics () 4552; Ellora Israni, 'Algorithmic Due Process: Mistaken Accountability and Attribution in State v. Loomis' (Jolt Digest, 31 August 2017), <<https://jolt.law.harvard.edu/digest/algorithmic-due-process-mistaken-accountability-and-attribution-in-state-v-loomis-1>> accessed 8 February 2021.

their perpetrators<sup>12</sup>, is mostly based on techniques capable of extracting information from data (data mining). This can take the form of automated analysis of the anomaly (e.g. of thefts) based on data from CCTV footage in public spaces, automated examination of electronic money transfers to uncover money laundering, detection of child pornography based on analysis of online video material or ongoing examination of social media content to uncover hate speech<sup>13</sup>. The facial recognition systems, which enable the matching of a human face from a digital image or video frame to law enforcement databases of faces, are quite a specific case<sup>14</sup>. Such systems are widely used by security services in many countries, including a large part of the Member States of the European Union<sup>15</sup>. Some countries have also chosen to use facial recognition systems in real-time interventions by equipping service personnel with facial recognition goggles<sup>16</sup>, an interesting combination of two technologies: a software facial recognition system and a hardware body cam i.e. a video recorder attached to the body or clothing of uniformed service personnel.

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12 Clearly, most of the techniques set out in this paragraph can be successfully used not only to detect crimes and criminals, but also to obtain evidence in criminal cases.

13 See also Mohammad Reza Keyvanpour, Mostafa Javideh and Mohammad Reza Ebrahimi, 'Detecting and investigating crime by means of data mining: a general crime matching framework' (2011) 3 Procedia Computer Science 872.

14 The threats connected with the use of such tools to human rights had been promptly recognised by the Council of Europe, which has been active in regulating the use of automatic facial recognition tools ('Facial recognition: strict regulation is needed to prevent human rights violations' (CoE, 28 January 2021) <<https://www.coe.int/en/web/artificial-intelligence/-/facial-recognition-strict-regulation-is-needed-to-prevent-human-rights-violations>> accessed 8 February 2021).

15 Nicolas Kayser-Bril, '*At least 11 police forces use face recognition in the EU, AlgorithmWatch reveals*', Algorithm Watch, 11 December 2019, updated 19 June 2020, <<https://algorithmwatch.org/en/story/face-recognition-police-europe/>> accessed 8 February 2021. The Polish Police uses a system called BriefCam that performs automatic analysis of video content to detect people, vehicles, etc. (Ewelina Kucharska, 'BriefCam - one system, many possibilities' (2019) 12 Stołeczny Magazyn Policyjny 20).

16 'Chinese police spot suspects with surveillance sunglasses' (BBC, 7 February 2018) <<https://www.bbc.com/news/world-asia-china-42973456#:~:text=Police%20in%20China%20have%20begun,crowds%20while%20looking%20for%20fugitives>> accessed 8 February 2021.

### 2.2.3. Automatic Evidence Analysis

The third area in which law enforcement agencies use Legal Tech tools in their substantive work is evidence analysis. These tools are of particular importance in the area of so-called e-discovery<sup>17</sup>, i.e. the discovery of electronically stored information (ESI) during legal proceedings<sup>18</sup>. Various Legal Tech 1.0 tools can be used in e-discovery, including in the course of a criminal case, as this process primarily involves the collection and processing of electronic evidence. From the point of view of Legal Tech 2.0 and 3.0, however, technology-assisted review (TAR), which at the current stage of technological development is usually based on natural language processing (NLP) techniques and machine learning (ML) models, is of particular importance. TAR enables the effective analysis of a big number of data. In a world of Big Data, without such tools law enforcement agencies would rely on "manual" verification of electronic data, which would almost always result in drastically reduced effectiveness<sup>19</sup>. At the same time, it is important to remember that AI-based automated data analysis tools can be a very useful search assistant, identifying relevant data and sorting it, however it is impossible to assign the entire evidence proceedings to them. The success of AI-based e-discovery lies in the seamless collaboration between a human being and a system<sup>20</sup>.

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- 17 *Discovery - in common law countries it is a pre-trial procedure for gathering evidence. In the countries of the continental system, the actions aimed at establishing the circumstances in question are generally carried out in the course of an evidentiary procedure.*
- 18 *E-discovery has always been of interest to academics in the context of criminal law – see Ken Strutin, 'Databases, E-Discovery and Criminal Law' (2008) 15 Rich. JL & Tech. 1; Justin P Murphy, 'E-Discovery in Criminal Matters - Emerging Trends & the Influence of Civil Litigation Principles' (2010) 11 Sedona Conference Journal 257; Jenia Turner, 'Managing Digital Discovery In Criminal Cases' (2019) 109 The Journal of Criminal Law and Criminology 237.*
- 19 Maura R Grossman and Gordon V Cormack, 'Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review' (2010) 17 Rich. JL & Tech. 1; Herbert L Roitblat, Anne Kershaw and Patrick Oot, 'Document categorization in legal electronic discovery: computer classification vs. manual review' (2010) 61 Journal of the American Society for Information Science and Technology 70.
- 20 See Michael Mills, 'Artificial Intelligence in Law: the State of Play 2016', Thomson Reuters, 4, <https://britishlegalitforum.com/wp-content/uploads/2016/12/Keynote-Mills-AI-in-Law-State-of-Play-2016.pdf>, accessed 8 February 2021.

#### *2.2.4. Automating Decision-Making Processes*

However, Legal Tech tools need not only be of an assistance for the personnel of the law enforcement agencies. In certain instance they can participate in decision-making processes carried out in the course of proceedings, and even take over the role of an independent decision-maker. The fourth of the highlighted areas of application of Legal Tech tools in the work of services is automation of decision-making processes in the course of conducted proceedings. The use of Legal Tech tools for the purposes of algorithmisation of the process of law application has already been discussed from the theoretical point of view in part II of this monograph. Incorporating these considerations into the practice of law enforcement agencies, it should be noted that in this case we will be dealing with automation of a potentially wide range of decisions<sup>21</sup>. Although one might be of the opinion that such a level of automation of proceedings conducted by law enforcement agencies has not become yet a standard, it has in fact been used in practice for years, e.g. in automatic traffic surveillance systems. For instance, CANARD<sup>22</sup> has been operating in Poland since 2011 which due to the automatic registration of offences reports violations of regulations within the scope of exceeding the established speed limits and disobeying traffic lights by the drivers. Information sourced from the point and section speed measuring devices or monitoring of intersections are processed automatically by the Central Processing System and then verified by the system in terms of the possibility of their further processing and use as evidence in a case of a traffic violation. The system also automatically exchanges information with the Central Register of Vehicles and Drivers, which makes it possible to send an automatic request to identify the driver of the vehicle. After receiving (or failing to receive) an answer from the vehicle owner, the system creates another solution such as: issuing a fine, delivering a statement to a person indicated

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- 21 Both those which take the form of a formal procedural decision (e.g. the system, on the basis of the analysis of data concerning the offence and the suspect, decides that it is appropriate to issue a decision on bail rather than to apply to the court for temporary arrest) and those which do not take any particular procedural form (e.g. the system, after the analysis of the database of inhabitants of a given city, selects persons who could potentially be the perpetrators of an offence and then automatically recognises their faces on public surveillance recordings, locating them for the law enforcement agencies).
  - 22 The Automatic Road Traffic Supervision Centre (CANARD) is an organisational unit of the General Inspectorate of Road Transport established to supervise road traffic.

by the owner or referring the case to court<sup>23</sup>. Employees of CANARD supervise the correctness of the whole procedure, however, as a rule, the system automatically performs all actions necessary to issue a summons.

It should be assumed that with the development of Legal Tech tools (especially those based on ML and NLP) the scope of their autonomy will increase. This will inevitably result in more and more significant interference in the scope of data regarding citizens processed by law enforcement agencies and, what is more important, will increasingly allow for automation of decisions made by law enforcement agencies with regard to citizens. For this reason, it is necessary to determine a legal framework for such actions.

### *3. Legal Tech in Law Enforcement - a Regulatory Perspective*

The undisturbed functioning of most of the methods in which Legal Tech tools are used in the work of law enforcement agencies set out in this chapter relies on ensuring automatic analysis of data held by the services. This can contribute both to speeding up and improving the quality of law enforcement investigations and, more generally, to better managing of the public security. However, these data remain to a large extent personal data. Taking into account the fact that the activities of law enforcement services - as it has been mentioned in this chapter - are aimed at a very wide range of citizens - not only those who are in any way involved in criminal activities, but also those who have never had and will never have any contact with the criminal world, one of the most important axis of legal considerations in this area are the legal regulations related to the protection of natural persons in relation to the processing of personal data by competent authorities for broadly defined criminal purposes<sup>24</sup>. Importantly, the general regulations on personal data would not be applicable within this

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23 <<https://www.canard.gitd.gov.pl/cms/>> accessed 8 February 2021.

24 Obviously, this is not the only legal perspective that can be analysed in terms of the use of Legal Tech tools in the work of uniformed services. Equally important as personal data protection regulations remain the fundamental rights, which are not the topic of this chapter. In this respect, however, see: European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, Artificial Intelligence and Law Enforcement: Impact on Fundamental Rights, PE 656.295, 2020, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/656295/IPO\\_L\\_STU](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/656295/IPO_L_STU)> (2020)656295\_EN.pdf, accessed 8 February 2021.

scope<sup>25</sup>. On European level<sup>26</sup>, the relevant law remains Directive 2016/680 of the European Parliament and of the Council of 27 April 2016<sup>27</sup>, hereinafter referred to as the "LED Directive"<sup>28</sup>.

As rightly highlighted in recital 3 of the preamble of the LED Directive, a rapid technological development and globalization have brought new challenges within the field of personal data protection, increasing the scale of collection and cross-border exchange of personal data by law enforcement agencies. Technology now makes it possible to process personal data<sup>29</sup> on an unprecedented scale for activities such as the prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties. The LED, seeking a balance between the free movement of personal data between EU Member States' services for criminal purposes while ensuring effective police cooperation and the

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- 25 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1, hereinafter referred to as "GDPR". As regards the exclusion of the application of the GDPR as to the protection of natural persons in relation to the processing of personal data by competent authorities in the framework of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including for the purpose of protecting against and preventing threats to public security, see Recital 19 GDPR. For more on the scope of the GDPR and the LED see Juraj Sajfert and Teresa Quintel, 'Data Protection Directive (EU) 2016/680 for Police and Criminal Justice Authorities' in Mark Cole and Franziska Boehm (eds), *GDPR Commentary* (Edward Elgar Publishing 2020) 3 <[https://papers.ssrn.com/sol3/paper.s.cfm?abstract\\_id=3285873](https://papers.ssrn.com/sol3/paper.s.cfm?abstract_id=3285873)>, accessed 8 February 2021.
- 26 Those interested in non-EU, US regulation are referred to, inter alia: Reema Shah, 'Law Enforcement and Data Privacy - A Forward-Looking Approach' (2015) 125 Yale Law Journal 543.
- 27 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection and prosecution of criminal offences or the execution of criminal penalties, on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L119/89. The LED Directive, similarly to the GDPR, was adopted in May 2016, together representing an important step forward in establishing a comprehensive EU data protection regime. It can be seen both as a lex specialis to the GDPR and a completely independent parallel regulation (Mark Leiser and Bart Custers, 'The Law Enforcement Directive: Conceptual Challenges of EU Directive 2016/680' (2019) 5 European Data Protection Law Review 367).
- 28 Abbreviation for Law Enforcement Directive.
- 29 This includes any information about identified or identifiable natural persons (see Article 3(1) LED).

due protection of the fundamental rights and freedoms of individuals, introduces an equivalent level of protection of personal data used in the field of criminal policy<sup>30</sup> and common rules for monitoring compliance with and enforcement of the binding principles<sup>31</sup>.

The processing of personal data<sup>32</sup> under the LED must comply with the fundamental principles governing data protection law, i.e. lawfulness, fairness, purpose limitation, data minimization, accuracy, storage limitation, integrity and confidentiality<sup>33</sup> as well as accountability<sup>34</sup>. These rules are broadly in line with the general principles of the GDPR<sup>35</sup>, with one important exception relating to transparency. Indeed, Article 4(1)(a) of the LED - contrary to Article 5(1)(a) of the GDPR - does not provide for an obligation to process personal data in a way which is transparent to the data subject. On the one hand, the lack of transparency is justified by the nature of the activities carried out by the services<sup>36</sup>, but on the other hand, one may not forget that these activities often concern a basically unlimited circle of citizens. It is also worth highlighting a certain inconsistency in the text of the Directive - although Article 4(1) of the LED Directive does not mention the principle of transparency in its content, recital 26 of its preamble indicates that „the processing of personal data must be (...) transparent in respect of the individual concerned (...). This does not prevent law enforcement agencies from carrying out activities such as covert surveillance or video monitoring”.

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30 It should be borne in mind that Article 1(3) LED does not preclude Member States from providing higher safeguards to protect the rights and freedoms of data subjects.

31 Examples of EU regulations implementing Article 11 LED, may be found in Matthias Hudobnik, 'Data protection and the law enforcement directive: a procrustean bed across Europe?' (2020) 21 ERA Forum 21 489.

32 The processing of personal data by competent authorities referred to in the LED encompasses a broad category of operations on data. According to Article 3(2) and Recital 34 of the LED, this includes any operation or set of operations which is performed upon personal data or sets of personal data within the scope of the Directive by automated or non-automated means, including in particular the collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, alignment or combination, restriction of processing, erasure or destruction, as well as the transmission of personal data, which serves the purposes specified in the LED, to recipients who are not subject to it.

33 Article 4(1) LED.

34 Article 4(4) LED.

35 Article 5(1) GDPR.

36 Full transparency could hinder or even frustrate the objectives of the investigation carried out by the competent services (Leiser and Custers (n 27) 371).

In the context of the application of Legal Tech tools within the law enforcement agencies' operations presented in the chapter, one of the most relevant provisions of the LED Directive remains Article 11 on automated decision-making in individual cases<sup>37</sup>. According to this provision Member States shall ensure that decisions which are based solely on automated processing, including profiling<sup>38</sup>, and which produce an adverse legal effect for the data subject or significantly affect him/her, shall be prohibited<sup>39</sup>. An exception to such prohibition shall only be allowed if such automated decisions are permitted by the EU law or a national law of the Member State to which the controller is subject, and at the same time the law provides for suitable safeguards with respect to the rights and freedoms of the data subject, including at least the right to obtain human intervention from the controller<sup>40</sup>. Member States - apart from the right to obtain human intervention imposed by the Directive - are left free to establish ap-

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- 37 This is a similar, but not identical, regulation to Article 22(1) GDPR. An intriguing difference between the LED regulation and the GDPR remains the fact that the prohibition of automated processing in the GDPR applies to decisions that "produce legal effects on the data subject or otherwise materially affect him or her in a similar manner" (cf. Article 22(1) GDPR), while the LED Directive prohibits in principle only decisions that "produce an adverse legal effect on the data subject or seriously affect him or her" (cf. Article 11(1) LED).
- 38 According to Article 3(4) LED, „profiling” means any form of automated processing of personal data that involves the use of personal data to evaluate certain personal factors relating to an individual, in particular to analyse or predict aspects relating to the individual's work performance, economic situation, health, personal preferences, interests, reliability, behaviour, location or movement. Criminal prediction, discussed earlier in the chapter, relies to a large extent specifically on profiling. It is also worth pointing out that although profiling and automated decision-making may be combined activities within the same process, they can also be carried out separately. There may be cases of automated decisions made with the use of profiling (or without) and profiling taking place without automated decision-making (Article 29 Working Party, Opinion on some key issues of the Law Enforcement Directive (EU) 2016/680, 29 November 2017, 17/PL, WP 258, 14 <[https://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=610178](https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610178)> accessed 8 February 2021).
- 39 At the same time, it should be borne in mind that even where the automated processing of personal data by law enforcement agencies does not fall within the scope of Article 11 LED, i.e. where it is not prohibited in principle (primarily because the processing will not be wholly automated or will not produce adverse effects for the data subject), a number of other provisions of the Directive shall apply to it (see Articles 4, 8, 10, 13 - 17 LED).
- 40 For more on the transposition of the LED provisions into national legal orders see <<https://eur-lex.europa.eu/legal-content/PL/NIM/?uri=CELEX:32016L0680>> accessed 8 February 2021.

propriate safeguards for the automation of decisions. Recital 38 of the LED Directive, however, indicates in this respect – similarly to the provisions of Article 22 and Article 15 of the GDPR - the required safeguards, in addition providing for the following: information obligations towards the data subject and the right to express one's opinion, obtaining an explanation of the decision and a right to contest it<sup>41</sup>. Due to the non-binding nature of the preamble, these can only be regarded as guidelines for national legislators<sup>42</sup>.

The prohibition of automated decision-making is even stricter when it comes to the processing of specific categories of data<sup>43</sup> which are not uncommon in the course of the services' operations. To the extent indicated, a decision may be automated only if "suitable measures have been implemented to safeguard the data subject's rights, freedoms and legitimate interests"<sup>44</sup>, and in any case no such decision may be made, based on profiling which would result in discrimination against individuals<sup>45</sup> (in line with the wording of Article 21 of the Charter of Fundamental Rights<sup>46</sup>). The exclusion of the consent as a basis for automation within the police context remains the main difference between the LED Directive and GDPR regulations when it comes to the automated decision making<sup>47</sup>. As recital 35 of the LED Directive rightly indicates, the consent of the data subject should not constitute a legal basis for the processing of personal data by competent authorities for criminal purposes. Indeed, if the data subject has to comply with a legal obligation (which is usually the case regarding the procedural position of persons involved in pre-trial investigations), he/she does not have effective freedom of choice which is the essence of the free consent. As the Working Party rightly points out -Article 29, the clear imbalance between the rights of the data subject and

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41 One may reflect on the reasons why the EU legislator did not decide to explicitly include the right to express one's position and the right to contest the decision in the text of Article 11 LED, following the example of the regulation of Article 22(3) GDPR.

42 Compare also: Juraj Sajfert and Teresa Quintel (n 25) 10.

43 This includes personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade-union membership, genetic data, biometric data, data concerning health and data concerning a natural person's sex life or sexual orientation (Article 10 LED).

44 Article 11(2) LED.

45 Article 11(3) LED.

46 Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

47 Compare Article 22(2)(c) and Article 22(4) GDPR.

the rights of the controller (law enforcement agency), rules out the consent as a basis for processing in this regard<sup>48</sup>.

#### *4. Summary*

Although the common perception is that new technologies reduce the time spent on cases and free the service employees from some performing some time- and effort-consuming activities, surveys conducted all over the world concerning the use of new technologies within the police operations demonstrate that assessments of the effectiveness of the applied technological solutions are extremely rare; therefore, hard empirical data on whether new technologies within the police operations actually work are very limited<sup>49</sup>. However, research shows that the use of Legal Tech tools within the law enforcement agencies' work is generally welcomed by the uniformed services, although at the same time there are also views that IT tools limit the discretion of human decision-makers<sup>50</sup>. It is not unlikely that the development of Legal Tech 3.0 tools, increasing the level of automation when it comes to the substantive work of the law enforcement agencies, will strengthen the officers' convictions on the reduction of their independence in decision-making processes, at the same time raising concerns about entrusting the tasks excessively to the technological systems. The key to responsible use of advanced Legal Tech solutions by the services thus involves primarily:

- 1) precise identification of areas where automation would bring more benefits than it would generate potential risks,
- 2) appropriate determination of the competence of persons using the technologies (not only technological knowledge, but above all legal and ethical awareness) and
- 3) implementation of well-designed legal solutions in this area.

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48 Working Party Article 29, Opinion on some key issues of the Enforcement Directive (EU) 2016/680, 29 November 2017, 17/PL, WP 258, <[https://ec.europa.eu/newsroom/article29/item-detail.cfm?item\\_id=610178](https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=610178)> accessed 8 February 2021.

49 Bart Custers and Bas Vergouw, 'Promising policing technologies: Experiences, obstacles and police needs regarding law enforcement technologies' (2015) 31 Computer Law & Security Review 518.

50 Janet BL Chan, 'Technological Game: How Information Technology is Transforming Police Practice' (2001) 1 Criminal Justice: The International Journal of Policy and Practice 139.

Interestingly, in the studies on the practical functioning of police services, apart from obvious difficulties in the implementation of IT tools in the operations of the services (such as insufficient funds for the purchase of technology or technological deficiencies of the tools themselves), the following factors are mentioned as barriers to the use of Legal Tech: lack of appropriate legal solutions, insufficient clarity thereof and difficulties in the appropriate processing of personal data<sup>51</sup>. It seems, therefore, that technological development alone is not the only determinant of the efficient and secured implementation of technological tools within the law enforcement agencies' operations. Legislative efforts<sup>52</sup>, constant education of officers within this field and ongoing monitoring of the effectiveness of the tools used are equally important.

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51 *ibid* 523.

52 The idea of certification of AI tools used in the sphere of justice (European Commission for the Efficiency of Justice) deserves recognition in this respect CEPEJ, 'Possible introduction of a mechanism for certifying artificial intelligence tools and services in the sphere of justice and the judiciary: Feasibility Study', 8 December 2020, CEPEJ (2020) 15 Rev.

# Smart Contracts, Blockchain and Distributed Ledger Technology (DLT) in the Work of a Lawyer<sup>1</sup>

Agnieszka Kubiak-Cyrul, Dariusz Szostek

## 1. *Blockchain, DLT<sup>2</sup> – a Foundation of LegalTech*

A number of tools used within LegalTech 2.0. and 3.0. apply blockchain and distributed ledger technologies<sup>3</sup>. This is not a new technology, the concept of distributed record keeping is over 50 years old (a memorandum no. RM-340-PR by Paul Baran<sup>4</sup> from 1964). What is innovative, is its application in a law firm and its adaptation to the needs of lawyers. Blockchain has been around for a number of years (paper by a ‘Satoshi Nakamoto<sup>5</sup>’ from 2008) and has been identified by, among others, the European Union

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- 1 The chapter was written thanks to financial support from the National Science Center, as part of project No. 2017/27 / B / HS5 / 01376.
  - 2 A detailed description of the matter of blockchain and DLT exceeds the bounds of this monograph. The authors restrict themselves only to pointing out problems at the junction of LegalTech and blockchain technology. For more on the subject of blockchain: Szostek, (n 55); Marcelo Corrales, Mark Fenwick, Helena Haapio (eds), *Legal Tech, Smart Contracts and Blockchain*, (Springer 2019); Makoto Yano, Chris Dai, Kenichi Masuda, Yoshio Kishimoto, ‘Creation of Blockchain and a New Ecosystem’ in Makoto Yano, Chris Dai, Kenichi Masuda, Yoshio Kishimoto (eds) *Blockchain and Crypto Currency*, (Springer 2019); Georgios Dimitropoulos, ‘The Law of Blockchain’ (2020) 1117 Washington Law Review 11; European Parliamentary Research Service, ‘Blockchain and the General Data Protection Regulation’, PE 634.445 (2019) 4, <[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS\\_STU\(2019\)634445\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/634445/EPRS_STU(2019)634445_EN.pdf)> accessed 10 October 2020; Deborah Maxwell, Chris Speed, Larissa Pschetz, ,Story Blocks: Reimaging Narrative through the Blockchain,’ (2017) 23 Convergence 79; Nicholas Roth, ‘An Architectural Assessment of Bitcoin: Using the Systems Modeling Language’ (2015) 44 Procedia Computer Science 527.
  - 3 The European Union Blockchain Observatory & Forum, *EU Blockchain Ecosystem Developments*, <[https://www.eublockchainforum.eu/sites/default/files/reports/EU%20Blockchain%20Ecosystem%20Report\\_final\\_0.pdf](https://www.eublockchainforum.eu/sites/default/files/reports/EU%20Blockchain%20Ecosystem%20Report_final_0.pdf)> accessed 2 January 2021.
  - 4 Paul Baran, ‘On Distributed Communications: I. Introduction to Distributed Communications Networks’ (1964) RAND Corporation <[https://www.rand.org/pubs/research\\_memoranda/RM3420.html](https://www.rand.org/pubs/research_memoranda/RM3420.html)> accessed 1 December 2020.
  - 5 Satoshi Nakamoto, ‘Bitcoin: A Peer-to-Peer Electronic Cash System ‘ (31 October 2008) <<https://nakamotoinstitute.org/bitcoin/>> accessed 1 December 2020. The

as a technology that is already affecting the way countries, institutions and societies function, and is expected to affect them even more significantly in the future. Both Paul Baran and Satoshi Nakamoto proposed their solutions having in mind the need to keep data safe and secure from any attack, be it physical or electronic.

The security component was also pointed out by Mariya Gabriel (Commissioner for Digital Economy and Society), who stated that “Europe must make more of technological innovation and Blockchain technology is an innovation that Europe cannot afford to miss. At the same time, it is clear that we need strong governance if we want to get the most out of distributed ledger technologies for the general interest, that means for our economy and for our society (...) Why are distributed ledger technologies relevant? The answer relates to a deeply human concept, trust. (...) Trusting the other side to honour their commitments, that is what gives them power and makes them useful. (...) In today's economy, however, there is less and less time to build trust in the way it happened in the past. (...) How can we achieve this? (...) Blockchain achieves this by removing the need to put trust into individual contractual partners. (...) But blockchain technology is not only useful in such familiar settings of individual transactions. There are other areas in which it can help us to establish system-wide trust. (...) However, Distributed Ledger Technologies are about much more than exchanging data in a safe manner. They allow us to rethink entirely existing business processes from scratch. (...) It is in this context that Blockchain and other DLT show their greatest potential: They can fuel new user-centric solutions that put individuals at the centre and give them control over their online identity, their data and their privacy. That is the promise. A technology to lift the decentralisation of the web and of the internet to a new level”<sup>6</sup>.

The law governs social relations. Legal engineering implements the law and codes, while trust is guaranteed by blockchain. It is for that reason the use of the latter within the framework of LegalTech is obvious, in many aspects. In the academic literature, authors distinguish three categories of blockchain<sup>7</sup>: 1.0, 2.0, and 3.0. This classification was introduced having recognised the way in which blockchain is used. Blockchain 1.0,

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real first name and surname of the author(s) of that work is not known, it was published under a pseudonym.

6 Speech by Commissioner for Digital Economy and Society Mariya Gabriel on blockchain applications, Brussels 3 April 2019 <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_19\\_1973](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_1973)> accessed 2 December 2020.

7 Melanie Swan, *Blockchain - A Blueprint for a New Economy* (O'Reilly 2015) 1 ff.

or "the original blockchain" according to M. Swan, refers exclusively to S. Nakamoto's project and its use in cryptocurrencies. Blockchain 2.0 is used to transfer "value" other than currency. It covers the tokenisation of, *inter alia*, securities, as well as other assets - such as copyrighted works, real estate, etc. Smart contracts are also recognised in this group. For the purposes of this chapter, Blockchain 3.0 is most important. It includes the applications to the benefit of the judiciary, based on blockchain and using a decentralised IP cloud protection, as well as digital identity verification and authentication. In this way, services provided by central or local government are replaced in whole or in part. Blockchain 3.0 applications offer advantages in terms of scale, efficiency, organisation and coordination in the fields of science, genomics, health, academia and academic publishing, development, aid and culture, where people themselves - instead of the state or public authorities - mutually certify certain facts<sup>8</sup>. This also paves the way for interaction of humans and machines.

Blockchain technology is used at every stage of LegalTech, including both LegalTech 1.0 (eg. blockchain-based registries), LegalTech 2.0 (eg smart contracts, tokenisation of processes, crypto-assets) and finally LegalTech 3.0 (using AI in the judicial system of Estonia<sup>9</sup>).

## *2. Influence of Blockchain on the New Paperless Approach. Datafication of the Law.*

Datafication, which means access to data instead of traditional formatted documents, is a major trend within the new paperless approach. It is also part of the development of LegalTech<sup>10</sup>, linked to the promotion of DLT, blockchain and smart contract in Europe. The essence of blockchain is the cryptographic protection of data saved in blocks. Cryptography, as a tool, makes that data immutable and by extension guarantees its veracity. Until now, the guarantors of the authenticity of data (or more broadly - documents) have been individuals representing professions of public trust - such as a judge, notary, lawyer, solicitor. Where blockchain technology comes into play - such guarantors are cryptography and algorithms.

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8 ibid 53-68.

9 <<https://e-estonia.com/artificial-intelligence-as-the-new-reality-of-e-justice/>> accessed 1 December 2020.

10 For more on the subject of datafication, see chapter on electronic communication in an organisation.

There are various ways of securing blocks, and thus the security of stored data. The latter depends on the number of nodes and on the type of cryptography securing the nodes. Not all blockchains are deemed equal. Among the blockchains in operation, one can find those impossible to break today (in terms of their cryptographic protection) and those that do not offer such protection. As a result, the immutability of the data entered into a blockchain varies, which should be borne in mind by lawyers when analysing IT systems. Blockchain operates in distributed registers. What is important from a legal point of view, is that the data recorded on each node, regardless of the number of nodes, is the 'original' recorded data and can therefore be uploaded by a court or other authority from any such node. This is an active tool, in opposition to traditional documents – entries occur in a constant manner and in real-time, sometimes even a few hundred thousand entries during a single day.

At the present time, there is no uniform European regulation regarding the relationship between an entry in a blockchain and the legal presumption of the veracity of a fact recorded in a block. Some countries have introduced such regulations. Some of them have done it in a general way, such as Singapore<sup>11</sup>, while others have decided on specific provisions for certain categories of entries, such as those related to cryptocurrencies<sup>12</sup> or securities. This situation is expected to change in the near future, as work is underway on EU regulations that would link blockchain entry to legal presumptions. Efforts to link entity identification, as well as the Internet of Things (IoT), to the use of attributes entered in blockchain are well advanced. The announced developments are aimed at promoting blockchain and making it more attractive as a tool, including within LegalTech. Blockchain is a tool that displaces public trust entities, but also a tool that supports such entities.

### *3. Using Blockchain in LegalTech*

In the 21st century, blockchain is becoming a technological, automated but also democratised tool which is analogous to traditional public trust

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11 Evidence Act (Chapter 97) Relevancy of Facts <<https://sso.agc.gov.sg/Act/EA1893>> accessed 25 October 2020.

12 Act No. XXXI of 2018 <<https://mdia.gov.mt/wp-content/uploads/2018/10/MDIA.pdf>> accessed 2 December 2020.

institutions. It does not replace them or their functions, but achieves similar goals, either on its own or by complementing existing institutions.

The speed of data generation, its complexity, datafication and the high frequency of transactions make it impossible to maintain the current classical way of data authentication. Moreover, for many types of data it is unworkable (eg IoT data). For this reason, the use of blockchain in LegalTech is becoming increasingly accepted and, in time, will become common practice. Certain trends are evident for blockchain:

- 1) with regard to legal presumptions:
  - a) as a modern database (without links to legal presumptions),
  - b) as a database which link blockchain entry to legal presumptions,
- 2) with regard to self-reliance:
  - a) functioning as support for a human, with entries made in a traditional manner by a specific person(s),
  - b) functioning in a fully automated manner, for instance through a smart contract, automatic storing of data from IoT etc.,
  - c) hybrid, after acceptance by an authorised person or an authorised institution, an automated entry,
- 3) with regard to manner of use:
  - a) as a component of other, more complicated LegalTech solutions (eg smart contract, durable medium),
  - b) solely as a database,
- 4) with regard to the entity using it:
  - a) public blockchain,
  - b) private blockchain,
  - c) government,
  - d) corporate,
  - e) business-oriented, etc.,
- 5) with regard to its territorial reach:
  - a) local,
  - b) state-wide,
  - c) cross-border,
  - d) aterritorial, where it is impossible (even indirectly) to establish a link with a given territory (eg Bitcoin).

The advantages of using blockchain include the elimination or reduction of the role of traditional intermediaries, the ability to obtain data attestation online without physical contact, unlike in case of traditional public trust institutions, and the auditability of blockchain, which guarantees its transparency and accountability. The application of blockchain in LegalTech is very diverse and subject to rapid development. For instance,

blockchain is used in InsureTech<sup>13</sup> - insurance (eg through smart contract, but also data analysis from IoT). It is also used in the energy sector, both in the scope of renewable energy projects, its redistribution, in smart energy meters, and in client databases. Smart contracts and crypto-currencies are based on blockchain, yet it is found also in traditional banking, settlement, and in creation of electronic money. Blockchain is used to certify documents, data, and entries (or rather, to guarantee their veracity, without the need of additional certification), in traditional logistics, and in humanitarian aid. It is used in craftworking, dematerialisation of securities, and for trade in such securities. The same may be said for attestation of copyright, patents, and for certification of origin for goods (EUIPO Blockathon). The same can be said of the legislative process monitoring, identity registers, electronic voting, general meetings of company members, managing company affairs solely in blockchain, and permanent data storage. It is further used as a register (for instance, as a company register or a land register), as a tool supporting notaries, the courts and public administration, and in the scope of taxes, control thereof, immutability of transactions, and in many other projects, including those at the intersection of the world of humans and that of machines.

Only for the purposes of providing examples and inspiration, certain models of using LegalTech based on blockchain are presented below. Among them, one of the boldest examples that modify prior legal concepts is found in the formation of the Blockchain-Based Limited Liability Companies (BBLLC) which operate only in a virtual manner and in a network, based on DLT and blockchain, with no physical company seat. A BBLLC is regulated by the act no. 205 relating to blockchain business development (Vermont, US). Such a company operates solely through algorithmic protocols defining, among other things, consensus rules, while the corporate resolutions passed by the company operate through smart contracts. An entry in blockchain is linked to a legal presumption. A BBLLC company is a conventional company carrying out business activities, what is new is the way it is organised and managed (based on LegalTech)<sup>14</sup>.

Another example is found in one of the biggest global blockchain projects<sup>15</sup>, implemented by Maersk and other carriers (eg Hapag-Lloyd and ONE - respectively - fifth and sixth shipping companies in the world by

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13 Pierpaolo Marano, Dariusz Szostek, *Smart Contract and Insurance* (Palgrave McMillan 2021).

14 See Dariusz Szostek, *Blockchain and the Law* (1 ed., Nomos 2019) 136 ff.

15 TradeLens Blockchain.

size), within the framework of which there are thousands of entries being made daily<sup>16</sup>, with said entries following from smart contract and operations on data. This includes transfer of ownership, the entry of goods into a given legal area, customs, etc. Interesting examples of regulation, and examples of blockchain-based LegalTech solutions, have emerged in the US. A blockchain entry meeting the written form requirement of the document has been proposed (an Act no. HB 1944, Arizona). In California, the entry of data from vital records has been linked with a presumption of veracity, without the need for physical certification (Senate bill no. SB-373 of 2019)<sup>17</sup>. Traditionally, law requires certified copies of birth, death, and marriage records be printed on chemically sensitized security paper with specified features, including, among others, watermarks, fluorescent fibers, and intaglio print. New law from 1.1.2022 would authorize a county to issue certified copies of marriage records by means of blockchain technology and would exempt those records from the required physical properties and features described above.

A bill no. SB-184 by the State of Colorado<sup>18</sup> vests a duty in the Colorado Water Institute at the Colorado State University to study potential applications of blockchain technology for managing a database of water rights, to facilitate the establishment or operation of water markets or water banks, and for any other useful purpose in the administration of the institute's powers and duties, and to report the results to the general assembly of that State. In the State of Connecticut, under bill no. HB 5417<sup>19</sup> there are acts taken in order to use blockchain to manage voter registration, mainly to prevent dual registration, while under bill<sup>20</sup> no. HB 6062 blockchain is used for online voting. In the State of Illinois, there are statutes being introduced on using blockchain in transactions, procedures, and in public registers<sup>21</sup>, while in Kansas this applies to regulations on company registers that use blockchain. There was a statute passed in the State of

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16 At the time of writing this chapter there were over 15 million documents entered <<https://www.tradelens.com/platform>> accessed 8 December 2020.

17 <[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200SB373](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB373)> accessed 7 December 2020.

18 <[http://leg.colorado.gov/sites/default/files/documents/2019A/bills/2019a\\_184\\_01.pdf](http://leg.colorado.gov/sites/default/files/documents/2019A/bills/2019a_184_01.pdf)> accessed 6 December 2020.

19 <<https://www.cga.ct.gov/2019/FC/pdf/2019HB-05417-R000081-FC.PDF>> accessed 7 December 2020.

20 <<https://www.cga.ct.gov/2019/TOB/h/pdf/2019HB-06062-R00-HB.PDF>> accessed 7 December 2020.

21 <[http://kslegislature.org/li/b2019\\_20/measures/documents/hb2039\\_enrolled.pdf](http://kslegislature.org/li/b2019_20/measures/documents/hb2039_enrolled.pdf)> accessed 7 December 2020.

New York that relates to agreements and electronic signatures entered into blockchain, and to smart contracts<sup>22</sup>. A similar occurrence came to be in North Dakota<sup>23</sup>.

In Europe, central banks and regulatory bodies (as well as the European Central Bank) are deliberating the use of Euro in digital form, based on blockchain. This follows *inter alia* from the growing number of projects on digital currencies in Asia (People's Bank of China vigorously develops Central Bank Digital Currencies)<sup>24</sup>. The so-called 'stabilcoins' emerge – electronic currencies fixed to state currencies by way of a "currency peg"<sup>25</sup>. Many states either implement blockchain in registers (eg Estonia, Georgia) or prepare such implementations. Blockchain is seriously considered for use in electronic identification<sup>26</sup>, including in eIDAS Regulation-related services<sup>27</sup>, and identification of persons, entities, attributes or IoT equipment. Professional legal associations are reaching for that technology eg notaries<sup>28</sup>, and other lawyers as well, *inter alia* in the scope of tokenisation of processes. The time of blockchain is upon us.

#### 4. Smart contract - a LegalTech tool in pure form

One of the most advanced LegalTech tools available nowadays, and one that is gaining in popularity, is the *smart contract*. Based on private law, it combines legal engineering and algorithmic codes, translates natural language into codes, and may contain tokens. It is based on DLT and blockchain technology, and, as a consequence, in most cases ensures a high level of cybersecurity and AI can be used as an oracle. It is not a document in the traditional sense, but rather is based on dataisation<sup>29</sup>. The EU<sup>30</sup> is

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22 <<https://nyassembly.gov/leg/?bn=A01683&term=2019>> accessed 8 December 2020.

23 <<https://www.legis.nd.gov/assembly/66-2019/documents/19-0127-06000.pdf>> accessed 8 December 2020.

24 <[https://www.eublockchainforum.eu/sites/default/files/reports/1st%20EUBOF%20Trend%20Report\\_December%202020.pdf](https://www.eublockchainforum.eu/sites/default/files/reports/1st%20EUBOF%20Trend%20Report_December%202020.pdf)> accessed 8 December 2020.

25 <[https://tlaib.house.gov/sites/tlaib.house.gov/files/STABLE\\_Act\\_One\\_Pager.pdf](https://tlaib.house.gov/sites/tlaib.house.gov/files/STABLE_Act_One_Pager.pdf)> accessed 7 December 2020.

26 <[https://www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/blockchain-strategie.pdf?\\_\\_blob=publicationFile&v=8](https://www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/blockchain-strategie.pdf?__blob=publicationFile&v=8)> accessed 6 December 2020; <<https://consensys.net/blockchain-use-cases/digital-identity/>> accessed 6 December 2020.

27 <[https://ec.europa.eu/futurium/en/system/files/ged/eidas\\_supported\\_ssi\\_may\\_2019\\_0.pdf](https://ec.europa.eu/futurium/en/system/files/ged/eidas_supported_ssi_may_2019_0.pdf)> accessed 8 December 2020.

28 <<https://7bitcoins.com/french-notaries-launch-their-blockchain/>> ; <<https://www.intone.lu/actualites/luxembourg-notary-blockchain-kickoff-first-europe>> accessed 7 December 2020.

29 See Malta.

30 See (indirectly related to the smart contract and directly to tokens): Proposal for a Regulation of the European Parliament and of the Council on Markets

increasingly taking into account smart contracts in new legislation. This trend will continue to develop, and the use of smart contracts will become standard practice, and in the case of, for example, crypto assets<sup>31</sup>, it has already become the standard.

At the present time, a smart contract is classified as a LegalTech 2.0 tool. The development of AI and the increasingly bolder combination of the smart contract "oracle" with AI will result in the former being reclassified as LegalTech 3.0.<sup>32</sup> The LegalTech 2.0 and 3.0 criteria concern the autonomy of decision-making. LegalTech 2.0 smart contracts follow pre-programmed sequences. At the present time, the vast majority of smart contracts fall within this group. On the other hand, the feasibility of a smart contract under LegalTech 3.0 depends on the decisions made by the algorithm after an independent analysis of the facts (at the moment we are at the stage of pilot schemes and small projects).

## *5. Definition of a smart contract*

Both legal treatises on new technologies and EU documents include many publications, studies and monographs devoted to the theme of smart contracts, its principles of operation, definitions, aspects of its functioning, and related legal problems. However, these need not be repeated<sup>33</sup> in this publication. This is because from the perspective of this monograph, we intend to focus on its application in LegalTech as a lawyer's working tool.

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in Crypto-assets, and amending Directive (EU) 2019/1937, COM/2020/593 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0593>> accessed 21 January 2021.

31 <<https://www.tradelens.com>> accessed 21 January 2021.

32 See also Markus Hartung, Micha-Manuel Bues, Gernot Halbleib, *Legal Tech. Die Digitalisierung des Rechtsmarkts* (C. H. Beck 2018) 6.

33 See latest publications: Daniel Hellwig, Goran Karlic, Arnd Huchzermeier, *Build Your Own Blockchain* (C. H. Beck 2020) 74 ff; Maria Grazia Vigliotti, Haydn Jones, *The Executive Guide to Blockchain* (Palgrave Macmillan 2020) 133; Eranga Bandara, Wee Keong Ng, Nalin Ranasinghe, Kasun De Zoysa, 'Aplos: Smart contract Made Smart' in Zibin Zheng, Hong-Ning Da, Minglong Tang, Xiangping Chen (eds), *Blockchain and Trustworthy System* (Springer 2020) 431; Robert Wilkens, Richard Falk, *Smart Contracts, Grundlagen, Anwendungsfelder und rechtliche Aspekte* (Springer 2019) 3 ff; Riccardo de Caria, 'Definitions of Smart Contracts: Between Law and Code' in Larry A. DiMatteo, Michel Cannarsa, and Cristina Poncibò (eds) *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms* (Cambridge University Press 2019) 19 ff.

The essence of a smart contract, as described by *R. Wilkens* and *R. Falk*<sup>34</sup>, consists simply in a set of algorithmic codes in a properly prepared computer program, entered and based on data in a blockchain operating on the "if-then" logic. Activating a smart contract constitutes an automatic execution of a predefined legal (eg making a transfer), procedural (eg entry in the register) or purely factual (eg sharing digital content) act, in connection with the occurrence of a predefined event, both events that are factual in form and events bearing the characteristics of a legal transaction. In information terms, a smart contract is an algorithmic code capable of achieving the correct execution of the terms of a contract<sup>35</sup>. One example of a simple system that we have been familiar with for years, is the simple vending machine. Today's smart contracts in LegalTech 2.0 or 3.0 form are much more complicated and complex. It should be pointed out at the outset that the smart contract, despite its name, is not always a contract in a legal sense. Not only that, but depending on the discipline, it also is understood differently by lawyers, computer scientists and economists.

At the present time, different countries have adopted different approaches to smart contract legislation, ranging from a complete absence of any reference to such contracts (where its operation is based on the principle of freedom of contract) to the implementation of statutes containing descriptive definitions<sup>36</sup> (eg of tokens, platforms, etc.) or legal definitions<sup>37</sup>.

The Maltese definition<sup>38</sup> adopted by the Malta Digital Innovation Authority Act<sup>39</sup> to explain the essence of a smart contract, deserves special attention. A *Smart contract* is defined here as an algorithm that automatically executes at least part of a contract. The contract itself can be concluded in its entirety in electronic form (we cannot determine by its form

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34 Robert Wilkens, Richard Falk, *Smart Contracts, Grundlagen, Anwendungsfelder und rechtliche Aspekte* (Springer 2019) 4.

35 Merit Kõlvert, Margus Poola, Addi Rull, 'Smart Contracts' in Tanel Kerikmäe, Addi Rull (eds) *The Future of Law and eTechnologies* (Springer 2016) 134 ff.

36 Singapore - Electronic Transactions Act <<https://sso.agc.gov.sg/Act/ETA2010#P1I>> accessed 27 January 2021.

37 See Arizona, Belarus, Malta.

38 Art. 2, para. 2: "A smart contract: means a form of innovative technology arrangement consisting of: (a) a computer protocol; and, or (b) an agreement concluded wholly or partly in an electronic form, which is automatable and enforceable by execution of computer code, although some parts may require human input and control and which may be also enforceable by ordinary legal methods or by a mixture of both."

39 See <<https://parlament.mt/media/95199/act-xxxi-malta-digital-innovation-authority-act.pdf>> accessed 27 January 2021.

whether it is to be concluded on the platform or via e-mail, or entered in a blockchain, etc.) or in traditional form (eg on paper) fully or partly (eg as a framework agreement). It can refer to named, unnamed, and mixed contracts.

In civil law terms, a smart contract is not always a contract. Its performance should take place automatically thanks the occurrence of predefined facts, while both activating contract performance or execution may require human action (eg by human activation of the algorithm). Contract enforcement may be fully automated, but traditional enforcement must also be acceptable. A contract may operate under one jurisdiction, but very often it operates simultaneously in many. A smart contract agreement may also be governed by various applicable laws (in the absence of a choice of law in the contract, its search is based on classic conflict of laws rules). It can operate as a single-step (performance of a single act), multi-step agreement (the performance of one act triggers another), or, finally, in continuous formats (through continuous interactions and entries in the blockchain). Evidence of the performance of a smart contract is registered in the blockchain, which requires lawyers to acquire new skills in the scope of gathering evidence. For this reason, increasingly legislation is being introduced on an ever more frequent basis aimed at binding an entry to a blockchain with a legal presumption<sup>40</sup>.

## *6. Examples of the application of the smart contract in LegalTech*

In the past, smart contracts were associated almost exclusively with transactions involving bitcoin or other cryptocurrencies. The technology has long since gone beyond this limited scope and is being applied in innovative ways in many sectors of the economy. The number of transactions made daily on the basis of smart contracts in a DLT (distributed ledger technology) environment is growing rapidly. According to data gathered by Dune Analytics, approximately 670,000 smart contracts are executed every month in the Ethereum blockchain alone<sup>41</sup>. Although not all smart contracts involving the implementation of legal actions, the above data point to the popularity of this tool and the versatility of its application.

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40 See the chapter: *Blockchain and DLT the Work of a Lawyer*.

41 Joshua Mapperson, *Ethereum Smart Contracts up 75 % to Almost 2M in March* <<https://cointelegraph.com/news/ethereum-smart-contracts-up-75-to-almost-2m-in-march>> accessed 27 January 2021.

Initially, most investments in solutions based on distributed ledger technology and smart contracts were carried out in the banking sector. Currently, such investments can be observed in most sectors of the economy.

Recently, Forbes published a list of the 50 largest entities that use blockchain technology and smart contracts in their operations<sup>42</sup>. They included the following giants: *A.P. Moller-Maersk* Denmark (logistics, maritime container shipping - blockchain: *TradeLens*, *Hyperledger Fabric*, *IBM Blockchain*), *Ant Group* China (an entity connected with the holding *Alibaba Group*, blockchain: *AntChain*, *Hyperledger Fabric*, *Quorum*), *BHP* Australia (mining industry, blockchain: *MineHub*, *Hyperledger Fabric*), *Boeing* USA aviation transport, blockchain: *Go Direct*, *Hyperledger Fabric*), *Carrefour* France (supermarket chain, blockchain: *IBM Blockchain*, *Hyperledger Fabric*), *Credit Suisse* Switzerland (financial services, blockchain: *Enterprise Ethereum*, *Paxos Settlement Service*), *Daimler* Germany (automotive industry, blockchain: *Hyperledger Indy*, *Hyperledger Fabric*, *Corda*, *Ocean Protocol*, *Ethereum*, *MoiveX*), *Equinor* Norway (fuel and energy industry, blockchain: *Data Gumbo*, *Vakt*), *Novartis* Switzerland (pharmaceutical industry, blockchain: *Ethereum*, *Sovrin*, *Hyperledger Fabric*, *Corda*, *DAML*, *Quorum*), *Walmart* USA (supermarket chain, blockchain: *Hyperledger Fabric*), *Visa* USA (payment services, blockchain: *Bitcoin*, *Ethereum*), *Samsung Group* South Korea (electronics industry, blockchain: *Nexledger*)<sup>43</sup> etc.

Smart contracts have been used in the insurance services sector for several years now.<sup>44</sup> In 2018, a consortium comprising EY, Guardtime, Møller-Maersk and Microsoft developed and launched the Insurwave platform. It uses blockchain and smart contracts to automate insurance contracts in maritime transport. This platform collects data on a vessel and its cargo from various sources in real time. The occurrence of events specified in the smart contract, information on which is provided via the Oracle function, triggers, eg the payment of compensation, without the need to

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42 Michael del Castillo, *Blockchain 50 2021*, <<https://www.forbes.com/sites/michaeldelcastillo/2021/02/02/blockchain-50/?sh=207076dc231c>> accessed 27 January 2021.

43 Michael del Castillo, *Forbes Blockchain 50 Of 2021: Cashing In On Bitcoin Mania* <<https://www.forbes.com/sites/michaeldelcastillo/2021/02/02/forbes-blockchain-50-corporate-america-cashes-in-on-bitcoin-mania/?sh=1bc729216e01>> accessed 27 January 2021.

44 OECD, *Technology and innovation in the insurance sector* (2017) <<https://www.oecd.org/pensions/Technology-and-innovation-in-the-insurance-sector.pdf>> accessed 27 January 2021; Marano, Noussia (n 13).

prepare any additional documentation. This technology also works well in parametric insurance.

One example of such insurance was Fizzy, a flight delay test insurance scheme marketed by the AXA group<sup>45</sup>. The insurance contract specifies a predetermined amount that will be paid after meeting the condition indicated. The payment obligation is expressed in machine language in the smart contract, which is stored in the Etherneum blockchain. As a result, its activation may result in the automatic payment of compensation without the need to complete any formalities and go through the claim settlement process, if the smart contract algorithm was thus constructed. The construction of such a smart contract features Oracle functions enabling the user to obtain information on the actual times and dates of aircraft take-offs and landings.

Based on the same principle, smart contracts can also be developed for insurance contracts concluded in the event of drought, hurricane, floods, heavy rain, etc. The selected policy conditions (eg price, planned departure time, amount of compensation) will be saved in the form of a smart contract in the blockchain. Changing the terms of such an agreement is not possible once the smart contract has been introduced into the blockchain. The decision-making regarding the payment of compensation has been fully automated and based on transparent rules, which eliminates the risk of potential disputes between the insurer and clients. The dissemination of blockchain technology in the insurance sector may serve as a foundation for specialized insurance products that provide protection against various types of risk, based on external data provided by reliable entities.

Another sector in which blockchain and smart contract technology is rapidly gaining a foothold is energy, in particular the pro-consumer electricity market.<sup>46</sup> Blockchain is used to build order and contract management systems. It is also useful platform for developing tools for direct sales of

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45 See <<https://www.axa.com/en/magazine/axa-goes-blockchain-with-fizzy>> accessed 27 January 2021. The insurance was available to customers during the period from 9.2017 to 11.2019.

46 Joseph Lee, Vere Marie Khan, ‘Blockchain and Smart Contract for Peer-to-Peer Energy Trading Platform: Legal Obstacles and Regulatory Solutions’ (2020) 19 UIC REV. INTELL. PROP. L. 285 ff; Qiang Wang, Rongrong Li, Lina Zhan, ‘Blockchain technology in the energy sector: From basic research to real world applications’ (2021) 39 Computer Science Review; Merlinda Andoni, Valentin Robu, David Flynn, Simone Abram, Dale Geach, David Jenkins, Peter McCallum, Andrew Peacock, ‘Blockchain technology in the energy sector: A systematic review of challenges and opportunities’ (2019) 100 Renewable and Sustainable Energy Reviews.

energy in a peer-to-peer network as well as for improving and developing electric car charging stations. The most advanced activities using blockchain and smart contract technologies are undertaken by the German energy network operator E.ON and the Italian company Enel. In 2017, they introduced blockchain transactions that do not require the participation of intermediaries and are performed in real time, which significantly reduces distribution costs for the end customer. The next step is “energy tokenization”. This requires the conversion of energy into contractual units, i.e., tokens, which can then be sold to recipients via smart contracts based on the same principles governing the operation of prepaid cards. The launch of Enerchain<sup>47</sup> in 2019 may accelerate the development of new forms of distribution for energy products. This is a trading platform for 44 energy companies based on blockchain technology, which enables the user to trade in various energy and gas products.

Blockchain is also used to create modern systems for registering property titles and real estate transactions. One example of an advanced platform based on blockchain technology and smart contracts is a real estate registry created for Georgia. It was prepared by Bitfury Group in collaboration with the Georgian National Agency of Public Registry (NAPR)<sup>48</sup>. The system provides a new and secure way of registering real estate that at the same time gives owners greater control over their property. Property ownership records are stored in the Exonum blockchain and are additionally secured in the bitcoin blockchain. The legal title to a property is documented by digital certificates supported by cryptographic evidence (a hash). This is a fully decentralized, secure digital system that is more efficient than its traditional counterpart and is corruption proof, thereby ensuring greater levels of trust among citizens. In the event of the sale or transfer of property ownership, the system saves new owners time and costs during the registration of such actions. In addition, it provides a transparent history of transactions and any changes in information regarding a given property. All blockchain processes can easily be audited both in real-time and retrospectively, which is important from the perspective of real estate registers. Work on planned real estate registers using blockchain and smart

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47 See <<https://enerchain.ponton.de/index.php/37-enerchain10live>> accessed 27 January 2021.

48 Nino Lazuashvili, Alex Norta, Dirk Draheim, ‘Integration of Blockchain Technology into a Land Registration System for Immutable Traceability: A Casestudy of Georgia’ in Claudio Di Ciccio and others (eds) *Business Process Management: Blockchain and Central and Eastern Europe Forum* (Springer 2019) 72 ff.

contract technologies is also at an advanced stage in a number of other countries, such as Sweden<sup>49</sup>, Great Britain<sup>50</sup> and India<sup>51</sup>.

Very promising innovations based on blockchain and smart contract solutions have been introduced in the area of copyright management, in particular in the form of systems for distributing fees paid to authors for the commercial use of their works. Blockchain-based platforms are beginning to emerge that use smart contracts to provide users with digitized music, such as UJO Music<sup>52</sup>. A pioneer in this regard was the British artist Imogen Heap, whose work Tiny Human was first made available to recipients via a smart contract. When the user pays a fee in cryptocurrency or in a digital currency for access to a work, the smart contract automatically pays the sum due to each entitled artist according to an earlier concluded contract included in the distribution algorithm. This is done immediately after the work is shared and without the need for intermediaries. The use of blockchain and smart contracts in this regard naturally requires determining who is entitled to receive royalties. This technology also enables the efficient transfer of fees to copyright collectives. For this reason, in 2017 Spotify, the Swedish global streaming service offering access to music, acquired the start-up Mediachain Lab, which develops blockchain-based projects<sup>53</sup>. It will be used to create a database of artists and their works in combination with license agreements, which will make it possible both to automate the distribution of works to users as well as

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49 For more on this topic: "The Land Registry in the blockchain – testbed. A development project with Lantmäteriet, Landshypotek Bank, SBAB, Telia company, ChromaWay and Kairos Future" <[https://chromaway.com/papers/Blockchain\\_Landregistry\\_Report\\_2017.pdf](https://chromaway.com/papers/Blockchain_Landregistry_Report_2017.pdf)> accessed 27 January 2021; Shefali Anand, *A pioneer in real estate blockchain emerges in Europe*, <<https://www.wsj.com/articles/a-pioneer-in-real-estate-blockchain-emerges-in-europe-1520337601>> accessed 27 January 2021; Molly Jane Zuckerman, *Swedish government land registry soon to conduct first blockchain property transaction* <<https://cointelegraph.com/news/swedish-government-land-registry-soon-to-conduct-first-blockchain-property-transaction>> accessed 27 January 2021.

50 See *HM Land Registry to explore the benefits of blockchain* <<https://www.gov.uk/government/news/hm-land-registry-to-explore-the-benefits-of-blockchain>> accessed 27 January 2021.

51 Vinay Thakur, M.N. Doja, Yogesh K. Dwivedi, Tanvir Ahmad, Ganesh Khadanga, 'Land records on Blockchain for implementation of Land Titling in India' (2020) 52 International Journal of Information Management.

52 See <<http://ujomusic.com/>> accessed 27 January 2021.

53 Hugh McIntyre, 'Spotify Has Acquired Blockchain Startup Mediachain' <<https://www.forbes.com/sites/hughmcintyre/2017/04/27/spotify-has-acquired-blockchain-startup-mediachain/?sh=6c9ffaf369ee>> accessed 27 January 2021.

make payments to entitled authors. The core element in this solution is a properly prepared smart contract, one that correctly executes the terms of contracts concluded between artists, entities providing streaming services, and consumers. It is not only commercial entities that nowadays see the benefits of blockchain and smart contracts. In 2020 the World Intellectual Property Organization (WIPO) began developing a system of intellectual property rights registration based on this technology<sup>54</sup>.

The above examples do not give a full picture of the practical applications of blockchain and smart contract technologies. These solutions have enormous potential and are undergoing rapid development. The smart contract should eventually be as ubiquitous in our daily lives as the Internet, Word, e-mails, ZOOM, electronic payments, Facebook etc. Its growing importance should be accompanied by greater awareness of the principles governing the operation of this technology as well as, and even more importantly, its limitations. In particular, it requires lawyers whose clients have the right to expect professional and competent support in matters relating to blockchain and smart contracts. The basic problems concerning the use of smart contracts in contract performance will be presented below.

## *7. Legal problems connected with the use of smart contracts in LegalTech*

The life cycle of smart contracts can be broken down into several phases. From a lawyer's perspective, the most important stage in this cycle is the actual creation of the contract. The interested entity (or entities) formulate the content of the draft agreement, specifying in particular the rights and obligations of the parties. Usually, not all elements of the contract can be automated. It is therefore necessary to specify which parts should be written in the form of a smart contract. Next, coding specialists must create a smart contract algorithm, that is, convert an agreement written in natural language into machine language. The programming languages most widely used for this purpose are Solidity, Go, Kotlin and Java. Databases already exist that contain ready-made code snippets in open source access, which coders use in the same way as lawyers use standard contractual clauses.

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54 WIPO Standards Launches Webinar Series with Blockchain for IP <[https://www.wipo.int/standards/en/news/2020/news\\_0001.html](https://www.wipo.int/standards/en/news/2020/news_0001.html)> accessed 27 January 2021.

The programming language requires the content of the smart contract to be formulated in an unambiguous way, dispelling any doubts as to the expected result. However, programmers should take care to ensure that the intentions of the parties regarding the contract are executed partially or fully on the basis of the smart contract. This is not an easy task as they lack adequate legal knowledge. As a consequence, in the case of complex legal relationships, there is a concern that the technical limitations of the programming language and the lack of appropriate expertise on the part of the code's creator will result in the non-performance or improper performance of the contract. For this reason, close cooperation between programmers and lawyers is very important at this stage. The success of this collaboration depends on achieving mutual understanding between both sides.

Translating the meaning of certain concepts from legal language into machine language is very difficult in practice, because lawyers and programmers use their languages for very specific (different) purposes. Contracts often contain abstract, ambiguous concepts (eg, responsibility, good faith, due diligence, forthwith), which allow a certain flexibility in the contractual relationship. However, creating a computer program requires precise, clear and unambiguous instructions for the computer. This means that not all contractual terms can be represented in machine language. The literature emphasizes the need to distinguish between different types of clauses in contracts. Not all clauses are equally susceptible to automation or their automation is not always desirable when the interests of the parties are taken into account.

A binary code is compiled on the basis of this version of the smart contract. Special software (a compiler) is used for this purpose. It transcribes the notation used in the language, eg Solidity, into machine instructions expressed in bytecode. This is another way of transforming the parties' intentions expressed at the time of the contract's conclusion. If this software contains bugs or was poorly designed, it may result in significant discrepancies between what the parties intended to achieve and what will be implemented after the smart contract is executed. The designed algorithm should then pass through the implementation and validation phases. In particular, the smart contract should be carefully checked to ensure it does not contain any potential errors or gaps. Unfortunately, this stage requires specialist knowledge, which means that it is not always properly executed. Repeated tests should be performed in an isolated environment, because a smart contract has real consequences that cannot be undone once the blockchain is running. Once the results are correct, the smart contract enters the implementation phase. However, even when appropriate tests

have been carried out, there is no guarantee that the smart contract will not contain errors or gaps that, when introduced into the chain, will have negative results.

The new transaction is transferred to the network together with the proposed fee expressed in GAS units and the indicated currency portfolio from which the fee is to be collected<sup>55</sup>. As a consequence, a certain degree of unpredictability should be expected regarding the commencement date of a smart contract, and thus the performance of the contract itself. Insufficient GAS will result in the transaction being rejected. If the amount of GAS was adequate, the transaction after verification must be packed into a block by miners, and then a new block must be added to the blockchain. This process is beyond the control of the parties to the smart contract. The time required to complete the tasks written in the algorithm is also difficult to predict. Smart contract execution usually entails making changes to the blockchain (eg transfers of cryptocurrencies or digital currencies between the addresses indicated in the smart contract). They are saved and distributed to all nodes in the chain.

The above stage concludes by placing the smart contract on the Ethereum blockchain and assigning it an individual address. From this moment, the smart contract can no longer be modified and is available to all blockchain users. Accessing this address enables the user to visualize certain data, such as the balance and the application binary interface (ABI). Each smart contract is identified by its software code associated with a specific block address, eg 0xbF35fAA9C265bAf50C9CFF8c389C363B05753275. It also has its own name, eg crowdsale, token, or mytoken. However, these names are repeated very often and do not have the power to individualize a given smart contract.

At the smart contract execution stage, problems may arise with the credibility and reliability of the source providing the information required to activate the action stored in the algorithm. This is the case only with

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<sup>55</sup> In the case of the Ethereum platform, consensus is achieved through the PoW algorithm. The Ether (ETH) cryptocurrency is used to reward miners that approve a transaction. To ensure the independence of the variable value of this cryptocurrency, the GAS unit is used in internal settlements, in which the price for transaction verification is determined. The transaction cost is determined as the product of the maximum amount of GAS units needed to generate the block and the GAS price specified in ETH. A party that wants to run a smart contract declares the payment of a certain amount of GAS in return for confirmation of the transaction (the greater the amount of GAS, the greater the motivation for miners to act). For more on this topic <<https://ethereum.stackexchange.com/questions/27452/how-to-estimate-gas-cost>> accessed 27 January 2021.

those smart contracts that have been programmed in a way that allows them to obtain data from outside the blockchain. The function that developers use to achieve this is called an "oracle". In simple terms, an oracle is a system that provides a smart contract with information from the outside world (eg regarding the temperature, wind strength, share prices, match results, plane landing times, courier deliveries, etc.) In a format which can be processed in a *blockchain* environment. The use of the oracle function requires making a payment to GAS each time. As a result, insufficient amounts of GAS in the indicated portfolio will prevent the acquisition of external data and the implementation of the smart contract. If a smart contract with an oracle function supports the execution of the contract, the parties should at the negotiation stage determine what or who will be a reliable source of the data on which the algorithm will depend. The credibility of this data is not subject to any formal or material verification by network participants. In addition, even if the selected data source is reliable, it may be the case that the external data received by that source was incorrect. Aware of the above consequences, the parties to a smart contract should thus agree on a reliable source of information in their case. This factor is the root of numerous technical and legal problems.

The above brief presentation of the principles governing the operation of a smart contract in a blockchain highlights the key role that technical aspects of this tool play when it is used to perform contractual obligations. By being aware of the limitations of this tool lawyers will be able to ensure that their clients avoid significant problems when acting on the basis of blockchain technology.

#### *8. Summary: Should lawyers be smart?*

A smart contract is written in a machine language, which most lawyers regard as a foreign language. Given this fact, how can such lawyers be sufficiently qualified to advise a client on a smart contract if they do not understand it themselves? There are only three options for solving this problem. First, lawyers must work closely with developers on such matters. However, we should be aware of the fact that while an IT specialist will explain what is written in the algorithm, a lawyer will have to imagine the legal consequences of running this algorithm in the blockchain. The second solution assumes that a lawyer will learn the rules of coding to a sufficient standard to be able to understand the content of the smart contract. Over time, further modifications in machine languages should make them much easier to understand. This was the case with operating

systems whose interfaces have become increasingly user-friendly. Finally, the third assumption is that in the future, artificial intelligence will replace lawyers in analysing the functioning of smart contracts. However, this development remains in the distance future. Meanwhile, we should expect to see the emergence of new third party liability insurance products in conjunction with legal services for entities operating on the basis of blockchain and smart contract technologies.

In the future, blockchains will become part of the legal services industry. If this does not happen through the initiative of lawyers themselves, it will result from the pressure exerted by their clients. On the one hand, major business entities, i.e., the biggest clients of law firms, are already carving out new areas of activity based on blockchain and smart contracts or are seeking development opportunities connected with these technologies. They will expect legal support in these areas. It would seem that only lawyers who make an effort to learn about such technology at the algorithm level will be able to provide competent legal assistance. On the other hand, the way law firms and legal departments function will change as blockchains become more commonplace in both public administration and various sectors of the economy. Document registers will be created in blockchain, and this will do away with the need for archives of paper documents, change the way in which contracts are prepared and, as a result, improve many internal processes and reduce operating costs.

# Legal Tech vs Data in Organisation

*Małgorzata Kurowska*

## *1. Data vs Information*

Both data and information are concepts understood intuitively in everyday life and, as experience has shown, also interchangeably, even by lawyers. However, information security management methodologies treat these concepts separately, with such distinction being crucial from the point of view of proper modelling of the information management process in a law firm.

Currently, ISO standards of the 27 000 family of standards (Information Security Management) do not define information. This concept is defined in a slightly different context in the ISO 2832:2015 framework defining key definitions in the field of information technology which takes, as central, the concept of information, understood as:

*“Knowledge concerning any objects such as facts, events, things, processes or ideas including concepts that within a certain context have a particular meaning.”<sup>1</sup>*

The concept of data is derived from information and is defined as:

*“A reinterpretable representation of information in a formalized manner suitable for communication, interpretation, or processing”<sup>2</sup>*

Legal scholars and commentators formulate definitions of the above-mentioned concepts on the grounds of legal scholarship and writings generally draw on an analogous distinction, assuming that data are fixed (recorded) signs that – at least for some time – are potentially interpretable<sup>3</sup>. Viewed as such, **information is the result of data interpretation**.

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<sup>1</sup> <<https://www.iso.org/obp/ui/#iso:std:iso-iec:2382:ed-1:v1:en>> access 12 January 2021.

<sup>2</sup> ibid.

<sup>3</sup> D. Szostek, Nowe ujęcie dokumentu w polskim prawie prywatnym ze szczególnym uwzględnieniem dokumentu w postaci elektronicznej (1st edn, Legalis 2012) [New treatment of a document in Polish private law with particular reference to a document in electronic form].

Information is therefore subjective in nature<sup>4</sup>. It cannot therefore be protected as such and, in order to respect legal certainty, we must ensure that data is protected as potentially interpretable.

This results in a number of normative **divisions of data** according to the type of information that can be decoded from such data. Just to mention in passing, it is worth pointing out that such divisions are based on inconsistent nomenclature and do not always take into account the distinction described above between information and data.

From a practical perspective, the most typical divisions that are of relevance to a lawyer, are as follows:

### 1) personal data and non-personal data

The GDPR defines personal data as *any information relating to an identified or identifiable natural person (...)*<sup>5</sup>. As can be seen, the definition itself uses the concepts of data and information interchangeably. In this regard, the prevailing view among legal scholars and commentators<sup>6</sup> is that personal data is a subjective concept, and that the nature of data as personal data depends on the degree of identifiability of a natural person in light of a reasonable likelihood of such identification (cf. recital 26 of the GDPR).

The definition of non-personal data is even more succinct. The EU Non-Personal Data Regulation<sup>7</sup> defines data subject to the Regulation simply as data other than personal data as defined in Article 4(1) of Regulation (EU) 2016/679 (Article 3(1)).

Thus, the European legislator assumes a dual division – however, it is difficult to determine at first sight whether this division refers to information (data interpreted as relating to a natural person, i.e. personal data and data which cannot be so interpreted), or to data as such (according to this approach, the non-personal data regulation would refer both to data which cannot be interpreted as personal data (“non-personal information”) and to any data, including data which is not information at all.

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4 D. Szostek, (3).

5 General Data Protection Regulation, art. 4(1).

6 P. Litwiński (ed.), Rozporządzenie UE w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych i swobodnym przepływem takich danych. EU Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (C. H. Beck 2018) marginal numbers 21-23; cf. also Lee A. Bygrave and Luca Tosoni, ‘Commentary on Article 4’ in Christopher Kuner, Lee A. Bygrave, Christopher Docksey (eds) *The EU General Data Protection Regulation (GDPR). A Commentary* (OUP 2020).

7 Regulation (EU) 2018/1807 of 14 November 2018 on a framework for the free flow of non-personal data in the European Union [2018] OJ L303/59..

Despite the above inconsistency, the latter approach should be supported, and it should be considered that, in light of the objectives of the non-personal data regulation, the intention of the European legislator was to ensure the protection of **data** flows, regardless of whether and under what circumstances they are interpreted in a way that gives them meaning (legal, business, economic or social).

## 2) information covered by professional secrecy and information not covered by professional secrecy

The Code of Conduct for European Lawyers does not define professional secrecy as such. However, it provides a description of the elements that information covered by such secrecy should meet<sup>8</sup>. However, professional secrecy is defined in a number of corporate regulations of EU Member States.

For example, according to the **Polish Code of Ethics of Attorneys at Law (KERP)**:

*(...) Attorneys at law shall keep secret all information about the client and their affairs, whether disclosed by the client or obtained in any other manner in connection with the performance of any of their professional duties and regardless of the source of such information or the form and manner of its recording (professional secrecy)<sup>9</sup>.*

Further, KERP specifies that professional secrecy extends to documents and correspondence drafted or exchanged in connection with the provision of legal assistance.

In contrast, the **French regulation** relating to the profession of lawyer (*Règlement Intérieur National de la Profession d'Avocat, RIN*) provides that:

*Professional secrecy covers all matters in connection with the provision of legal advice or defence, whether recorded on a tangible or intangible medium (hard copy, fax, electronic form)<sup>10</sup>.* RIN also sets out a broad, open-ended catalogue of information covered by the confidentiality obligation.

Similarly, the **German law on the practice of a legal profession** (BRAO)<sup>11</sup> defines professional secrecy as anything learned in the course of the practice of a legal profession (Article 43a(2) BRAO).

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8 Chapter 2.3: <[https://www.brrp.pl/pdf/Kodeks\\_Etyki\\_Prawnik%C3%B3w\\_Europejskich.pdf](https://www.brrp.pl/pdf/Kodeks_Etyki_Prawnik%C3%B3w_Europejskich.pdf)> accessed 12 January 2021.

9 Article 15: <<https://kirp.pl/etyka-i-wykonywanie-zawodu/etyka/kodeks-etyki-radcy-prawnego/>> accessed 12 January 2021.

10 Art 2: <[https://www.cnb.avocat.fr/sites/default/files/rin\\_2020-11-30\\_consolidefinal.pdf](https://www.cnb.avocat.fr/sites/default/files/rin_2020-11-30_consolidefinal.pdf)> accessed 12 January 2021.

11 <<https://www.gesetze-im-internet.de/brao/>> accessed 12 January 2021.

These – and other – legal divisions of information focus on the protective function, while defining the framework for handling information generally at a level other than strictly personal. Establishing to which category or categories the information belongs and, consequently, what legal and ethical requirements a lawyer should meet, is a basic condition for proper information security management<sup>12</sup>.

## 2. *Information Classification as an Information Security Tool*

Information classification can be based on different criteria, depending on its purpose. In general, information division in an organisation refers to the potential consequences of a breach of information confidentiality (understood as a situation where information is disclosed to an unauthorised person). The consequences of such a potential breach may be, in particular, regulatory (in the sense of legal capacity to continue operations in the event of a breach), financial or reputational<sup>13</sup>.

Information classification in an organisation allows for a structured and accountable application of consistent security policies defined at the organisation level for specific classes of information.

However, the processing of information by the Law Firm involves lawyer's liability in a number of aspects. As regards LegalTech tools, that are generally less recognised and require technical competence on the part of a lawyer, the same is required to exercise utmost care in implementing them and ensuring security of use. As we shall see later in this section, failure to exercise due diligence – corresponding to the professional nature of the activity pursued, and of particular social importance – exposes a lawyer to disciplinary liability. The need to demonstrate due diligence (accountability) may be responded to by a security-by-design (or “secure-by-design”) approach.

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12 As per clause A 7.2 of Annex A of ISO 27 001, the purpose of information classification is to *ensure that information receives the appropriate level of protection*. For more details, see section Legal Tech vs Data in Organisation.

13 The ISO 31000 standard provides such examples as financial aspects, impact on safety and hygiene, or environmental impact. From the perspective of practising as an attorney at law / advocate, the consequences for the security of professional secrecy and the continuity of providing legal services may be of significant importance. For more information, see section Legal Tech vs Data in Organisation.

The security-by-design approach is used primarily in the context of designing IT solutions<sup>14</sup> or in the broader sense of Enterprise Security Risks Management<sup>15</sup>. The security-by-design approach, viewed as such, is a concept to ensure the ongoing management of security risks that change over time, taking into account the specific aspects of an organisation.

Information security management is modelled on the traditional Deming cycle (Plan-Do-Check-Act)<sup>16</sup>. However, security-by-design focuses primarily on the **objectives** of the security solutions implemented rather than on the specific tools that provide them, which naturally follow from the objectives and assumptions adopted<sup>17</sup>.

As mentioned, the concept of security-by-design refers to the management of security in an organisation; however, some of its assumptions perfectly reflect the suggestions related to the implementation of new LegalTech solutions in an organisation. These assumptions include in particular:

- **Security culture**

Suggestion that the organisation's management constantly build awareness of the importance of safety (tone from the top) and ensure transparent communication about safety standards and expectations.

- **Designing solutions that do not become obsolete over time**

Demand for designing solutions whose main assumptions and structure remain independent of technical methods of achieving the objective, i.e. solutions that are capable of initiating technical solutions rather than those that depend on the existing solutions.

- **Continuous (ongoing) monitoring and improvement**

Suggestion that the process is not aimed at achieving a certain level of security, but rather at achieving and maintaining it, i.e. activities that require flexible adaptation to ongoing changes in external and internal conditions.

The development of LegalTech solutions, due to the importance of the information processed with their use and the associated responsibilities,

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14 Cf. Wikipedia, 'Secure by design' <[https://en.wikipedia.org/wiki/Secure\\_by\\_design](https://en.wikipedia.org/wiki/Secure_by_design)> accessed 13 January 2021.

15 Cf. L. Kent Howard, 'Security by Design' (2019) 12(2) *Journal of Physical Security* 1-13.

16 ISO/IEC 27001:2005.

17 Howard (n 15).

requires lawyers using them to understand how such solutions work and what their limitations are<sup>18</sup>. The chapter *Legal Tech vs Data in Organisation* further describes the suggested practical model for ensuring secure – from a legal, organisational and technical perspective – implementation and use of LegalTech solutions.

### 3. Information Processing via LegalTech Tools

The most common applications of LegalTech<sup>19</sup> today primarily include<sup>20</sup>:

- **e-discovery solutions;** in this context, it seems that the understanding of the term LegalTech is somewhat expanded to include the automated analysis of legal texts not only in relation to court proceedings, especially on the grounds of precedent law, for which such solutions were originally developed, but also to review of documents while providing services relating to due diligence or audit proceedings;
- solutions to support the creation of **standardised and consistent templates for legal documents;**
- **client support tools** – such as platforms that facilitate the purchase of legal services<sup>21</sup>.

From a legal perspective, the purpose of information processing within a solution is of paramount importance. To a large extent, it is the very purpose of the processing that will determine the admissibility of using a particular tool (legal basis to use information from a particular source for a particular purpose), the scope of information used (e.g. obligation to minimise the personal data processed) or the scope of liability related

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18 CCBE, *Considerations on the legal aspects of artificial intelligence*, (2020) <[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/IT\\_LAW/ITL\\_Guides\\_recommendations/EN\\_ITL\\_20200220\\_CCBE-considerations-on-the-Legal-Aspects-of-AI.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Guides_recommendations/EN_ITL_20200220_CCBE-considerations-on-the-Legal-Aspects-of-AI.pdf)> accessed 12 January 2021.

19 Because of the profile, the use of LegalTech tools in court has been omitted; interesting conclusions on the topic are available in the study entitled CCBE (n 18).

20 CCBE Considerations (n 18).

21 Solutions that enable the client-consumer to resolve legal issues on their own (directly), without lawyer's assistance, are sometimes placed outside the concept of LegalTech, and are classified in a separate category: LawTech [cf. Susana Navas, 'LegalTech Services and the Digital Content and Digital Services Directive', 6<[https://www.academia.edu/44791640/LegalTech\\_Services\\_and\\_the\\_Digital\\_Content\\_and\\_Digital\\_Services\\_Directive](https://www.academia.edu/44791640/LegalTech_Services_and_the_Digital_Content_and_Digital_Services_Directive)> accessed 12 January 2021].

to the processing (liability regime related to personal data, liability for ensuring the confidentiality of business or professional secrecy).

#### *4. Liability for Data Security*

A lawyer's liability for the consequences of an information security breach (in particular, its loss or disclosure to unauthorised persons) may be considered on civil, administrative, criminal and disciplinary grounds.

Civil law and administrative law solutions related to data breaches are relatively uniform across the EU countries since they are governed, to a considerable extent, by a regulation of the Council and the European Parliament. The GDPR provides for both the possibility of imposing financial administrative sanctions by the competent supervisory authority, both financial (Article 83 GDPR) and non-financial sanctions (reprimand, order for specific action – Article 58 GDPR).

In turn, Article 82 GDPR concerns the possibility for an individual who has suffered damage relating to a breach to bring a claim for damages against the data controller or processor. Damage is understood here in a broad sense and includes both material and non-material damage<sup>22</sup>.

Detailed rules for pursuing claims are governed by national legislation, providing for interesting derogations in certain cases. As an illustration, the French law on information processing, data filing systems and related freedoms<sup>23</sup> provides in its Article 37 the possibility for a class action (*action de groupe*) to be brought by all persons affected by a similar type of damage resulting from the same breach of data protection rules. In turn, the provisions of Polish law explicitly exclude the vast majority of claims for infringement of personal interests from class actions, which will effectively exclude some personal data claims<sup>24</sup>

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22 Gabriela Zanfir-Fortuna, 'Commentary to Article 82' in Christopher Kuner, Lee A. Bygrave, Christopher Docksey (eds) *The EU General Data Protection Regulation (GDPR). A Commentary* (OUP 2020) 1175.

23 1978, La loi relative à l'informatique, aux fichiers et aux libertés n° 78-17 du 6 janvier 1978 , <[www.legifrance.gouv.fr/loda/id/JORFTEXT00000886460/2021-01-12/](http://www.legifrance.gouv.fr/loda/id/JORFTEXT00000886460/2021-01-12/)> accessed 12 January 2021.

24 Cf. Article 1(2a), Act on Pursuing Claims in Class Actions, Journal of Laws of 2020, item 446, in conjunction with Article 92, Act on the Protection of Personal Data, i.e. Journal of Laws of 2019, item 1781; it is worth mentioning here that the Polish Supreme Court generally accepts that the protection of personal data and personal interests constitute two separate protection regimes, which, however, may overlap in certain cases (cf. B. Łukańko, Uchybienie przepisom o ochronie

This naturally begs for the question regarding the extent of a lawyer's (Law Firm's) civil liability for damages caused by the use of LegalTech tools.

As it has already been mentioned, currently the most common LegalTech solutions used in law firms are tools supporting legal research and simple analytics. Potential damage caused by the malfunction of such tools would therefore be extremely difficult to prove, both in terms of causation and amount.

However, as the complexity of the solutions increases, the issue of liability for such damage will become increasingly important – it is enough to imagine relying on automated solutions for drafting pleadings, deciding on pleading strategy or reviewing a particular judge's decisions.

In this context, leading proposals are currently being identified to regulate the liability regime as either (1) tort liability based on fault or (2) strict liability based on, similar to a dangerous product liability regime<sup>25</sup>. This issue goes beyond the limits of this paper; however, it is worth bearing in mind that it should be resolved taking into account issues such as a lawyer's duty of care. In the case of a lawyer, such care should extend to the entire process of implementing and using LegalTech solutions, from reviewing and classifying the information processed by their use, through estimating the risk associated with implementing the solution, appropriate training, to deciding how to work with those involved in the information processing.

From the perspective of these considerations, it is also necessary to mention the consequences related to the breach of security of not so much personal data, but rather of information constituting professional secrecy (attorney at law's or advocate's secrecy), consisting in its loss or compromise to its confidentiality or integrity. Given the definition of professional secrecy, which is uniformly extremely broad, the vast majority of personal data breaches generally also amount to breaches of professional secrecy. The data protection regime shall be complementary to the duty of confidentiality<sup>26</sup>.

Breach of professional secrecy primarily gives rise to a lawyer's disciplinary and criminal liability.

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danych osobowych jako naruszenie dobra osobistego – analiza na przykładzie orzecznictwa Sądu Najwyższego (2016) 46 UWM, Studia Prawnoustrojowe, .

25 CCBE Considerations (18) 25; cf. Martin Ebers, Susana Navas, Algorithms and law (UCL 2020).

26 CCBE Considerations (18) 33.

Professional secrecy is one of the key ethical principles and the essence of a lawyer's activity (cf. section 2.3.1. of the Code of Conduct for European Lawyers) and lies at the core of a lawyer's ethical obligations<sup>27</sup>. It is accepted that *professional secrecy is an interest in itself, as an element of the proper and ethical exercise of the profession*<sup>28</sup>, and even that it is an intrinsic condition of the exercise of a legal profession<sup>29</sup>. The obligation to preserve professional secrecy implies an obligation to apply appropriate security measures in connection with the processing of information subject to it<sup>30</sup>. Consequently, a breach of professional secrecy (especially involving the unauthorised disclosure of information covered by secrecy) is therefore one of the most serious disciplinary offences.

## 5. France

Violation of legal and professional rules (including the rules of advocates' code of conduct) may result in disciplinary proceedings<sup>31</sup>. Potential sanctions include, in the first place, a notice, a reprimand, temporary suspension of licence to practise law and, ultimately, disbarment.

Breach of professional secrecy as such is furthermore a criminal offence. Pursuant to 226-13 of the French Criminal Code<sup>32</sup>, disclosure of information covered by professional secrecy by a person in possession of such information, whether by virtue of a legal provision or their function, is punishable by imprisonment or a fine of up to EUR 15,000. The manner or circumstances in which the secret is disclosed are irrelevant, unless one of the exceptions set out in Article 226-14 of the Code applies.

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27 ibid.

28 SDI 32/12, Polish Supreme Court judgement of 15 November 2012.

29 <[https://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/Porteron\\_AJ\\_Penal\\_-04\\_052010.pdf](https://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/Porteron_AJ_Penal_-04_052010.pdf)> accessed 27 January 2021.

30 WO-106/19; Judgement of the Polish Higher Disciplinary Court of the National Bar Association of Attorneys at Law of 23 October 2019.

31 Décret n°91-1197 du 27 novembre 1991 organisant la profession d'avocat, <<https://www.legifrance.gouv.fr/loda/id/JORFTEXT00000356568/2021-01-13/>> accessed 13 January 2021, Article 183.

32 Code penal, <<https://www.legifrance.gouv.fr/codes/id/LEGIARTI000006417945/2012-12-11/>> accessed 13 January 2021.

## 6. Poland

The disciplinary liability of attorneys at law and advocates is set out in the Act on Attorneys at Law<sup>33</sup> and the Act on Advocates<sup>34</sup>, respectively. The disciplinary court may sanction an attorney at law or an advocate sanctions such as a notice, a reprimand, a fine, as well as suspend their licence to practise law or disbar them.

The Polish Criminal Code addresses the issue in a similar manner, albeit to a broader extent. Article 266 of the Criminal Code provides for a fine, a community sentence or a sentence of imprisonment for a maximum term of two years, both in the case of unauthorised disclosure and **use** of information entrusted in connection with the performance of a function or activity.

## 7. Germany

The German Act on the Legal Profession provides for disciplinary liability for breach of duties under the Act (Article 113 BRAO). Confidentiality obligations are further underlined in the Rules of Professional Practice (Berufsordnung für Rechtsanwälte, BORA)<sup>35</sup>, in its Article 2. Potential sanctions for violations of the rules of conduct include, in particular, a notice, a reprimand, a fine, suspension of a licence to practise law and disbarment (Article 114 BRAO).

Finally, the German Criminal Code (Strafgesetzbuch, StGb)<sup>36</sup> provides for a sentence of imprisonment for a maximum term of one year or a fine if information entrusted to the holder of a secret is disclosed in connection with his or her function or profession (Article 203 StGb). Lawyers (Rechtsanwälte) are explicitly referred to in the provision as falling within the subjective scope of the legal norm. It is worth noting here that Article 203 StGb clearly excludes sanctions for the disclosure of information covered by the service provider's secrecy if such provider's participation is necessary for the performance of certain professional activities.

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33 The Act on Attorneys at Law, Journal of Laws of 2020, item 75, chapter 6.

34 The Act on Advocates, Journal of Laws of 2020, item 1651, chapter VIII.

35 <[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/National\\_Regulations/DEON\\_National\\_CoC/EN\\_Germany\\_BORA\\_Rules\\_of\\_Professional\\_Practice.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/National_Regulations/DEON_National_CoC/EN_Germany_BORA_Rules_of_Professional_Practice.pdf)> accessed 13 January 2021.

36 <<https://www.gesetze-im-internet.de/stgb>> accessed 13 January 2021.

## *8. Conclusion*

LegalTech tools significantly contribute to making a lawyer's work simpler. When properly applied, they also improve the quality of work and, consequently, of legal services provided to clients.

Implementation of LegalTech technical solutions requires a lawyer to exercise due diligence appropriate to the profession (professional due diligence), including, in particular, to have a good capture of the tool's functionality, risk analysis and identification of risk mitigation methods. These activities should be implemented in a way that ensures accountability at every stage of the process.

Indeed, a lawyer should be mindful of the core values of the profession, i.e. protection of professional secrecy and promotion of trust between client and lawyer. Failure to comply with the fundamental obligations in terms of risk assessment and ensuring the security of processed information, coupled with compromising core values associated with the practice of the profession, may trigger a lawyer's liability – both civil liability for damages and liability under corporate control (disciplinary liability). In certain cases, a lawyer may also be held criminally liable.



# LegalTech Insurance<sup>1</sup>

*Kamil Szpyt*

„With great power there must also come great responsibility”  
– Stan Lee<sup>2</sup>

## *1. Introduction*

It is undoubtedly rare to begin considerations in the field of legal sciences with a quotation derived from the world of pop culture. At the same time, this maxim, although somewhat pompous, perfectly complements the thesis underlying this study. Moreover, since almost all of the articles contained in the present paper deal with issues that would have been considered pure science fiction only ten or twenty years ago, a slight reference to the realm of fantasy seems very appropriate here.

Coming of the crux of the matter: an analysis of press releases, popular science texts and even the majority of contemporary scientific publications may sometimes lead to the conclusion that LegalTech is an ointment without even one fly. It is almost always presented in glowing terms, with a long list of benefits that it brings not only to representatives of the legal sector, but also to all entities forced, to a greater or lesser extent, to seek assistance of lawyers<sup>3</sup>. Thanks to Legal Tech, the work of attorneys, notaries, legal department employees, etc. will ultimately become easier, faster, more efficient, and what is more, its quality will significantly increase.

The chances for the above vision to come true are undoubtedly high. However, one can get the impression that its proponents often completely ignore or disregard all (often serious) risks related to the introduction

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1 The research was financed from the funds earmarked for Statutory Activities of the Faculty WPAiSM/PRAWO/SUB/10/2020.

2 <[https://archive.org/details/Amazing\\_Fantasy\\_vol1\\_15\\_201607/page/n13/mode/2up](https://archive.org/details/Amazing_Fantasy_vol1_15_201607/page/n13/mode/2up)> accessed 25 April 2021.

3 See Jolanta Ojczyk, ‘LegalTech to nieunikniona przyszłość prawników’ <[www.prawo.pl/prawnicy-sady/legaltech-day-podsumowanie,503668.html](http://www.prawo.pl/prawnicy-sady/legaltech-day-podsumowanie,503668.html)> accessed 25 April 2021.

of new IT solutions, such as increased risk of data being stolen by hackers from a poorly secured cloud or data loss due to failure of outdated software. There is never a hundred percent certainty that even the best solutions will not fail and the strongest security measures will not be broken. All the more so that LegalTech includes not only products of leading IT companies that meet demanding standards, but also - very often - debuting or even experimental software created by small start-ups or cheaper and more modest substitutes for computer programs offered by larger providers. We should not forget about the weakest link - people. Often untrained, tired and susceptible to manipulation<sup>4</sup>.

According to the research conducted by BlueVoyant, in 2020 there was a surge in hacking attacks on law firms<sup>5</sup> and it seems that in 2021 this trend will not slow down at all<sup>6</sup>. This should come as no surprise, by the way - the legal sector has been among the top five sectors most attacked by cybercriminals for several years<sup>7</sup>.

And here the question arises: are lawyers prepared for the worst possible scenario? That is, a situation in which, due to a lack of due diligence or as a result of sheer bad luck , confidential data of clients, contractors or the attacked party itself is lost/modified/disclosed, or the entire IT infrastructure of a law firm becomes blocked/destroyed? Undoubtedly, the consequences of such an incident can be truly dramatic: long-term paralysis of the law firm's operations, tarnished reputation that has been built up over the years, as well as enormous financial losses, including the costs of damages and administrative penalties.

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4 Mitnick Security, ‘The weakest link in safety is still man. Kevin Mitnick showed us how to outsmart us’ <[www.mitnicksecurity.com/in-the-news/the-weakest-link-in-safety-is-still-man.-kevin-mitnick-showed-us-how-to-outsmart-us](http://www.mitnicksecurity.com/in-the-news/the-weakest-link-in-safety-is-still-man.-kevin-mitnick-showed-us-how-to-outsmart-us)> accessed 25 April 2021.

5 Krzysztof Sobczak, ‘Coraz więcej cyberataków na firmy prawnicze’ <<https://www.prawo.pl/prawnicy-sady/cyberbezpieczenstwo-coraz-wiecej-atakow-na-firmy-prawnicze,505642.html>> accessed 25 April 2021.

6 See Anita Błaszczyk, ‘Cyberprzestępcość: 2021 będzie rokiem wymuszeń w Internecie’ <[www.rp.pl/Biznes/201209783-Cyberprzestepcosc-2021-bedzie-rokiem-wymuszen-w-Internetie.html](http://www.rp.pl/Biznes/201209783-Cyberprzestepcosc-2021-bedzie-rokiem-wymuszen-w-Internetie.html)> accessed 25 April 2021.

7 Others are: medical industry, financial services, manufacturing and production, and government institutions; see: Dariusz Włodarczyk, ‘Bezpieczny przedsiębiorca’ (2018) 6 Miesięcznik Ubezpieczeniowy 87.

One of the basic preventive measures in this situation is taking out an appropriate insurance<sup>8</sup>. Its aim is to transfer the risk of negative financial consequences of the above-mentioned event to a third party, dealing professionally with such risk. The question is, whether the solutions used in this area for years are equally valid in today's reality - in the era of widespread use of new technologies in the legal sector? The present study aims to find an answer to this question

## *2. Insurance in the Legal Sector - Past, Present and Future*

### *2.1. The Past - Professional Liability Insurance*

Starting the consideration on insurance in law firms, it should be noted that it has become somewhat of a standard over the years that the lawyers running their own law firms have limited themselves to purchase only professional liability insurance. This type of insurance is intended for people who perform professions requiring high degree of specialization and carrying a risk of significant damage as a result of performing professional activities (both acts and omissions). This group, of course, includes virtually all legal professions whose representatives associate in self-governing bodies and operate in the free market, such as: attorneys, legal advisors, tax advisors, bailiffs<sup>9</sup>, notaries and patent attorneys. Significantly, in many EU countries there is now an obligation for all or selected members of the a/m professions to take out compulsory professional indemnity insurance as a condition of lawful provision of services<sup>10</sup>. This is the case, for example, in

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8 See more on the protective function of insurance: Małwina Lemkowska, 'Funkcje ubezpieczeń gospodarczych a zrównoważony rozwój' (2020) 2 Wiadomości Ubezpieczeniowe 50.

9 It seems that in the opinion of some people, the inclusion of the bailiff, who is - de facto - a public official, in the group of legal professions whose representatives operate in the free market, may arouse some controversy. However, looking at the issue from the practical, rather than merely doctrinal, perspective, such classification is - in principle - fully justified (at least in some EU countries, e.g. Poland).

10 Compulsory insurance is required for attorneys practicing in countries such as Italy, Spain, Germany, England, and Wales, among others; see Xymena Dyduch, *Zawód adwokata (abogado) w Hiszpanii*, in Michał Masior (ed), *Analiza prawnoporównawcza ustroju korporacyjnego wolnych zawodów prawniczych oraz rynku usług prawniczych w wybranych państwach, w kontekście regulacji i rynku w Polsce z uwzględnieniem dostępności obywateli do tych usług* (Instytut Wymiaru Sprawi-

Poland, Spain, Germany and Italy. It should also be noted that the Polish legal system does not provide for such an obligation for law graduates who do not belong to any of the above mentioned professional self-governments<sup>11</sup>.

In practice, the aforementioned insurance serves to protect lawyers from the negative financial consequences of mistakes made at the stage of conducting court cases (e.g. failure to meet the deadline for lodging an appeal) or providing legal advice (e.g. indicating a solution based on outdated legal status)<sup>12</sup> and related to potential liability for damages. Over the years, this model of insurance has worked well, providing both lawyers and their clients with a relative sense of security.

However, with the increasing use of new technologies in the legal sector, especially LegalTech solutions, this situation has begun to change. To indicate its background, it is first necessary to clarify that in the activity of a law firm one can distinguish, so to speak, two areas within which an incident causing damage to a third party may occur:

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edliwości 2018) 91 <<https://iws.gov.pl/wp-content/uploads/2018/08/IWS-Masior-M.-i-inni-Wolne-zawody-prawnicze.pdf>> accessed 25 April 2021; Michał Masior, *Wolne zawody prawnicze w Anglii i Walii oraz reforma ich regulacji*, 1. w Michał. Masior (ed) Analiza prawno-porównawcza ustroju korporacyjnego wolnych zawodów prawniczych oraz rynku usług prawniczych w wybranych państwach, w kontekście regulacji i rynku w Polsce z uwzględnieniem dostępności obywateli do tych usług, (Instytut Wymiaru Sprawiedliwości 2018) <<https://iws.gov.pl/wp-content/uploads/2018/08/IWS-Masior-M.-i-inni-Wolne-zawody-prawnicze.pdf>> accessed 25 April 2021 138.

- 11 Therefore, for the sake of clarity, in the following part of the article, when reference is made to law firms, it will only refer to firms run by representatives of one of the indicated professions (attorneys, bailiffs, notaries, etc.), whereas when reference is made to lawyers, it will refer to lawyers associated in one of the indicated professional self-governments, and not to graduates of law schools without professional qualifications. It should also be noted that, in the case of patent attorneys, referring to all members of the profession as lawyers may raise some doubts, since the law allows to practice this profession also persons with other, yet useful, education (economists, administrators, chemists, etc.). Nevertheless, taking into account that these persons are entitled to represent clients both in court proceedings and in administrative proceedings before appropriate state or EU bodies dealing with IP issues, a similar abbreviation seems acceptable.
- 12 For more on the civil liability of professional attorneys see Andrzej Rościszewski, Odpowiedzialność cywilna adwokatów (2014) 10 Palestra 7; Magdalena Bieluk, *Cywилноправна odpowiedzialność profesjonalnego pełnomocnika za błąd* (Uniwersytet w Białymostku 2019) passim, <[https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/8734/1/M\\_Bieluk\\_Cywилноправна\\_odepowiedzialnosc\\_profesjonalnego\\_pelnomocnika\\_za\\_blad.pdf](https://repozytorium.uwb.edu.pl/jspui/bitstream/11320/8734/1/M_Bieluk_Cywилноправна_odepowiedzialnosc_profesjonalnego_pelnomocnika_za_blad.pdf)> accessed 25 April 2021.

- 1) substantive - related to irregularities, already mentioned above, and resulting from the lawyers' negligence or lack of necessary competence in the scope of their legal practice;
- 2) technical<sup>13</sup> - concerning all kinds of failures in the duty to ensure security of the processed data, including document storage - disclosure of confidential information to an unauthorized third party (e.g. as a result of sending an unencrypted e-mail to the wrong addressee) can be indicated here as an example<sup>14</sup>.

As recently as a few or a dozen or so years ago, the predominant risk was that errors would occur in the substantive area. Technical incidents were relatively rare and were usually related to the carelessness of lawyers or their employees, which manifested itself, for example, in losing case files during their relocation. The introduction of new technologies, especially LegalTech solutions, into everyday work in law firms seems to reverse these proportions. On the one hand, lawyers gain new tools to support their competencies and improve the quality of their services: legal information systems equipped with letter templates and case law compasses, computer programs that check the content of a contract, or even systems based on artificial intelligence that can predict the outcome of a future lawsuit. As a result, the number of substantive mistakes will undoubtedly decrease over time. On the other hand, lawyers often lack elementary knowledge of cybersecurity and make cardinal mistakes in this area, e.g., using computers with outdated operating systems, unprotected with anti-virus software, or using commercial email providers' services that are not adapted to the requirements of the legal industry<sup>15</sup>. And we are discussing only some basic IT tools. If we couple this with the constant improvement of methods used by hackers to break through security measures, it turns out that in the coming years, the probability of stealing poorly protected client data will be several (dozen / several dozen?) times greater than the

<sup>13</sup> See Christian Zimmermann, 'Legal Tech – Vielfalt der Anwendungen und richtige Haftungsvorsorge', 815 <<https://anwaltsblatt.anwaltverein.de/files/anwaltsblatt.de/anwaltsblatt-online/2019-815.pdf>> accessed 25 April 2021.

<sup>14</sup> Of course, such an outlined division can hardly be considered rigid. In some cases, such as those involving the disclosure of professional secrets, it seems that similar incidents can be classified as both substantive and technical, or their nature changes over time and shifts from one to the other.

<sup>15</sup> On the practical aspects of securing data in a law firm see Dariusz Szostek (ed), *Bezpieczeństwo danych i IT w kancelarii prawnej radcowskiej/adwokackiej/notarialnej/komorniczej. Czyli jak bezpiecznie przechowywać dane w kancelarii prawnej* (Wydawnictwo C.H.Beck 2018).

risk of an attorney at law bringing an action based on a legal basis that is no longer valid. We should also add the risk of a long-term downtime in the law firm's operations due to IT system interference, or even the need to recreate the collected data in case of encryption thereof<sup>16</sup>.

In the light of the foregoing, the question arises whether traditional professional liability insurances are able to protect law firms from the negative consequences of such attacks. Some of them are, to a certain limited extent. For example, professional liability insurance offered by AXA Ubezpieczenia Towarzystwo Ubezpieczeń i Reasekuracji S.A. covers, among others, damage caused by improper edition of documents, as well as loss, distortion, damage and improper transmission of information (including by electronic means), as well as damage resulting from hacking into the insured entity's computer system by a third party<sup>17</sup>. However, in general insurance terms and conditions of a similar product offered by Aviva Towarzystwo Ubezpieczeń Ogólnych S.A., there is an exclusion stating that the insurer is not liable for data loss<sup>18</sup>. In other words, protection against the aforementioned damages is by no means an obligatory element of such insurance and its provision will always depend on the content of a specific agreement as well as general insurance terms and conditions.

Incidentally, it is worth mentioning that the situation will be no better for any entities established by (and associating) lawyers who do not belong to any of the above-mentioned self-governments. Similar entities, most often functioning in the form of limited liability companies (e.g. insurance claim and debt collection law firms), in practice usually take out liability

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16 Of course, it is important to mention that not all incidents of a technical nature will be the responsibility of the law firm and its affiliated lawyers. One should not forget about mistakes made by IT entities providing services to the law firm, e.g. in the form of a cloud solution. In such a situation, they will be held liable, possibly - in their place - the insurer. It is worth mentioning that representatives of the aforementioned industry usually use IT liability insurance dedicated to them.

17 Paragraph 1 Section 3 'Warunki Ubezpieczenia. Ubezpieczenie odpowiedzialności cywilnej zawodowej' <[www.uniqqa.pl/fileadmin/produkty/centrum\\_klienta/dokumenty/540\\_WU.pdf](http://www.uniqqa.pl/fileadmin/produkty/centrum_klienta/dokumenty/540_WU.pdf)> accessed 25 April 2021; currently AXA Ubezpieczenia Towarzystwo Ubezpieczeń i Reasekuracji S.A. merged with UNIQA Towarzystwo Ubezpieczeń S.A.

18 Pkt 10.5 'Ogólne Warunki Ubezpieczenia odpowiedzialności cywilnej z tytułu wykonywania zawodu' <<https://www.aviva.pl/ubezpieczenia-dla-firm/ubezpieczenia-korporacyjne/ubezpieczenia-OC-zawodowe/ubezpieczenie-OC-zawodowe>> accessed 25 April 2021.

insurance for the conducted business activity. As a rule, it does not provide for the possibility of covering the risk of data loss or hacking attack<sup>19</sup>.

However, returning to the issue of professional liability insurance: in view of the findings to date, it is undoubtedly necessary to increase the awareness of lawyers, so that when taking out professional liability insurance, they would choose those policies which also cover the above-mentioned damages<sup>20</sup>. At the same time, it is difficult to hide the fact that even this solution will be insufficient. Civil liability insurance, by its nature, covers only damage suffered by third parties, not the entities insured themselves. Therefore it does not cover such negative consequences as the need for a law firm to restore lost data, secure the system or pay administrative fines. The costs of these activities may also exceed the law firm's financial capabilities. Thus, it can be assumed that, although professional liability insurance is an indispensable element of any lawyer's business, it should be complemented by insurance that provides protection also for the damages incurred by the law firm itself.

And here comes the key issue: what kind of insurance should it be? Even a cursory analysis of the market will show that there is no insurance dedicated to LegalTech solutions. At least - for the time being. It is another matter whether it is really needed when its role is played by so called cyber risk insurance. And it is cyber risk insurance that will be discussed in the next subchapter.

## 2.2. *The Present - Cyber Risk Insurance*

Cyber risk insurance is also often referred to as cyber insurance<sup>21</sup> or data insurance<sup>22</sup>. The latter term is inaccurate, as these insurance policies some-

19 ‘Cyber ubezpieczenia a inne polisy’ <<https://broker.andiw.pl/cyber-ubezpieczenie-broker-ubezpieczeniowy-ubezpieczenie-cybernetyczne/>> accessed 25 April 2021.

20 This is assuming, of course, that they have a say in the matter. For it may be that in a particular state or law corporation, insurance for lawyers affiliated with the self-regulatory body is negotiated and purchased by its governing body.

21 See Christian Zimmermann (13) 816.

22 Sometimes they are even colloquially referred to as GDPR “insurance” or “GDPR risk insurance”, which is supposed to refer to GDPR. This should not come as a surprise as the coming into force of the aforementioned legal act was undoubtedly a strong impulse for cyber risk insurance market development. Therefore, even in the offers of some insurers, one may come across “special treatment” of personal data issues. As an example, we can mention the “CYBER GUARD” insurance of Colonnade Insurance S.A. (admittedly described in the general conditions of in-

times cover incidents that have little to do with data breaches, such as the publication of material on a website infringing a third party's copyright<sup>23</sup>.

Consideration on the subject of insurance should begin with an explanation of what this "cyber risk" really is. Contrary to appearances, it is not that simple. This is because at the current stage the term "cyber risk" has neither legal, nor a commonly accepted definition<sup>24</sup>. Among the many definitions present in the literature, the one proposed by The Geneva Association is worth mentioning, according to which the a/m term means any risk resulting from the use of information and communication technologies, which assumes confidentiality, availability and integrity of data or services<sup>25</sup>.

The source of loss in the aforementioned insurances can be primarily:

- 1) an intentional external attack (e.g. hacking into an IT system by a hacker);
- 2) intentional internal attack (e.g. transfer of data by disloyal employee);
- 3) accidental losses (e.g. human error - mistaken deletion of data, loss or destruction of data carrier)<sup>26</sup>.

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surance as "liability insurance for incorrect handling of information", but actually being insurance against cyber risks). The product in question is available in two variants: a broader one (covering the full catalog of cyber risks) and a narrower one (covering only the issue of personal data law breach - "RODO GUARD"). This clearly proves that in the opinion of the insurance company the second issue may be much more important for the clients and therefore it is justified to purchase insurance variant limited only to it; see 'CYBER GUARD. Ogólne warunki ubezpieczenia odpowiedzialności za nieprawidłowe postępowanie z informacją' <[https://colonade.pl/files/file\\_items/Og%C3%B3lnie%20warunki%20ubezpieczenia%20CYBER%20GUARD%202025.05.18\\_0.pdf](https://colonade.pl/files/file_items/Og%C3%B3lnie%20warunki%20ubezpieczenia%20CYBER%20GUARD%202025.05.18_0.pdf)> accessed 25 April 2021 and 'RODO GUARD. Ogólne warunki ubezpieczenia odpowiedzialności za dane osobowe' <[https://colonade.pl/files/file\\_items/Og%C3%B3lnie%20warunki%20ubezpieczenia%20RODO%20GUARD%202017.06.19.pdf](https://colonade.pl/files/file_items/Og%C3%B3lnie%20warunki%20ubezpieczenia%20RODO%20GUARD%202017.06.19.pdf)> accessed 25 April 2021.

23 'Cyber ubezpieczenia a inne polisy' <<https://broker.andiw.pl/cyber-ubezpieczenia-broker-ubezpieczeniowy-ubezpieczenie-cybernetyczne/>> accessed 25 April 2021.

24 See Katarzyna Malinowska, 'Aspekty prawne ubezpieczenia cyber ryzyk' (2018) 2 Prawo Asekuracyjne 16.

25 The Geneva Association, 'Ten key questions on Cyber Risk and Cyber Risk Insurance', 12, <[https://www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf\\_public/cyber-risk-10\\_key\\_questions.pdf](https://www.genevaassociation.org/sites/default/files/research-topics-document-type/pdf_public/cyber-risk-10_key_questions.pdf)> accessed 25 April 2021.

26 Simon Cooper, *Cyber Insurance*, w: Peter Rogan (ed.), *The Insurance and Reinsurance Law Review* (Law Business Research Ltd 2020), <<https://thelawreviews.co.uk/title/the-insurance-and-reinsurance-law-review/editors-preface>> accessed 25 April 2021; another common, dichotomous division is: by source (external

The literature indicates that for a long time the protection against cyber risks was partly provided by other types of insurance: property insurance<sup>27</sup>, business interruption insurance<sup>28</sup>, general liability insurance and professional liability insurance. However, as the aforementioned insurances were not constructed strictly in order to protect against the negative effects of cyber risk, despite some substantive compatibility, their scope was not adjusted to the specificity of the risk, which resulted in exclusion of the insurer's liability in case of the most critical episodes<sup>29</sup>. As a result, even now the scope of cyber risk insurance may overlap with other types of insurance, but it will concern only small parts<sup>30</sup>.

Cyber risk insurance as a separate product in many countries (including Poland) is still developing and trying to gain more popularity. In other countries it has been appreciated and used more widely for years (e.g. USA)<sup>31</sup>. Cyber risk insurance should undoubtedly be classified as property insurance, however, it is not possible at the moment to point out one main model of its construction. Although some unification is taking place, it is still quite a diverse insurance of a complex nature. In more general terms it can be stated that the protection covers both civil liability as well as own costs incurred by the insured in connection with an incident. To be more specific, cyber risk insurance usually consists of several segments/sections, among which the following can be pointed out as the most important ones:

- 1) civil liability related to violation of the right to privacy and personal data - including, in particular, the costs of damages and compensation for the disclosure or loss of personal data, as well as other forms of violations of privacy<sup>32</sup>. In addition to this, the said section should also

and internal) and by cause (intentional attack and negligence of the insured/his employee).

- 27 On property insurance see Bartosz Kucharski, *Świadczenie ubezpieczyciela w umowie ubezpieczenia mienia* (Wolters Kluwer 2019).
- 28 On business interruption insurance see Jerzy Sawicki, 'Ubezpieczenie Business Interruption (BI) jako zabezpieczenie przyszłych dochodów przedsiębiorstwa' (2008) 7 Studia i Prace Wydziału Nauk Ekonomicznych i Zarządzania. 37–48; Agnieszka Szewczuk, 'Business interruption: ewolucja kompleksowego programu ubezpieczeniowego dla sektora małych i średnich przedsiębiorstw' (2010) 50 Ekonomiczne Problemy Usług 521–528.
- 29 Malinowska (n 24) 22.
- 30 Cyber ubezpieczenia a inne polisy' (n 23).
- 31 Michał Molęda, 'Cyber is the new black' (2018) 6 Miesięcznik Ubezpieczeniowy 80.
- 32 ibid 81.

- include, among other things, the costs of notifying the affected persons of the incident, removing their data from the network and the costs of restoring the removed data<sup>33</sup>;
- 2) administrative penalties - one of the most important and highest rated elements of this type of insurance. As you can easily guess, it will be applied mainly to administrative penalties imposed for violation of data protection regulations. Therefore, as it was already mentioned in the footnote, in practice the market offers products that are a “sliver” of the full cyber risk insurance and cover only the above mentioned area (e.g. “CYBER GUARD Colonnade Insurance S.A.”);
  - 3) the costs of IT incident handling activities - these costs usually refer to acting on three levels and providing assistance in three different areas: IT, legal and public relations. The insurance may either cover the costs of using specialist service in these areas chosen by the insured or provide assistance of entities cooperating with the insurer on a permanent basis<sup>34</sup>. This section is extremely important as it is often both very difficult and expensive for the insured to find similar ad hoc assistance. The IT team may be requested, for example, to analyze whether the encrypted data can be recovered, or whether it is “worth” recovering, or whether it would be cheaper to pay the ransom. When it comes to the legal team, the question may arise whether law firms will actually be interested in using “external” lawyers. After all, they should have their own employees with the necessary expertise in this area. That is, by all means, a major fallacy, which can be supported by three arguments. Namely: the support provided by such teams provides an appropriate distance to the conducted case (due to the fact that it does not concern the lawyers personally), specialist knowledge (since the attack could have taken place, for example, on a law firm specialized in tax or family law, whose representatives do not have the slightest knowledge of the potential legal consequences of cyberattacks), as well as own equipment, i.e. computers, legal programs, etc. (this is especially important when the attack took place on a law firm specialized in

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33 ibid.

34 Of course, this is not a closed catalog. Some insurances (e.g. Cyber ERM 2 offered by Chubb Limited) provide, for example, the assistance of an investigator or a credit specialist (usually - for a specified period of time), who is to advise no longer the insured person himself, but individuals whose data has been disclosed as a result of a cyber-attack; see 3.17 Letter G Ogólne warunki ubezpieczenia <[www.chubb.com/content/dam/chubb-sites/chubb-com/pl-pl/products/cyber/documents/pdf/owu-cyber.pdf](http://www.chubb.com/content/dam/chubb-sites/chubb-com/pl-pl/products/cyber/documents/pdf/owu-cyber.pdf)> accessed 25 April 2021.

- tax law). This is particularly important when a law firm's IT system has been hacked and locked/encrypted);
- 4) civil liability related to the operation of an IT system - theoretically, the scope of this segment coincides with that of section 1); in practice, however, it may concern damages reaching far beyond the sheer data leakage. As an example, a client's or contracting party's computer may be infected with incoming files, which may result in incurring costs of using an IT specialist (which will no longer be the law firm's self-inflicted damage, but third party's)<sup>35</sup>;
  - 5) multimedia liability - this segment deals with liability coverage for publications through electronic means (e.g., websites, social media or intranet)<sup>36</sup>;
  - 6) ransomware costs in case of cyber extortion - the insurer's ability to cover ransomware costs is usually subject to the insurer's prior approval. This is usually preceded by a process of analysis of a specific situation by the already mentioned IT team, which verifies whether in a given case an "honourable" hacker group is behind the attack (i.e. a group which, having received the demanded money, will provide a program to decode data) or not (i.e. a group which will not fulfill its part of the "agreement" and the money spent on the ransom will be wasted). Usually, the payment of the ransom is realized in one of the cryptocurrencies<sup>37</sup>;
  - 7) costs of data restoration and downtime costs - in this case we are no longer talking about the data of third parties (e.g. clients), but the data of the law firm itself. Moreover, the said section also covers downtime costs related to the fact that e.g. malware overloaded the servers<sup>38</sup>.

Of course, this type of insurance does not cover all damages. As almost every type of insurance, it involves a number of exclusions. The most common exclusions are usually related to the negligence of the insured entity in applying appropriate information system protection rules (principles):

<sup>35</sup> Michał Molęda (n 23) 82.

<sup>36</sup> ibid.

<sup>37</sup> More about the issue of cryptocurrencies and related legal issues see Paweł Opiłek, 'Kryptowaluty jako przedmiot zabezpieczenia i poręczenia majątkowego' (2017) 6 Prokuratura i Prawo 36–59; Krzysztof Markowski, 'Kryptowaluty. Powstanie-typologia-charakterystyka' (2019) 3 Civitas et Lex 69–82

<sup>38</sup> See the similar systematics proposed by Michał Molęda (Michał Molęda (n 31) 81).

- 1) failure to encrypt data that has been lost;
- 2) storing data on a device that was not equipped with appropriate security software (especially anti-virus software);
- 3) lack of care for infrastructure, i.e., use of outdated devices, improperly enabled/connected;
- 4) lack of software updates<sup>39</sup>.

The exclusion most often will also cover data loss resulting from cyber-terrorist activities<sup>40</sup>.

In the light of the above considerations, it should be said that the pandemic and the associated progressive digitization as well as transfer of activities to the network will undoubtedly increase the interest in cyber risk insurance in all industries. At the same time, it is the legal industry, so keen to move with the times and use LegalTech solutions in its business, that should be among the first to become interested in cyber risk insurance. This solution may bring numerous benefits. First and foremost, it allows for faster engagement of appropriate financial means and substantive support, which - perhaps - would not be immediately available to a particular law firm, and which will allow to minimize or completely eliminate the negative effects of a cyber incident<sup>41</sup>. Additionally, and also noteworthy, the insurance itself to some extent also increases the security of data in a law firm. In many cases, the policyholder will have to meet a number of strict conditions regarding, among others, data security, employee training, etc. in order to be able to enter into the agreement and - in the event of an incident - benefit from the insurance. This forces the policyholder to be extra diligent in this regard<sup>42</sup>.

To sum up: it seems that cyber risk insurance should become an obligatory element of "equipment" for law firms that want to use LegalTech solutions in a really responsible and professional way.

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39 See Paragraph 9 Section 7 'Ogólne Warunki Ubezpieczenia od Ryzyk Cybernetycznych' - insurance offered by Sopockie Towarzystwo Ubezpieczeń ERGO Hestia S.A <<http://cyberochrona.ergohestia.pl/wp-content/uploads/2015/10/OG%2093LNE-WARUNKI-UBEZPIECZENIA-OD-RYZYK-CYBERNETYCZNYCH%2.pdf>> accessed 25<sup>th</sup> April 2021.

40 See Jacek Zębala, 'Wybrane problemy ubezpieczeń cyber risk' (2018) 6 Monitor Ubezpieczeniowy 85.

41 *ibid.*

42 We are dealing with an analogous situation, e.g. in the case of car insurance, in which one of the conditions for the payment of compensation for a stolen vehicle may be the proof of parking the car in a guarded parking lot.

### *2.3. The Future - Civil Liability Insurance of Artificial Intelligence System Operator*

A certain part of LegalTech solutions is based on - more or less - advanced artificial intelligence systems. Therefore, when writing about insurance in LegalTech, one cannot fail to mention the planned introduction of a new, mandatory civil liability insurance provided for artificial intelligence (AI) operators. The enactment of this type of insurance is stipulated by the draft regulation annexed to the Resolution of the European Parliament of 20.10.2020 with recommendations to the Commission on the system of civil liability for artificial intelligence [2020/2014(INL)]<sup>43</sup>. This act, entitled Regulation of the European Parliament and of the Council on liability for the operation of Artificial Intelligence-systems, would be intended to unify the rules of liability and insurance of AI within the EU. For the purposes of the a/m act, the European Parliament provided a new definition of an AI system, according to which it is a system that is based on software (possibly embedded in a device), that exhibits behavior simulating intelligence (i.a. by collecting and processing data, analyzing and drawing conclusions regarding the environment) and takes actions which are autonomous to a certain extent, aiming to achieve a specific goal.

The draft regulation distinguishes between two types of AI systems: high-risk and high-risk-free. "High risk" is understood as "a significant potential in an autonomously operating AI-system to cause harm or damage to one or more persons in a manner that is random and goes beyond what can reasonably be expected", whereby "the significance of the potential depends on the interplay between the severity of possible harm or damage, the degree of autonomy of decision-making, the likelihood that the risk materializes and the manner and the context in which the AI-system is being used "<sup>44</sup>.

According to the draft regulation, the operator of a high-risk AI system should be liable on a strict liability basis for any damage caused by a physical or virtual operation, a physical or virtual operation of a device, or a physical or virtual process using an artificial intelligence system, while an operator of an AI system that is not a high-risk system should be held liable on the basis of presumed guilt.

43 <[https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html)> accessed 25 April 2021.

44 Article 3 Letter c draft Regulation of the European Parliament and of the Council on liability for the operation of Artificial Intelligence-systems.

With the above in mind, there is a question of clarifying the term “operator”. The draft regulation indicates that both frontend and backend operators will be considered operators. The former term refers to a natural or legal person who controls the risks associated with the operation of an artificial intelligence system to some extent and benefits therefrom, while the latter one should be understood as referring to “natural or legal person who, on a continuous basis, defines the features of the technology and provides data and an essential backend support service and therefore also exercises a degree of control over the risk connected with the operation and functioning of the AI-system”<sup>45</sup>.

The EP believes that one of the conditions for AI to succeed in the future is to guarantee coverage for liabilities related to the damages and losses caused thereby. This guarantee can be achieved by introducing mandatory civil liability insurance for the operators of high-risk AI systems. In the case of a front-end operator, the liability insurance would cover the operation of the AI system, and in the case of a back-end operator, the insurance for the activity or product should cover services offered by that product<sup>46</sup>.

Ultimately, all high-risk systems would be included in an exhaustive list in an appendix to the envisaged regulation. The list would be reviewed and modified every six months to respond as quickly as possible to the technological developments and the introduction of new products approved for the market. In order to provide the entrepreneurs and research organizations with a sense of certainty in planning and investment process, changes to the list of critical industries should only be made every twelve months.

The regulation also specifies the maximum amounts of compensation, which undoubtedly translated into the amount of cover in the insurance taken out. Namely, the operator of a high-risk artificial intelligence system is liable for the following damages:

- 1) up to a maximum amount of two million euros in the event of death, injury or mutilation of a person as a result of the operation of a high-risk artificial intelligence system;
- 2) up to a maximum amount of one million euros in the case of serious intangible damage resulting in verifiable economic loss or damage to property, including the destruction of several objects belonging to the

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<sup>45</sup> Article 3 Letter d-f draft Regulation of the European Parliament and of the Council on liability for the operation of Artificial Intelligence-systems.

<sup>46</sup> Article 4 Section 4 draft Regulation of the European Parliament and of the Council on liability for the operation of Artificial Intelligence-systems.

victim as a result of a single operation of a one high-risk artificial intelligence system; where under the contract the aggrieved party also has a right to claim against the operator, no compensation will be payable under the future regulation if the total value of the destroyed property or serious intangible damage does not exceed five hundred euros.

The above solution should undoubtedly be considered as raising a lot of doubts and creating significant complications for the insurance industry (related, among others, to risk estimation<sup>47)</sup>). Detailed analysis of these complications goes beyond the framework of this research paper. The issue that should be noted, however, is the lack of exclusions for specific industries, including the legal sector. As a result, it should be recognized that the above regulations will also apply to LegalTech solutions whose operation is based on artificial intelligence. In some cases, this will necessitate the purchase of additional insurance.

It is also worth pointing out that the described situation may also result in lawyers attempting to attribute certain actions to themselves, even though these actions were carried out by artificial intelligence. For example, software used to estimate optimal compensation and punitive damages and to draft lawsuits in medical cases. Even if it was not considered a high-risk AI system, it would still give rise to liability on the basis of presumed guilt, that is, less favorably than in case of liability for the actions of a “real” lawyer (for in the latter case, the liability is established on the basis of guilt). Hence, the average lawyer would often prefer to point out that he himself is the author of the solutions in question, particularly if he had not previously taken out AI operator liability insurance (which is not supposed to be compulsory in the case of AI systems other than high-risk systems).

### *3. Summary*

The main conclusions that can be derived from the above considerations are as follows: professional liability insurance for lawyers should not be

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47 See Grzegorz Dybała and Kamil Szpyt, 'Odpowiedzialność odszkodowawcza za sztuczną inteligencję' (2021) 5 Gazeta Ubezpieczeniowa 19; Marcin Amrosz, 'Sztuczna inteligencja z obowiązkowym ubezpieczeniem OC?' (2021) 5 Miesięcznik Ubezpieczeniowy 52–53; more general comments about AI insurance see: Dariusz Smołoni, Oskar Sokoliński and Gustaw Szarek, 'Polisa od sztucznej inteligencji' (2018) 10 Miesięcznik Ubezpieczeniowy 34–36.

considered a sufficient solution for law firms wishing to use LegalTech solutions on a larger scale. The extent of damages that can be suffered by both the insured, as well as his clients and contractors, goes well beyond the scope of protection provided by this type of insurance. Searching for an answer to the question how to fill this gap, it should be stated that for the moment there is no insurance policy intended specifically for LegalTech solutions available on the market and, moreover, there is no need for it to be introduced. This role is being successfully performed by Cyber risk insurance and it seems reasonable to popularize and recommend its wider use. Ultimately, it could be a good supplement to the mandatory professional insurance taken out by attorneys, notaries, patent attorneys, bailiffs and tax advisers. On the other hand, the introduction of a new compulsory civil liability insurance for AI system operators is likely to cause a lot of confusion. The provisions presented in the draft raise considerable doubts, which will be increased by the risk of duplication of protection offered by these provisions with that guaranteed by professional liability insurance and cyber risk liability insurance.

To sum up the whole discussion so far, it is worth recalling once again the opening quotation of this research paper: "with great power there must also come great responsibility". In the context of the considerations presented so far, it may be understood both literally, as a warning against the risk of inflicting considerable damage to the client, which may then result in a law firm being sued, as well as metaphorically - as a reminder of the lawyers' responsibility for their clients who entrusted them with their secrets. In either case, however, it is hard to ignore the message of the aforementioned quotation.

# Basic Principles for the Effective Use of Legal Tech Tools

Tomasz Zalewski

## 1. Introduction

The use of technology in the provision of legal services is not a new topic. The use of technology in legal services (*LegalTech*) have begun with the spread of computers and software. As early as in the 1970s, there were attempts to use computers for, among other things, analysing case law, calculating taxes, gathering evidence in court proceedings or preparing documents<sup>1</sup>.

In the US, the *International Legal Technology Association*<sup>2</sup> (ILTA) was founded in 1980 to address the use of technology by lawyers. It currently has 1358 members, mainly law firms<sup>3</sup>.

A turning point in the development of *LegalTech* was the appearance of the first IBM PCs<sup>4</sup> on the market in 1981. Along with them, dedicated office software also appeared on the market. In 1990, such computers were used by 59 % of small law firms in the US, and in 1995, already by 87 % of such firms<sup>5</sup>. Another turning point was the emergence of the Internet and the spread of e-mail.

Such processes have been taking place all over the world. Law firms began to use IT tools as standard in their operations and this continues to this day. The market of software producers responded to the law firms' interest in IT tools by starting to develop specialised programmes intended only for lawyers, such as law firm management software. Publishers of legal publications have also begun to prepare their legal information databases in electronic form.

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1 Robert P. Bigelow, 'The Use of Computers in the Law' (1973) 24, 4 Hastings Law Journal <[https://repository.uchastings.edu/hastings\\_law\\_journal/vol24/iss4/4](https://repository.uchastings.edu/hastings_law_journal/vol24/iss4/4)> accessed: 17 March 2021.

2 <<https://www.iltanet.org/home?ssopc=1>> accessed 17 March 2021.

3 <<https://www.iltanet.org/about>> accessed 17 March 2021.

4 Robert Ambrogi, 'A Chronology of Legal Technology 1842-1995' <<https://www.lawsitesblog.com/2010/02/chronology-of-legal-technology-1842.html>> access 17 March 2021.

5 ibid.

As a result, the market for *LegalTech* tools emerged. However, it initially developed mainly in the US and the UK - countries with the largest law firms forming the market for such solutions. In other countries the offer was much more modest. It was not until the development of *cloud computing* technology, enabling access to many solutions that previously required one's own server infrastructure, that the *LegalTech* market really took off almost worldwide. Today, estimates of the number of companies that develop *LegalTech* tools range from 1200<sup>6</sup> to over 5000<sup>7</sup>.

More and more financial investors are interested in ventures in the *LegalTech* industry. There are many such investments and their scale<sup>8</sup> is increasing. Financial investments in the development of technologies for the legal services industry should therefore soon result in more *LegalTech* solutions.

However, to date, the vast majority of IT tools used by law firms are primarily a package of standard office software in the form of programs for preparing documents and sending them by e-mail. It is usually enriched by an electronic legal information database, typically accessible via the Internet, and, in the case of law firms with at least a few staff, a law firm management program. These are tools that should be classified as *LegalTech* 1.0, i.e. technology supporting the activity of lawyers as professionals. The catalogue of such tools is subject to change all the time, as market offerings change, and also in result of influence of external factors such as the COVID-19 pandemic, which has brought into widespread use a number of online services for remote working, such as videoconferencing.

However, all these tools are mainly used in a traditional way, i.e. they do not fundamentally change the operating model of lawyers and their law firms. These tools allow the implementation of the same business processes that were carried out without their use, only in a digitalised form.

## 2. Examples of Typical LegalTech 1.0 Products and Services

Most law firms use typical IT solutions that are not particularly different from those used by other businesses, regardless of their industry. These are

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6 <<https://www.crunchbase.com/hub/legal-tech-companies>> accessed 17 March 2021.

7 <<https://www.legalpioneer.org/>> accessed 17 March 2021.

8 Robert Ambrogi, 'At \$1.2 Billion, 2019 Is A Record Year for Legal Tech Investments - And It's Only September' <<https://www.lawsitesblog.com/2019/09/at-1-1-billion-2019-is-a-record-year-for-legal-tech-investments-and-its-only-september.html>> access: 17 March 2021;

solutions enabling the production of documents in electronic form (office suite), their storage and management (computer disk, server), printing and copying and electronic communication (e-mail).

Producers of LegalTech solutions offer additional tools to this set, specific to the legal services sector<sup>9</sup>. These may include:

- 1) law firm or legal department management software - allows for efficient organisation of work on individual client cases, especially in a team of several people;
- 2) time recording programmes for lawyers - allow time to be recorded and allocated to individual cases and clients, which facilitates billing to clients;
- 3) virtual data rooms - allow a set of documents for analysis to be placed on a server that can be accessed by the buyer's legal advisors, thus allowing the legal due diligence review of the company to be organised efficiently during the transaction;
- 4) software for patent attorneys - facilitates the management of industrial property rights by, for example, reminding of any renewal deadlines or faster verification of registrability.

### *3. What Is LegalTech 1.0 Used For?*

Classic *LegalTech* tools - such as those mentioned above - are technology that supports the legal profession. It works in the background of the lawyer-client relationship, it does not change the way legal advice is performed, but only improves it, replacing traditional ways of working with use of computers, software and the Internet.

Preparing a contract using word processing software and then sending it by e-mail is simply a more convenient and faster way of editing documents and sending correspondence than handwriting or typing and sending by post. At the same time, however, it is still the same business process, only digitised.

Therefore, irrespective of the *LegalTech* 1.0 technological solutions used and their "modernity", legal advice is, in principle, performed in the same way as before - it is advice performed in a "craftsman" manner, where the most important thing is the work of a particular lawyer and his skills.

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<sup>9</sup> More in Part III, Chapter 4.

*LegalTech* 1.0 tools are usually implemented in a way that takes into account or even directly results from external pressure. Communication by email is due to the fact that such communication is expected by clients. The presentation of budgets in spreadsheet form is most often the result of a client requirement. Therefore, the basic impetus for the implementation and use of such solutions is the digitisation of the economy, in particular the digitisation of the courts and judicial system.

*LegalTech* 1.0 tools are thus implemented in the rhythm of new products appearing on the market or as improved versions of these products become available, as well as in response to requirements arising from legislative changes or customer demands.

#### *4. How to Implement and Use LegalTech 1.0 Tools?*

Lawyers usually have no doubt that using technology brings them many benefits. In particular, they point to increased productivity and automation of repetitive tasks<sup>10</sup>.

Among *LegalTech* 1.0 tools, the most important are:

- 1) electronic document management software - the so-called DMS (*Document Management System*);
- 2) electronic legal information databases;
- 3) case management software - allows to create individual assignments and assign documents and correspondence to them, and to settle them.

Among these tools, it is worth noting the electronic legal information databases, which are slowly turning from ordinary databases into a comprehensive system for analysing the legal system with many additional options like facilitating the editing of documents using the content contained in the database.

Implementing *LegalTech* 1.0 tools, in most cases, is not fundamentally different from implementing other IT solutions. Each such implementation is a project in which technical, as well as organisational, financial and human considerations must be taken into account. The ultimate success of the implementation is influenced by all these factors.

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<sup>10</sup> See Diagnosis of lawyers' needs regarding the use of IT tools in legal services, Fundacja LegalTech Polska Politechnika Warszawska, 2018) <[https://legaltchpolska.pl/wp-content/uploads/2018/06/2018.06.25\\_Raport\\_LegalTech\\_ost.pdf](https://legaltchpolska.pl/wp-content/uploads/2018/06/2018.06.25_Raport_LegalTech_ost.pdf)> accessed 17 March 2021.

The first and basic element of such a project is to define the specific problems that the tool is supposed to solve. This usually involves analysing the lawyers' current way of working and assessing the possibility of improving it by implementing a technological solution.

Many lawyers are reluctant to change their way of working. When implementing software, they want to replicate their habits, e.g. with regard to document workflows, in a digital environment. This often leads to the need to introduce many modifications to standard software, which lengthens the implementation process and increases its costs. It is also not always the best solution from the point of view of efficiency - transferring an inefficient paper document workflow procedure to an electronic form will not bring the expected benefits.

Many smaller law firms in such cases rely on software vendors who include in the standard configuration of the software the average needs of their other clients - law firms. Accepting a standard configuration may therefore not only be the simplest solution, but also an adaptation to market standards in terms of work organisation.

The best solution, however, is always to analyse organisational processes within a specific law firm, as well as to improve and simplify them before implementation, and only then to implement a technological solution that will allow, for example, more effective realisation of either entire processes or their most critical stages. This involves choosing either a comprehensive solution or a set of separate tools supporting specific activities<sup>11</sup>.

Other factors important in implementing *LegalTech* 1.0 tools in a law firm are proper internal communication and involvement of lawyers in the project, taking care of integration with other systems in use, and choosing the program based on defined needs.

However, implementation of such solutions is becoming increasingly easy, especially when the solution is offered in the *Software as a Service* (SaaS) model, which significantly reduces implementation time and usually does not require changes to the law firm's own IT infrastructure<sup>12</sup>.

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11 Ryszard Sowiński, Bartłomiej Majrzak, 'Programy do zarządzania kancelarią prawną. Jak wybrać i wdrożyć najlepszy program dla Twojej kancelarii?' <<https://kirp.pl/raport-programy-do-zarzadzania-kancelaria-prawna-juz-dostepny/>> accessed 17 March 2021.

12 Yara Nardi, 'Cloud computing and the use of legal technology in the cloud' (Legal Insights Europe 7 August 2020) <<https://blogs.thomsonreuters.com/legal-uk/2020/08/07/cloud-computing-and-the-use-of-legal-technology-in-the-cloud/>> accessed 17 March 2021.

Finally, it is worth mentioning that many lawyers do not see the potential and all the functionalities embed in already implemented tools. This applies especially to office suites, which are currently offered in the form of SaaS and are enriched with a number of add-ons that allow for simple automation or even the creation of algorithms without the need to know programming languages (the so-called *no-code* technology). Therefore, it is worth taking a look at least the possibilities that are built in the office software you already own. A spreadsheet is a powerful tool that can be used in many new ways, e.g. to create a schedule of events for a court case, or to create a handy database, while a mail program has many possibilities of automating notifications, automatic replies or forwarding messages<sup>13</sup>.

The COVID-19 pandemic popularised the use of video conferencing tools, which also began to be used for training and webinars, and even for court hearings. The popularity of *Microsoft Teams*, initially used only for videoconferencing, has led many lawyers to discover its other capabilities and the benefits of team collaboration and communication beyond *email*.

### 5. LegalTech 2.0 - a Breakthrough in the Way We Think

Several years ago, it began to be recognised that technology was not only making lawyers' jobs easier, but was also enabling a shift in the way legal advice was delivered. The breakthrough in the way we think about technology in the context of legal services can be attributed to *R. Susskind*, who in 2008 published a book entitled "The end of the world of lawyers?"<sup>14</sup>. He indicated that the legal advice industry would be changed in the near future under the influence of two factors: the commoditisation of legal services and the development of information technology. Among the technologies that were expected to impact the legal industry, *R. Susskind* mentioned automation of document creation, interactive self-service systems for legal advice, and online systems for dispute resolution. It is worth noting that these predictions, as indicated, were made in 2008 and that *R. Susskind* did not take into account the rapid development of tools based on artificial intelligence. However, these predictions have proven to be accurate. Many of the current LegalTech trends fit in, although not all are yet being used on a large scale. This is facilitated by the progressive

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13 See also the analysis in Part III, Chapter 4.

14 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, (Oxford 2010).

digitalisation of the economy and social life, which to some extent even makes it impossible to practise the legal profession as before.

Digitisation means for lawyers an increasing amount of data that they have to consider and analyse in order to provide legal advice. This data consists of both client data (and its quantity only increases in the age of electronic communication), as well as data in the form of judicial decisions and legal literature. These data are often so extensive that it is no longer possible to analyse them in a completely manual manner. The use of technological solutions for data analysis not only speeds up the analysis, but also enables analysis in a way that changes the quality and manner of the legal services provided. Advanced document analysis allows for the detection of many problems or issues that are impossible to spot when reviewing documents in a traditional manner. No one is able to notice, for example, small differences in standard contractual provisions, if the database contains several thousand similar contracts. It is also difficult to fully analyse the variation in jurisprudence on similar issues if thousands of rulings by courts of different instances are available.

In addition to providing information that has often been overlooked so far, these solutions also enable the omission of a number of manual and time-consuming activities performed by lawyers. For example, a lawyer can quickly obtain satisfactory results of analysing case law or collections of a large number of documents on his own, eliminating a stage of work usually performed by the youngest lawyers - the legal research and document analysis as part of transactional analyses.

As a result, *LegalTech 2.0* tools can eliminate many of the repetitive tasks traditionally assigned to humans, but their impact on the way lawyers perform their work is potentially even greater in another respect.

Today, the value of a lawyer and his or her work derives (leaving aside the problem of skills or talent) both from knowledge of the law and from experience in advising on the application of the law. Experience is a special combination of knowledge of the law and the practical situations when the law is applied with a pragmatism which makes it possible to assess the risks involved in a given situation. Gaining experience takes time and is difficult to transfer. Young lawyers need a longer period of working with an experienced lawyer to acquire similar skills. For example, experience in contract negotiation requires participation in the negotiation of many contracts, observation of other negotiators, and analysis of key issues related to the execution of such contracts, which over time allows for easy identification of relevant issues based on their similarity to other contracts negotiated in the past. Experience also enables the lawyer to identify those

provisions that are within normal industry practice and those that deviate from such standards.

Meanwhile, *LegalTech* 2.0 tools now make it possible to compare the contract under analysis with collections of other contracts, making it easier for a lawyer even without significant experience to assess the risks associated with specific provisions. If such an analysis is carried out taking into account the templates used by the company which is a party of the contract, contracts signed in the past and collections of similar contracts concluded by other companies, the lawyer will obtain knowledge that both speeds up his analysis and facilitates his decision as to the recommendation to the client, even if the lawyer in question has no experience in negotiating contracts of a given type or in a given sector<sup>15</sup>.

Another consequence of this use of technology to process large data sets is that the *know-how* contained in documents created by lawyers can be at least partially retained, even after they have left the law firm in question.

Thus, *LegalTech* 2.0 solutions allow not only to automate the work of lawyers, but also to accelerate the acquisition of experience and knowledge and to make better use of already generated *know-how*. An additional advantage of *LegalTech* 2.0 solutions is the adaptation of the law firm's offer to the real needs of clients. Not all cases or tasks entrusted to the law firm by clients require "tailor-made" services. Some tasks can be performed more efficiently and cheaply if the lawyer is assisted by technological tools, while some can be automated and operate only under supervision - either by the law firm or directly by the client.

## 6. How to Implement and Use LegalTech 2.0 Tools?

In case of *LegalTech* 1.0 tools, the goal of their implementation is to perform tasks within law firms more efficiently, faster or cheaper. Because these solutions are designed to support lawyers in their traditional, well-defined duties, lawyers usually know what kind of solution they need and how to use it.

In case of *LegalTech* 2.0 tools, the situation is different. These solutions introduce methods of performing certain activities or services in a comple-

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<sup>15</sup> Tim Pullan, 'Experience: the Critical Commodity in Deal Negotiation + Star-Studded Careers' (*Artificial Lawyer*, 12 February 2021) <<https://www.artificiallawyer.com/2021/02/12/experience-the-critical-commodity-in-deal-negotiation-star-studded-careers/>> access 17 March 2021.

tely different way than previously adopted by law firms. Their implementation is therefore usually the result of either noticing a new product that introduces such new solutions or the effect of innovation on the part of lawyers who want to perform their services in a new way and are then looking for appropriate tools.

Lawyers and law firms wishing to introduce *LegalTech* 2.0 tools should therefore follow, usually simultaneously, two paths: on one hand, they should observe new products offered on the market (which - due to the above-mentioned dynamic development - offers more and more), and on the other hand, they should develop an innovative attitude, looking for new ways to use technology to provide legal advice. This is best done in parallel, as knowledge of new tools allows to see new opportunities in the provision of legal advice, while an innovative mindset allows for sometimes non-obvious applications of available tools.

*LegalTech* 2.0 solutions can be divided into two basic categories: tools that solve a specific problem (e.g. online contract negotiation, contract signing, document management during transactional research) and tools that lawyers can use to create their own solution.

This second category includes a range of tools that allow lawyers to design and build legal advice solutions themselves. Typically, these are applications that allow lawyers to independently implement IT projects using so-called *no-code* platforms, i.e. platforms that allow users to create applications without any programming knowledge. Using ready-to-use components, even people without technical knowledge can design more or less complex IT solutions and thus implement their ideas for business improvements.

There are many *no-code* platforms on the market that can be used by lawyers, but there are also *no-code solutions* dedicated only to them<sup>16</sup>. *No-code* solutions are usually used to build legal knowledge bases, which can be used on a self-service basis, it is also possible to prepare standard documents or contracts using them, as well as to verify whether in a given situation specific provisions of law can be applied<sup>17</sup>.

A specific type of *no-code platforms* are chatbots that allow information to be collected or shared using a dialogue with the user. Chatbots are

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16 Adriana Peterson, ‘NoCode And Lawyers’ (NoCode Journal, 12 May 2020) <<https://www.nocodejournal.com/posts/nocode-and-lawyers>> accessed 17 March 2021.

17 Examples of applications built using *no-code* platforms include Neota Logic and Bryter, see <<https://www.neotalogic.com/neota-logics-client-app-gallery/>; <https://bryter.io/use-cases/>> accessed 17 March 2021.

particularly useful in providing legal assistance to consumers, allowing, for example, an initial verification whether legal assistance is possible in a specific factual situation<sup>18</sup>.

*Robotic Process Automation* (RPA) solutions are also becoming increasingly popular. RPA is business process automation software that operates at the user interface level - it handles various programs just like humans do. RPA software makes it possible to handle repetitive actions usually performed by humans with the use of various programmes (e.g. scan a document, save it in a specific directory, send the saved file as an attachment to the addressee). Implementation of such solutions does not require modifications to the existing IT systems or reconstruction of business processes in the office, which is their significant advantage. More and more often RPA solutions are equipped with some machine learning mechanisms, which significantly broadens the scope of their application.

It is worth noting that the functionalities included in standard office software packages can also be used to create the above described *no-code* or RPA solutions, e.g. allowing to create surveys in which the questions asked depend on the fulfilment of certain logical conditions, e.g. answering in a specific way to previous questions or creating simple data exchange processes between applications from the office package.

Another noteworthy division of *LegalTech* 2.0 solutions is between tools that the law firm uses within its own organisational structure; tools that are used to provide legal assistance to the client and tools that the law firm passes on to the client for its own use.

Tools used within the firm's own organisational structure are a natural extension of *LegalTech* 1.0 level tools. These are solutions that support lawyers in their tasks and often have an impact on many aspects of the firm's operations, including staffing level or its structure, but from the point of view of the client of the firm they do not change much in the firm-client relationship. These tools usually lead to improvements in the speed of service delivery and often in the quality of service, which together increase client satisfaction with the law firm's services. However, it is still legal advice provided in the traditional way.

The introduction of technology solutions for the direct delivery of legal services is already a step that requires a change of habits on both the law

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18 An example is the *chatbot* providing advice on so-called loans in Swiss francs, which won the competition for a legal chatbot organised by Fundacja LegalTech Polska, <<https://legaltechpolska.pl/konkurs-na-prawniczego-chatbota-wyniki/>> access 17 March 2021.

firm and client side. These include, for example, legal project management solutions that allow progress to be monitored both on the side of the law firm and the client or other parties involved in the project. In this case, the client has to accept the new way of communication or that draft documents are submitted to him for approval on an electronic platform.

Such solutions are not always possible to implement. While in case of solutions used within the firm's own organisational structure, the problem lies in the lawyers' habits, in this case the client may often have problems with accepting the solutions proposed. An additional difficulty may also be the need to adapt a given solution to the requirements of the client's IT department, which often exclude the possibility of storing client data in third-party IT systems other than the law firm's.

The use of such solutions also creates a new level of lawyer's responsibility towards the client. Providing legal aid with the use of technological tools means the necessity to assume responsibility not only for the substantive value of the advice, but also for the risks inherent in the technology, such as the risk of violation of professional secrecy, or the risk of improper provision of legal assistance due to failure of the technology used (e.g. failure to meet a procedural deadline or a deadline agreed with the client).

Another risk is related to the use of artificial intelligence techniques and approaches in the LegalTech tools built by the law firms or proposed by them to the clients. The first EU proposal of legal regulations for artificial intelligence<sup>19</sup> aims to regulate not only AI solutions based on machines learning but also systems using logic- and knowledge-based approaches, including expert systems, what may include the vast majority of LegalTech tools. The regulation target mainly so-called high-risk AI solutions and this category includes, among others, AI systems intended to assist a judicial authority in researching and interpreting facts and the law and in applying the law to a concrete set of facts. The production and use of AI systems, especially high-risk systems, would require meeting several compliance requirements.

The use of technological solutions for the direct provision of legal services consequently requires lawyers to take steps to review these solutions for risks, their severity and how to mitigate them<sup>20</sup> as well as general

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19 European Commission's Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) published on 21 April 2021 (<<https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence-artificial-intelligence>>) accessed 17 March 2021).

20 More on risk assessment and management methodologies in Part V.

regulatory compliance. The main risk is usually the threat to professional confidentiality of information.

The initiative for using such tools sometimes comes from the client and the law firm then usually starts using them, which often results in starting to use them also in other projects, including with other clients.

It is worth noting that in such a case, the law firm does not bear the risk associated with the choice and use of a given tool - the risk is borne by the client who proposes (or requires) the use of this solution for the provision of legal assistance by the law firm. This is one of the main reasons why lawyers are more likely to use solutions proposed by clients than to offer them themselves to their clients. However, even where the initiative to use the tool comes from the client, this does not relieve the lawyer of the duty to exercise care to protect professional confidentiality - therefore, even then, the lawyer should - as a minimum - analyse the risks associated with the use of the tool and inform the client about them.

The most difficult to implement *LegalTech* 2.0 solutions are tools designed for self-use by clients. This is a form of legal self-service using tools provided by the law firm. These may be, for example, document generators or a database of *know-how* allowing for quick access to legal information on a given topic. Often such tools have the character of a so-called decision tree or conversational chatbots. A significant number of solutions of this type are offered in the area of *compliance* consulting, e.g. for the recognition and correct classification of tax schemes or for compliance with GDPR. Such tools can be developed in-house from scratch, created on behalf of a law firm by an external software house or created using the *no-code* platform discussed above.

Such tools completely change the way legal advice is provided. However, it also means changing the way legal services are offered to clients. Selling such solutions is more similar to selling software than to selling legal services. It also changes the way a law firm operates - the products delivered to the client must be updated both in terms of content and technology (i.e. the software used to present content), and the law firm is also responsible for providing technical support. As a result, law firms offering such products either have to set up their own technical team to support these products or offer such solutions through specially established entities, often in *joint ventures* with technology providers, what brings such products closely to classic products offered on the *LegalTech* software market.

In this case, the above-mentioned problem of responsibility not only for the merits of the advice, but also for the risks inherent in the technology used, is particularly pronounced. Therefore, law firms offering such soluti-

ons usually use software provided by specialised third parties who assume the technological risks or offer it through separate entities - companies owned by the law firm or the law firm together with the technology provider. As a result, a law firm implementing such solutions usually starts to operate in a kind of capital group model, in which the law firm provides traditional advisory services and offers its clients additional services in the *LegalTech 2.0* model through subsidiaries.

Another important classification of *LegalTech 2.0* tools is how they are produced. While *LegalTech 1.0* tools are offered by software vendors or publishers, many *LegalTech 2.0* tools are offered directly by or with participation of a law firm. The development of technology and the emergence of a favourable climate for innovation in legal services has led many lawyers and law firms to see an opportunity for themselves in creating *LegalTech 2.0* solutions.

Law firms that have not found the solutions they need on the market have taken various actions. Some have started producing their own software solutions, others have used *no-code* platforms, still others have started working with external entities to jointly prepare *LegalTech* solutions. Incubators for *LegalTech* start-ups organised by law firms have also appeared on the market to support *LegalTech* start-ups in the development of their products<sup>21</sup>. Many lawyers have decided to leave their careers in law firms to start *LegalTech* solutions<sup>22</sup>.

## *7. How to Find an Area to Use LegalTech 2.0 Tools?*

The basic direction of analysis for implementing *LegalTech 2.0* tools should be the possibility of introducing automation and replacing people in routine activities.

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21 Mark A. Cohen, 'The Rise of Legal Tech Incubators and Why Allen & Overy's 'Fuse' Has the Right Stuff' (Forbes 12 February 2018) <<https://www.forbes.com/sites/markcohen1/2018/02/12/the-rise-of-legal-tech-incubators-and-why-alien-overy-fuse-has-the-right-stuff/#10482014494d>> accessed 17 March 2021.

22 An example is Mariana Hagstrom from Estonia, founder of Avokaado, see The Legal Technologist, 'An interview with Mariana Hagström – From Managing Partner to Legaltech Founder' (The Legal Technologist 12 August 2020) <<https://www.legaltechnologist.co.uk/an-interview-with-mariana-hagstrom-from-managing-partner-to-legaltech-founder/>> accessed 17 March 2021.

As many studies have shown, lawyers point to a number of activities that they consider routine or administrative<sup>23</sup>. Introducing automation in these areas may be relatively easy as it should not encounter resistance even from those lawyers who are generally reluctant to change.

To this end, it is worth performing a comprehensive analysis of each stage of legal services, from acquiring a client, through providing him with advice, to issuing an invoice and receiving payment. Very often such an analysis reveals numerous possibilities of process improvement, even without the use of any technology. After the analysis, it is worth comparing the results with available IT solutions. Even for many experienced professionals, it may come as a surprise how many possibilities are in new tools and how much they can facilitate the work of lawyers.

Automation does not have to cover the entire process of providing legal assistance. The greatest potential for development lies in tools automating some elements of process, e.g. collecting information from a potential client in order to determine the type of his/her case and directing to the appropriate lawyer in the office or digitising and describing incoming correspondence.

A rewarding area of automation is management of contracts - from their creation using templates and data through their negotiation and circulation between different people to their signing and archiving. All standard business processes, such as debt collection, can also be automated. Legal consultancy of a recurrent nature may also be automated - this category includes, for example, replying to typical queries on a given subject. Using technology, these legal queries can be made more precise by specifying their scope, redirecting them to a database of previous answers and only then directing them to a lawyer if the database does not contain the right answer.

However, the automation will be successful only if the scale of the automated problem is sufficient. Automating the creation of a contract that is signed only several times a year will probably consume more time and resources than it would pay off in a few years. It is therefore necessary to select those stages of legal services which occur in almost every case, regardless of the type of matter. It is relatively easy to identify such areas in a specialist law firm which naturally deals with specialised types of cases. Technology can significantly change the service delivery model in such law firms. The same is true in legal in-house departments - which provide their in-house client with advice closely related to the specifics of the business.

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23 See Diagnosis of the needs of lawyers for the use of IT tools, 10-15.

To visualise the impact of *LegalTech* 2.0 tools on the provision of legal services, one only needs to look at the personal data protection advice market. To a large extent, such services are not provided by law firms, but by consulting or IT companies that create tools allowing for partial automation of many elements related to data protection compliance. Law firms dealing with debt collection have previously gone down a similar path.

Technology allows not only for improvements of the existing market for legal services. One of its benefits is also opening up entirely new markets and new clients for legal services. Online platforms connecting lawyers with clients have already begun to really shape the market for legal advice to consumers, enabling many law firms to go beyond their local territory. Consumers have also become well accustomed to the online availability of simple legal knowledge, as well as to solutions based on automation and online access.

Technology also makes it possible to realistically arm people who want to find themselves a solution to their legal problem with tools that will allow them to deal with such situations effectively. More and more solutions are emerging that allow, for example, to semi-automatically pursue claims against air carriers for flight delays, to generate an appeal against a parking ticket or to join a collective dispute. Collective disputes are also an example of cases which, without the use of even simple technologies for collective communication and data processing, would be difficult to be handled efficiently and cost-effectively.

*LegalTech* 2.0 has a lot of potential to really activate citizens and consumers, who will be able to exercise their rights against the state or businesses. This is also a factor of change in the legal services market, which poses new challenges for lawyers and law firms.

## *8. LegalTech 2.0 and the Expectations of Lawyers and Clients*

The potential for using information technology for the delivery of legal services, and in particular the opportunities associated with automation, have been quickly recognised on the legal market.

However, often the mere awareness of the possibility of change is not enough to bring the change. Lawyers need an incentive to change. Interest in applying technological solutions in legal advice can be motivated, on one hand, by the digitalisation of public services, from the digitalisation of court proceedings to the digitalisation of public procurement, and on the other, by changing client expectations.

Before buying a new solution, especially one that requires commitment on the client to use it, it is therefore worth asking ourselves what expectations clients have. And lawyers' clients do not always expect to be offered technological solutions. Rather, they expect effective ways to solve their legal problems. Therefore, it will be easier to implement solutions that address internal law firm processes than solutions that involve clients.

In addition, both lawyers and clients are not always prepared to use technologically advanced products. The basic expectation of a client is an easy relationship with a lawyer that does not require too much commitment or effort on his/her part. Lawyers are usually only one of the service providers to the client, so clients will not be willing to undertake an effort of getting used to a new communication system used by a law firm just because it is more modern and offers a range of new facilities. This is one of the main reasons why e-mail communication still remains the most important means of communication despite the passage of years<sup>24</sup>.

In implementing *LegalTech* 2.0 solutions, law firms should therefore not focus on inventing new tools to replace those currently in use. Rather, their energy should be focused on finding ways to use the tools that their clients also use as effectively as possible, and new tools should be used where existing solutions clearly fail. Automation should focus on areas that have a real mass appeal, and the primary way to increase efficiency should be through the use of electronic information flows and digitalised business processes.

This was clearly demonstrated in the subsequent months of the COVID-19 pandemic: when companies are under pressure, they opt for solutions that work here and now and are easy to implement. The greatest value in a hastily digitised world has proven to be not in specialised tools, but in versatile tools and platforms that can be easily adapted to changing needs. The COVID-19 pandemic and the digitalisation processes accelerated by it have also provided many new lessons on the effectiveness of implementing digital solutions in business organisations. It turned out that it is not enough to have the technological tools, you still need to have properly prepared data that can be processed and used within these tools. The use of videoconferencing platforms is not much different from the use of a standard teleconference if the meeting participants do not have remote access to their documents and cannot work on them together in a shared environment.

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24 Number of e-mail users worldwide from 2017 to 2024, <<https://www.statista.com/statistics/255080/number-of-e-mail-users-worldwide/>> accessed 17 March 2021.

The biggest challenge for the development of *LegalTech* tools in the near future will be to create a framework for collecting data that can be used to improve these tools. It is particularly clear in the case of solutions using machine learning mechanisms. This is because many *LegalTech* 2.0 projects using artificial intelligence stall when the data necessary to achieve a sufficient level of accuracy is missing. Producers of these solutions need real data contained in real contracts and other legal documents, which are covered by professional confidentiality duty in law firms and are relatively rare in public circulation (although the situation varies in this regard in different countries).

For many years *LegalTech* was reduced to the introduction of technological solutions in law firms in the form of mainly computer programs. These solutions worked within the law firms and were used for the internal needs of the lawyers. The new wave of *LegalTech* solutions goes beyond this pattern.

*LegalTech* 2.0 or *LegalTech* 3.0 are solutions that need data and collaboration beyond the confines of a single law firm in order to work. Especially the full use of the potential of artificial intelligence requires such an approach. The currently offered tools in the field of natural language processing using machine learning mechanisms (e.g. *for due diligence*) require a lot of work to "train" them and, moreover, they give good results only when applied to large sets of repetitive documents of the same type (e.g. only to lease or licence agreements).

The challenge for both producers and law firms will be to create solutions enabling collection and sharing of data to be used for e.g. setting market standards as to the content of contractual provisions or the amount of contractual penalties, while respecting the principles of professional confidentiality. Overcoming these limitations may bring a quantum leap in the number of useful tools that will allow lawyers to significantly increase the efficiency and effectiveness of their services.

## *9. Unstoppable Trend*

Information technology has begun to make a real difference to the delivery of legal services in many areas. However, no breakthrough has yet been achieved. New solutions are increasingly being tested and used, but the scale of their use does not allow to speak about a radical change in the way the entire legal services market operates.

This change will occur, but its pace will be driven both by changes in the socio-economic environment, including the digitalisation of the

*Tomasz Zalewski*

economy and public life, and by advances resulting from experiments with *LegalTech* tools being conducted around the world.

Clients, at least for now, are not going to hire robot lawyers, but this does not mean that lawyers can afford for passive waiting for change.

**SECTION FOUR.**

**Possibilities of Applying AI-based LegalTech Tools**

**in Legal Practice**



# AI and the Work of Lawyers in the Light of the Council of Europe Guidelines

Marek Świerczyński

## 1. Introduction

The ambitious goal of AI-based technologies is to equip computers with the functions of the human mind, i.e. the ability to learn, recognize and reason. The ability to understand natural language and to think independently from humans is key to the further development of AI-based technologies<sup>1</sup>. AI-based systems perform increasingly complex and important tasks with reduced human control (or even no supervision at all). They can change initial algorithms by processing external data collected during their activity<sup>2</sup>.

As long as machines act as mere executors of human will, their actions should be normatively attributed to a natural person. Although AI systems are often viewed as operating autonomously, they typically just support humans and automate routine tasks<sup>3</sup>. Once the individuals operating AI systems have been identified, the extent of their liability should be proportionate to the actual level of instruction given to the AI systems.

As in case of many other disruptive innovations, AI-based tools pose legal risks. They can be characterized by limited predictability. This phenomenon is intensifying with the rise of machine learning technologies and the development of quantum computers<sup>4</sup>. AI algorithms can be defec-

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1 Habib Hadj-Mabrouk, ‘Contribution of Artificial Intelligence to Risk Assessment of Railway Accidents’ (2019) 5(2) *Urban Rail Transit* 107.

2 Expert Group on Liability and New Technologies New Technologies Formation, Liability for Artificial Intelligence and other emerging digital technologies, ‘Report’ (European Union 2019) 33, hereinafter as “AI Liability Report (2019)”.

3 See further in the report: Center Information Policy Leadership ‘Artificial Intelligence and Data Protection: Delivering Sustainable AI Accountability in Practice. First. Report: Artificial Intelligence and Data Protection in Tension’ (2018) 6 <[https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl\\_ai\\_fist\\_report\\_-\\_artificial\\_intelligence\\_and\\_data\\_protection\\_in\\_te....pdf](https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_ai_fist_report_-_artificial_intelligence_and_data_protection_in_te....pdf)> . accessed 8 April 2021.

4 AI Liability Report (2019) 43.

tive. The data bases used for AI training may be inadequate or contain inaccurate data<sup>5</sup>. This could lead to decisions, predictions or analyses made by AI systems being undermined, cause harm and result in legal liability for certain individuals, including their users and manufacturers<sup>6</sup>. The negative aspects of AI tools are now widely recognized, including the "black box" problem (to be further explained in this chapter)<sup>7</sup>. For these reasons, lawyers therefore need clear guidelines for the use of AI tools in the judicial systems. Such guidelines have been already prepared by the Council of Europe.

## 2 Definition of Artificial Intelligence

Artificial intelligence lacks uniform legal definition. Diverse definitions are presented in international documents (EU, Council of Europe, OECD, UNESCO). However, adoption of a uniform legal definition is a key issue. When discussing the topic of artificial intelligence, we tacitly assume that we all understand this concept in the same way. In fact, the proposed definitions are far different<sup>8</sup>.

As a scientific discipline, AI encompasses a variety of approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (involving planning, action programming, knowledge representation and reasoning, search, and optimization), and robotics (involving control, perception, sensors, and actuators, as well as the integration of all other techniques in cyber-physical systems). Since in this chapter we present the guidelines of the Council of Europe, it is necessary first to address the definition used for the purposes of this international organization. The AI definition can be found in the European Ethical Charter on the use of artificial intelligence in judicial systems and their environment, adopted by the European Commission CEPEJ<sup>9</sup>. It states that "artificial intelligence" or

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5 See further Thomas H. Cooren, *Algorithms Unlocked* (MIT Press 2013).

6 Virginia Dignum, *Responsible Artificial Intelligence. How to Develop and Use. AI in a Responsible Way* (Springer 2019) 99.

7 Rosario Girasa, *Artificial Intelligence as a Disruptive Technology. Economic Transformation and Government Regulation* (Palgrave Macmillan 2020), 4.

8 Tomasz Zalewski 'Definicja sztucznej inteligencji' in Luigi Lai and Marek Świerny (eds), *Prawo sztucznej inteligencji* (C. H. Beck 2020).

9 See further European Ethical Charter on the use of artificial intelligence in judicial systems and their environment, Council of Europe, Commission for the Efficiency

"AI" refers to a set of scientific methods, theories and techniques that aim to replicate human cognitive abilities by a machine. The Charter sets out 5 principles to which the development of AI tools in European judicial systems should be subjected. These 5 principles are also fully reflected in the 2021 Guidelines for Digitization of the Judiciary, which will be presented in the later section of this chapter.

The guidelines implement also the initial definition of AI proposed in the EC Communication on AI, subsequently expanded by the independent high-level expert group on AI that was convened by the EC<sup>10</sup>, as well as the definition of AI system in the OECD Council Recommendation on AI adopted in 2019<sup>11</sup>. The latter applies to AI systems and it states that: "An AI system is a device-based system that can, with respect to a specific set of human-defined goals, make predictions, recommendations, or decisions that affect real or virtual environments. AI systems are designed to operate with varying degrees of autonomy". As we see, both CoE and OECD definitions are simpler and clearer than the recent vague definition of the AI system presented by the EU in the draft regulation on AI (published on 21.04.2021).

### *3. The "Black Box" Problem in AI Decision Making Process*

A key legal issue for practical applications of AI tools by the lawyers is the so-called "black box" problem<sup>12</sup>. This term refers to algorithms whose implementation and usage is opaque, and in result it is difficult to under-

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- of Justice (CEPEJ), <<https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>> accessed 8 April 2021.
- 10 See further The European Commission's high-level expert group on artificial intelligence, 'A Definition of AI: Main Capabilities and Scientific Disciplines. Definition developed for the purpose of the deliverables of the High-Level Expert Group on AI Brussels': <<https://ec.europa.eu/digital-single-market/en/news/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines>> accessed 8 April 2021 and <<https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai>> accessed 8 April 2021.
- 11 Recommendation of the OECD Council on Artificial Intelligence, 'OECD/LEGAL/0449' <<https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449>> accessed 8 April 2021.
- 12 See further Manuel Carabantes, 'Black-box artificial intelligence: an epistemological and critical analysis' (2019) 35 *AI & Society*.

stand the internal workings of the method<sup>13</sup>. The problem of explainability of decisions made with AI tools occupies a central place at the interface between AI and law. Explainability is an important legal category not only in respect to data protection law, but also in case of law of obligations. Contract and tort law (rather than data protection law itself) may impose legal requirements to use machine learning models that are capable of being explained<sup>14</sup>. Explainability has become a key consideration for AI tools from both a technical and legal perspective.

As an example, we can mention the use of AI tools in the justice system. When using complex algorithms leading to the effect of the so-called black box, it is impossible to analyse the decision-making process. This leads to the conclusion that the evaluation of cases submitted to the court, except those of a routine and formal nature, must be always carried out by a human judge. Otherwise, the civilizational and cultural foundation of the judiciary, which is the independence of the courts and the independence of judges, would be disturbed<sup>15</sup>.

Paragraph 41 of the conclusions of the Council of the European Union entitled: "Access to justice - seizing the opportunities of digitization" accurately points out that: "The results of the reasoning of artificial intelligence systems based on machine learning cannot be reproduced, leading to a black box effect that prevents proper and necessary accountability and makes it impossible to verify how the result was reached and whether it complies with the relevant rules. This lack of transparency can undermine the ability to effectively challenge decisions based on such results and thus violate the right to due process and an effective remedy, and limit the areas in which these systems can be legitimately used"<sup>16</sup>.

In this context the warning of the Council of European Judges (CJEU) present in Opinion No. 14 of 2011 remains valid. It states that: "the introduction of IT in courts in Europe should not endanger the human and symbolic face of justice. (...) Justice is and should remain human, because it is primarily about people and their disputes". Also, the EC points out

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13 Andrzej Krasuski, *Status prawnego sztucznego agenta, Podstawy prawne zastosowania sztucznej inteligencji* (C. H. Beck 2020) 153.

14 Philipp Hacker, Ralf Kreßel, Stefan Grundmann, Felix Naumann, 'Explainable AI under contract and tort law: legal incentives and technical challenges' (2020) 28 Artificial Intelligence and Law, 416.

15 Aleksandra Partyk 'Legitim 2.0., czyli o robocie przyszłości... rozstrzygającym sporach zachowkowych' (2019) 2(25) Studia Prawnicze 38.

16 <<https://sip.lex.pl/akty-prawne/dzienniki-UE/konkluzje-rady-dostep-do-wymiaru-sprawiedliwosci-wykorzystanie-mozliwosci-69365245>> accessed 8 April 2021.

in the AI White Paper that: "the specific characteristics of many AI technologies, including opacity ('black box effect'), complexity, unpredictability and partially autonomous behaviour, may make it difficult to verify compliance with the provisions of existing EU law aimed at protecting fundamental rights and impede their effective enforcement"<sup>17</sup>.

#### *4. Council of Europe Work on Artificial Intelligence*

The Council of Europe is currently playing a key role in ensuring that AI is developed in line with human rights protection standards. The organization supports also other international AI initiatives in this area, including those of the OECD, EU, UNESCO<sup>18</sup>. Cooperation is carried out in the direction of seeking synergies of activities and avoiding duplication of work. The Council of Europe's activities in the field of AI law are rich and varied<sup>19</sup>. The resulting achievements can be divided into four areas:

- 1) Recommendations, guidelines and other instruments issued by Council of Europe bodies or established AI committees<sup>20</sup>;
  - 2) Studies, reports and conclusions from key events (such as conferences and expert sessions)<sup>21</sup>;
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17 European Commission, White Paper On Artificial Intelligence - A European approach to excellence and trust. , Brussels, COM (2020) 65 final, 12, <[https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020\\_en.pdf](https://ec.europa.eu/info/sites/info/files/commission-white-paper-artificial-intelligence-feb2020_en.pdf)>.

18 See further: <<https://www.oecd.org/going-digital/ai/>> access 17 March 2021, <<https://ec.europa.eu/digital-single-market/en/artificial-intelligence>> access 17 March 2021; and <<https://en.unesco.org/artificial-intelligence>> access 17 March 2021.

19 See further: <<https://www.coe.int/en/web/artificial-intelligence/work-in-progress>> access 17 March 2021.

20 Recommendation of the Committee of Ministers to member States on the human rights impacts of algorithmic systems, Recommendation on developing and promoting digital citizenship education, Declaration of the Committee of Ministers on the manipulative capabilities of algorithmic processes, European Ethical Charter on the use of artificial intelligence (AI) in judicial systems and their environment, Recommendation of the Parliamentary Assembly of the Council of Europe about Technological convergence, artificial intelligence and human rights, <[https://search.coe.int/cm/pages/result\\_details.aspx?objectid=09000016809e1154](https://search.coe.int/cm/pages/result_details.aspx?objectid=09000016809e1154)> (accessed 8 September 2021).

21 Such as: Feasibility study on the establishment of a certification mechanism for artificial intelligence tools and services (2020); Artificial intelligence in the audio-visual industry – Summary of the workshop (2019); Artificial intelligence and its

- 3) Reports of the Parliamentary Assembly of the Council of Europe<sup>22</sup>;
- 4) Other initiatives<sup>23</sup>.

The importance of the work on AI is highlighted by the creation within the Council of Europe of the Ad hoc Committee on Artificial Intelligence (CAHAI)<sup>24</sup>. CAHAI aims to analyse, on the basis of broad consultation and collaboration with different stakeholders, the issue of possible global regulation of artificial intelligence (AI) on the basis of the Council of Europe's promoted standards for human rights, democracy and the rule of law<sup>25</sup>.

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impact on young people – Seminar report (2019); Proceedings of the Roundtable on Artificial Intelligence and the Future of Democracy (2019) CDDG-Bu(2019, 17);, Conclusions from the Conference “Governing the Game Changer – Impacts of artificial intelligence development on human rights, democracy and the rule of law” (2019).

- 22 Such as the following reports: artificial intelligence and labour markets: friend or foe?; Report on Artificial intelligence in health care: medical, legal and ethical challenges ahead; Report on Justice by algorithm (the role of artificial intelligence in policing and criminal justice systems); Report on preventing discrimination caused by the use of artificial intelligence; Report on the need for democratic governance of artificial intelligence.
- 23 Concept note: Artificial intelligence and criminal law responsibility in Council of Europe member states – the case of automated vehicles, Development of Recommendation and Study on the impacts of digital technologies on freedom of expression, Youth policy standards and other institutional responses to newly emergent issues affecting young people’s rights and transition to adulthood, including AI, Report on AI in the audiovisual industry, Draft Declaration of the Committee of Ministers of the Council of Europe on the risks of computer-assisted or artificial-intelligence-enabled decision making in the field of the social safety net.
- 24 See <<https://rm.coe.int/cahai-2020-2021-rev-en-pdf/16809fc157>> accessed 17 March 2021.
- 25 The CAHAI is composed of representatives of the 47 member states, appointed by their governments, who have recognized expertise in digital governance and the legal implications of various forms of AI; representatives of observer states (such as Canada, Vatican, Israel, Japan, Mexico, USA); representatives of other Council of Europe bodies, in particular the Secretariat of the Parliamentary Assembly, the Office of the Commissioner for Human Rights, and intergovernmental commissions dealing with AI issues. Human Rights, and intergovernmental commissions dealing with AI issues; representatives of other international and regional organizations working in the field of artificial intelligence, such as the EU, the UN (in particular UNESCO), OECD, OSCE; representatives of the private sector, including companies and associations with which the Council of Europe has exchanged letters in the framework of its partnership with digital enterprises; representatives of civil society, research and academic institutions who have been

One may well ask what justification there is for the Council of Europe to undertake legislative work fundamental to the international legal order on the use of AI in the legal sector. It is undoubtedly an experienced international organization that has acted quickly and efficiently in the past and provided strong legal reaction to disturbing new technologies. The Data Protection Convention No. 108 and the Cybercrime Convention created by the Council of Europe set global standards for legal protection. Through the European Convention on Human Rights and other legal instruments, the Council of Europe is in a strong position to define the international legal framework for artificial intelligence<sup>26</sup>. It was also the Council of Europe that was the first international organization to create a legal framework for biomedicines. To this day, the Oviedo Convention<sup>27</sup>, opened for signature in 1997, remains the only binding international legal instrument for the protection of human rights in the field of biomedicine. It incorporates the principles provided for in the European Convention on Human Rights. The same assumptions based on the protection of human rights should be applied to the use of artificial intelligence technologies in legal systems<sup>28</sup>. AI tools should not be introduced without establishing clear international rules to protect against the risk of discrimination, privacy or security breaches, establishing clear liability rules and key legal aspects<sup>29</sup>.

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admitted by CAHAI as observers; see further: <[https://www.coe.int/en/web/artificial-intelligence/cahai#%2266693418%22:\[0\]](https://www.coe.int/en/web/artificial-intelligence/cahai#%2266693418%22:[0])> access 17 March 2021 and <<https://rm.coe.int/list-of-cahai-members-web/16809e7f8d>> accessed 17 March 2021.

- 26 Human Rights in the Era of AI - Europe as international Standard Setter for Artificial Intelligence, Conference Conclusions: <<https://www.coe.int/en/web/artificial-intelligence/human-rights-in-the-era-of-ai>> accessed 17 March 2021.
- 27 The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No 164), open for signature on 4.4.1997 r. in Oviedo (Spain).
- 28 Filippo A. Raso. Hannah Hilligoss. Vivek Krishnamurthy. Christopher Bavitz, 'Artificial Intelligence & Human Rights: Opportunities & Risks, Berkman Klein Center for Internet & Society' (Harvard University 2018) 6, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3259344](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3259344)> accessed 17 March 2021.
- 29 See further Karen Yeung, A study of the implications of advanced digital technologies (including AI systems) for the concept of responsibility within a human rights framework, <<https://rm.coe.int/a-study-of-the-implications-of-advanced-digital-technologies-including/168096bdab>> accessed 17 March 2021.

##### *5. Council of Europe Guidelines on Common Courts Digitalisation*

The most recent document developed by the Council of Europe are the guidelines on the online dispute resolution (ODR) mechanisms that aim to ensure compatibility with Article 6 (right to a fair trial) and Article 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR). They have been prepared by the CDCJ (European Committee for Legal Affairs) of the Council of Europe. The guidelines were completed on 24.11.2020 and are to be adopted by the Committee of Ministers of the Council of Europe on May 2021. The guidelines set the current standard of documents regulating the digitization of justice. They also provide a model for further soft - law instruments, to be prepared by the Council of Europe.

A comprehensive background to the guidelines on the use of AI tools in the justice sector emerges from the official commentary (Explanatory Memorandum) to the guidelines. It indicates that the introduction of AI tools into civil and administrative proceedings enables automated decision-making<sup>30</sup>. It also leads to faster proceedings and allows for more predictable and fairer outcomes<sup>31</sup>. Moreover, many states are already using AI tools to anonymize court decisions or translate documents and plan to use them more extensively in judicial proceedings (e.g. in the remote hearings). New AI tools can assist judges in other activities, such as advanced data analytics, among others<sup>32</sup>. In some states, the possible replacement of the judge (human) with an information system for data processing and analysis is being considered<sup>33</sup>. In result the increasing use of AI tools in the courts should be addressed in basic procedural rules<sup>34</sup>. This is the subject of current work of the Council of Europe bodies, such as CDCJ.

The guidelines in question address various problems of using AI tools by the courts.

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- 30 Davide Carneiro, Paulo Novais, Francisco Andrade, John Zeleznikow and José Neves, ‘ODR: an Artificial Intelligence Perspective’ (2014) 41 Artificial Intelligence Review, 211-240.
- 31 Maxi Scherer, ‘Artificial Intelligence and Legal Decision-Making: The Wide Open?’ (2019) 36 Journal of International Arbitration, No. 5, 539 - 574.
- 32 Sofia Samoilis and others, ‘AI Watch. Defining Artificial Intelligence. Towards an operational definition and taxonomy of artificial intelligence, EUR 30117 EN, Publications Office of the European Union’ (2020), 7–8.
- 33 Jacek Gołaczyński, ‘e-Sąd przyszłości’ (2019) 2 Monitor Prawniczy, 97.
- 34 See further Ephraim Nissan, ‘Digital technologies and artificial intelligence’s present and foreseeable impact on lawyering, judging, policing and law enforcement’ (2017) 32 AI & Society, 539 - 574.

Firstly, parties should be notified of the intention to process their case using an AI tool (Guideline 6). Parties to proceedings have the right to be informed about the AI-based processing operations that are applied. This information also includes the consequences of the AI tool being used<sup>35</sup>. This is a transparency requirement that is formulated by numerous international organizations. It is stipulated in the recommendations, codes of ethics and guidelines that establish ethical standards for the design, use and application of artificial intelligence, enacted by Council of Europe, UN, EU, OECD and other international institutions. These standards must be adhered to by designers and suppliers as well as administrators of AI systems for their use in the courts.

Secondly, Guideline No. 18 requires that sufficient justification must be provided to the parties of the court proceedings for court decisions based on digital tools, such as AI systems. The wording of the guideline means that the Council of Europe does not oppose the use of artificial intelligence in the judicial decision making. The purpose of the guideline is to set limits on its use in accordance with principles under the ECHR and other human rights instruments. This guideline is intended to promote transparent judicial decision-making. Decisions that make it impossible to see how a result was achieved are as much a threat to transparency and the principle of due process as decisions that do not contain a statement of reasons at all<sup>36</sup>. Parties are entitled to an explanation of the processing operations applied to them. This should include the consequences of such reasoning. If, due to the nature of the AI tool used, no information can be provided (i.e. “black box” problem), courts should refrain from issuing decisions made with AI whose reasoning results cannot be reproduced.

Thirdly, Guideline No. 20 provides for the right to review adjudications based on AI tools. This issue was particularly controversial during the *travaux préparatoires* of the guideline. This is because the wording of this guideline suggests that the Council of Europe permits member states to replace human judge with the AI system. One can ask if this is in line with the ECHR? In the case of EU, the authorities already issued resolutions opposing fully automated decision-making in the judiciary. In the previously quoted conclusions of the Council of the European Union we read

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35 Jenna Burrell, ‘How the Machine ‘Thinks’: Understanding Opacity in Machine Learning Algorithms’ (2016), 3(1) Big Data & Society, <[https://papers.ssrn.com/so/l/papers.cfm?abstract\\_id=2660674](https://papers.ssrn.com/so/l/papers.cfm?abstract_id=2660674)> accessed 8 September 2021.

36 Wojciech Samek, Thomas Wiegand and Klaus-Robert Müller, ‘Explainable Artificial Intelligence: Understanding, Visualizing and Interpreting Deep Learning Models’ (2017), 1 ITU Journal: ICT Discoveries, 1 - 10.

that: "the use of artificial intelligence tools must not interfere with the decision-making powers of judges or the independence of the courts. The decision of the court must always be made by a human being and must not be delegated to an artificial intelligence tool.". We see that Council of Europe adopt more flexible approach in this respect.

## 6. Summary and Conclusions

The Council of Europe guidelines address the current needs of lawyers resulting from the use of AI tools in their judicial practice<sup>37</sup>. The condition for the proper development of AI tools in the legal system is directly linked to effective processing of data and digitalisation of documents<sup>38</sup>. When it comes to court proceedings, it is important to give clear instruction to what extent AI tools can be used in court practice, including the replacement of the judge. Such solution requires a detailed legal analysis whether in such a case we would still be dealing with a court within the meaning of the ECHR.

The Council of Europe guidelines relating to artificial intelligence, as an instrument of so-called soft law, are suitable for easy changes and additions as technology advances. The Council of Europe Strategy for future was presented at the Council of Europe Conference of 20.1.2021. Its main purpose was to present the work to date of CAHAI (the ad hoc committee on artificial intelligence), which is preparing principles of global legal framework for artificial intelligence. The feasibility study conducted by CAHAI identifies gaps in the current legal framework with respect to the challenges associated with the design, development and use of artificial intelligence. It also concludes that limiting the Council of Europe's future work to soft - law instruments is not sufficient due to the excessive limitations of this method of regulation. Thus, it seems that the adoption of an international Council of Europe convention on artificial intelligence is only a matter of time.

The claim that legal regulation of artificial intelligence hinders the progress of innovation is wrong. The exact opposite is true. Clear, sensible and risk-management based regulation provides legal certainty<sup>39</sup>. National

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37 Gołaczyński (n 33) 98.

38 ibid.

39 See the speech of Christian Kastrop during the CoE conference 'Human Rights in the Era of AI – Europe as International Standard Setter for Artificial Intelligence'

regulation is not sufficient. Technologies based on artificial intelligence are global in nature. Therefore, multilateral cooperation among countries is needed to establish uniform international standards and the Council of Europe is in the best position to create such standards.

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(2021), <<https://www.coe.int/en/web/artificial-intelligence/human-rights-in-the-era-of-ai>> accessed 17 March 2021.



# AI In Law Firms

*Gabriela Wiktorzak*

## *1. Introduction*

Over the past five years, investment in the technology sector has increased significantly, and thanks to the diverse potential of artificial intelligence (AI) and blockchain, new means of solving current problems are emerging in a more efficient way. New sub-sectors of used technologies are also being created, such as: AgriTech, HealthTech, CleanTech, LegalTech, which, despite significant differences, have common features: they put the end user first, improve data flow and automate processes.

Innovations in law firms are not a new topic, as information technologies appeared in legal services much earlier. The 1970s are considered to be the beginning of the computer revolution in law firms, when Lexis-Nexis introduced UBIQ, a red computer terminal that allowed lawyers to search for case law in a database<sup>1</sup>. The revolution quickly progressed from document search to document creation, when Wang Laboratories introduced a computer with a new functionality – a word processor. The Wang systems entry into the market was a breakthrough for large law firms, because this new technology allowed them to store documents in a centralised manner and allow all their employees to edit texts<sup>2</sup>. Around the same time companies started buying fax machines too. In 1992, Microsoft Corporation released Version 3.1 of Windows<sup>3</sup>, which eventually replaced DOS, and Microsoft subsequent platforms successfully monopolized the PC market,

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1 David Smetana, ‘The Future of Legal Technology: 3 Emerging Trends’ (5 August 2020) <<https://www.chalkline.tech/blog/future-of-legal-technology-3-trends>> accessed 30 September 2020.

2 See: Rob Hosier, ‘Evolution of the Law Firm: Why Clients Demand that You Embrace New Technology’ (*Legal Futures*, 28 October 2020) <[www.legalfutures.co.uk/features/evolution-of-the-law-firm-why-clients-demand-that-you-embrace-new-technology](http://www.legalfutures.co.uk/features/evolution-of-the-law-firm-why-clients-demand-that-you-embrace-new-technology)> accessed 16 November 2020.

3 Maciej Gajewski, ‘To były czasy. Kiedy po raz pierwszy uruchomiłem system z graficznym interfejsem i nie rozumiałem, co widzę’ (Spider’s Web, 7 December 2018) <[www.spidersweb.pl/2018/12/microsoft-windows-3-1.html](http://www.spidersweb.pl/2018/12/microsoft-windows-3-1.html)> accessed 20 May 2020.

causing a massive migration of law firms to Windows systems. Due to the growing demand, conditioned by the needs of customers and the changing market of services, lawyers had to tame and familiarise themselves with the Internet. Ignoring changing technological trends became impossible, even for such a conservative environment as lawyers, who were forced to make at least basic investments in the IT infrastructure of their law firms. Interest in innovation increased significantly, when LegalTech tools started to be enhanced with the AI element, even if all the confusion around AI sometimes seems to be based on an unrealistic vision of the possibilities of current technology<sup>4</sup>, a hypothetical machine that exhibits behaviour at least as skilful and sophisticated as the one of associated with a human. Nonetheless, today what is accessible to us is a "weak" or "narrow" AI that focuses on a single, specific task and can only be used in a limited context<sup>5</sup>.

However, regardless of its narrow scope, AI is transforming the way legal services are provided, predominantly in six main areas – litigation; automation of expertise; legal analysis; contract analysis; generating contractual and judicial documents; predictive analytics<sup>6</sup>. Artificial Intelligence in law firms today constitutes a digital system specifically designed for lawyers to help them do their job, and which integration has the potential to create a comprehensive solution for legal teams. Such tools were created in cooperation with lawyers who have the necessary knowledge that technology companies need to develop the most useful and optimal tools to provide services to their clients. Owing to machine learning, the system begins to make decisions with minimal programming. Instead of manually writing rules for a computer's interpretation of a dataset, machine learning algorithms (i.e. set of instructions which needs to be performed to solve a problem) allow the computer to specify the rules themselves. Such statistical techniques can be used for a wide range of activities – image analysis,

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4 Andrew Ng, 'What Artificial Intelligence Can and Can't Do Right Now' (Harvard Business Review, 9 November 2016) <[www.hbr.org/2016/11/what-artificial-intelligence-can-and-cant-do-right-now](http://www.hbr.org/2016/11/what-artificial-intelligence-can-and-cant-do-right-now)> accessed 21 November 2020.

5 Michael Bues, 'What AI in Law Can and Can't Do' (European Legal Tech Association) <[www.europe-legaltech.org/what-ai-in-law-can-and-cant-do/](http://www.europe-legaltech.org/what-ai-in-law-can-and-cant-do/)> accessed 2 February 2021.

6 Anthony E. Davis, 'The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence' (American Bar Association, 2 October 2020) <[www.americanbar.org/groups/professional\\_responsibility/publications/professional\\_lawyer/27/1/the-future-law-firms-and-lawyers-the-age-of-artificial-intelligence/?q=&wt=json&cstart=0](http://www.americanbar.org/groups/professional_responsibility/publications/professional_lawyer/27/1/the-future-law-firms-and-lawyers-the-age-of-artificial-intelligence/?q=&wt=json&cstart=0)> accessed 30 November 2020.

fraud detection, price prediction and even NLP<sup>7</sup>, i.e. natural language processing technology. The next step in digital initiation is deep learning, which uses more advanced algorithms to perform more abstract tasks, such as image recognition<sup>8</sup>. Due to the fact that art of practicing law relies in large part on document analysis, the ability to read text using the right software, which at the same time gathers useful insights, is an advantageous attribute and the end result is impressive.

*Example:*

In a landmark study, which took place in February 2018<sup>9</sup>, American lawyers with years of experience in corporate law confronted the AI algorithm to detect problems in five non-disclosure agreements (NDA). After extensive testing, the AI accuracy rate averaged at 94 %, while lawyers achieved an average of 85 %. The lawyers' average time to complete the NDA analysis was 92 minutes. Artificial Intelligence only needed 26 seconds to do so.<sup>10</sup>

## 2. *AI i rozwój praktyki prawa*

*Gottfried Wilhelm Leibniz*, a famous lawyer, mathematician and 17th century polyhistor, once said: „It is unworthy of excellent men to lose hours like slaves in the labour of calculation which could safely be relegated to anyone else if machines were used.<sup>11</sup>”. The dilemmas of the German philosopher were and are still current to the present day. Three hundred years later, we are once closer to answering Leibniz's questions.

7 See: 'Natural Language Processing vs. Machine Learning vs. Deep Learning' (24 June 2020) <[sigmoidal.io/natural-language-processing-vs-machine-learning-vs-deep-learning/](https://sigmoidal.io/natural-language-processing-vs-machine-learning-vs-deep-learning/)> accessed 15 December 2020.

8 Khalid Al-Kofahi, 'Cognitive Computing: Transforming Knowledge Work, Transforming Knowledge Work' (27 January 2017) <[www.blogs.thomsonreuters.com/answerson/cognitive-computing-transforming-knowledge-work/](https://www.blogs.thomsonreuters.com/answerson/cognitive-computing-transforming-knowledge-work/)> accessed 15 December 2020.

9 See: 'Comparing the Performance of Artificial Intelligence to Human Lawyers in the Review of Standard Business Contracts' (Law Geex Paper 2018) <[www.images.law.com/contrib/content/uploads/documents/397/5408/lawgeex.pdf](https://www.images.law.com/contrib/content/uploads/documents/397/5408/lawgeex.pdf)> accessed 30 November 2020.

10 *ibid.*

11 See biographical note: <[www.math.dartmouth.edu/~m3cod/LeibnizWheelBig.htm](https://www.math.dartmouth.edu/~m3cod/LeibnizWheelBig.htm)> accessed 30 September 2020.

There are many solutions available on the market, created for individual, small and medium-sized law firms respectively, the functionalities of which can be adapted to clearly defined needs of users. A client can choose the right software solution, which fits one's needs (desktop application, client-server application or web application)<sup>12</sup>. Over the past few years, more and more organizations have started to abandon on-premises server-based software for cloud-hosted services. Despite the risks associated with such a change, law firms, as well as the in-house legal teams through such a transformation, have the opportunity to benefit from seamless remote access, availability assurance and significant long-term cost savings. The cloud has popularized Software as a Service (SaaS) solutions, and many law firm management tools are delivered using software-as-a-service model, where a manufacturer provides both the operating system, server space, and the application. Regardless of the software model chosen, law firm management systems have basic functions such as document management, customer relationship management (CRM), ability to build case management procedures and work cycle, synchronization with an e-mail inbox. With the available applications, you can create electronic files, and in them a case plan - templates, dedicated to the relevant legal proceedings, which automatically set all tasks, questions, deadlines and actions that will take place during the conduct of the case or litigation.

A practical complement to such a system is the document management function (DMS), which allows you to model a number of different processes for the purpose of document circulation. Back in 2018, a significant trend in document management software was to ensure increased document functionality. Therefore, companies that created such solutions, rather than just allowing online storage and document organization, have begun adding additional features to their products that allow users to create, annotate, and collaborate on legal documents. For example, document collaboration and sharing features are available on some platforms, which greatly facilitates secure collaboration on documents with customers, colleagues, experts. Another feature included in some software products is the conversion of scanned documents to an optical character recognition

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12 Majchrzak and Sowiński, <<https://www.oirpwarszawa.pl/wp-content/uploads/2020/10/programy-do-zarzadzania-kancelaria-prawnia.-jak-wybrac-i-wdrozyc-najlepszy-program-dla-twojej-kancelarii.pdf>> accessed 30 November 2020.

format that creates searchable, indexed PDFs. Other useful features include annotation tools, electronic signatures, and customized security features<sup>13</sup>.

### *3. AI for legal in-house teams and law firms*

*John Grisham*, an American bestselling author and lawyer by profession, stated in his first book *Time to Kill*, that what a good lawyer is worth if he can't find an important document in thirty seconds<sup>14</sup>. The fictional characters in Grisham's novel were aware of the important aspect of access to information, analysis of documents and their proper organization, which indissolubly embedded within the reality of this profession. In the work of a lawyer, the provision of objective advice is their bread and butter, and the final results they deliver must be based on detailed and reliable data. AI tools can support the legal departments and law firms by offering the insightful and fast analysis that demanding customers need.

Today, the most prevalent AI are those legal technologies that deal with repetitive work and manage large amounts of documents more effectively, while minimizing the risk of legal errors.<sup>15</sup> Some of these technologies will be analysed below.

#### *3.1. Document analysis – Document Review and E-discovery*

Many legal tasks require the knowledge of lawyers and a thorough understanding of the various legal documents. It takes a long time to find and understand the collection of gathered evidence, even for lawyers.<sup>16</sup> Software that uses NLP can be deployed to read legal documents and to extract useful information, often at the clause level or when key data is

13 Nicole Black, 'The Latest on Legal Document Management Software' (ABA Journal, 27 April 2020) <[www.abajournal.com/web/article/the-latest-on-legal-document-management-software](http://www.abajournal.com/web/article/the-latest-on-legal-document-management-software)> accessed 29 May 2020.

14 John Grisham, *A Time to Kill* (Delta 2004) 369.

15 Rasmussen Roslin, 'Legal Technology and In-house Counsels Today' (StaraNise, 1 June 2020) <[www.staranise.com.hk/knowledge-hub/articles/legal-technology-in-house-counsels.html](http://www.staranise.com.hk/knowledge-hub/articles/legal-technology-in-house-counsels.html)> accessed 30 September 2020.

16 Haoxi Zhong, Chaojun Xiao, Cunchao and others, 'How Does NLP Benefit Legal System: A Summary of Legal Artificial Intelligence' (Proceedings of the 58th Annual Meeting of the Association for Computational Linguistics, on-line, July 2020) 5218-5230 <[www.aclweb.org/anthology/2020.acl-main.466.pdf](http://www.aclweb.org/anthology/2020.acl-main.466.pdf)> accessed 1 July 2020.

stored within clauses. This technology presents an expedient way to deal with due diligence in mergers and acquisitions and is valuable in terms of extracting leasing data for large-scale real estate transactions.

*E-discovery* is the process of obtaining and exchanging evidence or electronically stored information (ESI) that could potentially become evidence in litigation. The first stage of *E-discovery* is the collection of data that can be used in legal proceedings or investigations. In addition, forensic IT programs<sup>17</sup>, enable organizations to accurately collect and preserve potentially relevant (responsive) data, both on-premises and in cloud. The parties to the proceedings often disagree as to which method of identifying potentially responsive electronically stored information is best. In particular, the method of using keywords compared to Technology Assisted Review (TAR) is usually a topic of long debates<sup>18</sup>. Technology Assisted Review is a method, which can be deployed during the document review phase that uses algorithms to identify and mark potentially responsive documents based on keywords and other metadata. The advantage of TAR is that it can help significantly accelerate the document review process.<sup>19</sup> During a disclosure process, when evidence is shared with the requesting party, such documented evidence is converted to a different format, such as TIFF or PDF, which allows the editing and redacting of privileged and irrelevant information.<sup>20</sup> Using TAR (or computer assisted review, CAR), predictive encoding in combination with analytics software for *E-discovery*, reduces the number of documents required for review and allows the legal team to prioritize the analysis accordingly. Narrowing the scope of documentary review in such a way, reduces hours and thus costs. The ultimate purpose of *E-discovery* is to provide the essential amount of evidence for litigation in a defensive manner.

The future of *E-discovery* with the capabilities of TAR seems quite revolutionary thanks to so-called legal ontology, which represent a new structure for aggregating and organizing information in such a way that it

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17 Russell Chozick, ‘The Major Differences Between Digital Forensics and E-discovery’ (Flashback Data, 30 June 2017) <[www.flashbackdata.com/digital-forensics-vs-ediscovery/](http://www.flashbackdata.com/digital-forensics-vs-ediscovery/)> accessed 20 January 2021.

18 Kathryn Cole, ‘Judges Make the Case for TAR’ (Farrell Fritz, 17 February 2021) <[www.allaboutediscovery.com/2021/02/judges-make-the-case-for-tar/](http://www.allaboutediscovery.com/2021/02/judges-make-the-case-for-tar/)> accessed 24 February 2021.

19 See: ‘What Is Technology-Assisted Review or TAR?’ <[www.zapproved.com/blog/what-is-technology-assisted-review-tar/](http://www.zapproved.com/blog/what-is-technology-assisted-review-tar/)> accessed 24 February 2021.

20 Kathryn Cole, ‘In What Format Should I Make My Production? And, Does Format Matter?’ (JD Supra, 3 June 2019) <[www.jdsupra.com/legalnews/in-what-format-should-i-make-my-61643/](http://www.jdsupra.com/legalnews/in-what-format-should-i-make-my-61643/)> accessed 24 February 2021.

can be understood and processed by machines. Their principal advantage is that they consist of concepts, relations, instances, and axioms, as opposed to ordinary keywords. This allows professionals to streamline their work by looking for legal concepts or precedents instead of just keywords<sup>21</sup>.

### *3.2. Contract review/management software*

Lawyers are often involved in contract negotiations, and their role is to advise whether the proposed contract reflects the client's intentions and expectations, or whether it requires appropriate changes, improved terms and conditions. Some agreements can be relatively simple, e.g. previously mentioned non-disclosure agreements (NDA), in contrast to very complex contracts that often extend over hundreds of pages. Automated contract analysis systems can be used to review documents that are relatively standardized and predictable in terms of the type of content they contain<sup>22</sup>. This process involves dividing the contract into individual terms or clauses, and then evaluating each of these elements, in order to extract key information or compare it with a certain standard, which is based on the information collected and examples of contracts contained in the company's database. Such a structured contract review system may indicate which provisions are missing from the contract and which are relevant to the customer, or indicate that the clauses covering the change in the rates in force during the term of the contract do not set a cap on the percentage increase in charges. It can then provide an example wording as an alternative based on how such a clause is usually formulated, according to company standards.

The contract automation described above is only one aspect of the wide range of functionalities offered by available contract lifecycle management AI platforms, because modern contract management systems are able to support the entire process, from contract creation, through negotiation and review of terms, electronic signatures, to monitoring the performance

21 Harry F. Karoussos, 'Law & The Digital Disruption: The Impact of ICT and AI on the Legal Profession' (2017) American College of Greece Research Paper <[www.researchgate.net/publication/321527178\\_Law\\_The\\_Digital\\_Disruption\\_The\\_Impact\\_of\\_ICT\\_and\\_AI\\_on\\_the\\_Legal\\_Profession](http://www.researchgate.net/publication/321527178_Law_The_Digital_Disruption_The_Impact_of_ICT_and_AI_on_the_Legal_Profession)> accessed 25 February 2021.

22 Robert Dale, 'Law and Word Order: NLP in Legal Tech' (*Towards Data Science*, 15 December 2018) <[www.towardsdatascience.com/law-and-word-order-nlp-in-legal-tech-bd14257ebd06](http://www.towardsdatascience.com/law-and-word-order-nlp-in-legal-tech-bd14257ebd06)> accessed 4 January 2020.

of contractual obligations of the parties to the contract and analysis of the commercial relationship<sup>23</sup>. In 2020, there was a clear trend in contract management software on the market. It transpired that everyone is observing and looking for ways how to exploit and use data to generate immediate value, and how to prepare for a future, where AI is likely to replace today's simple automation. While basic features such as electronic signature have become a necessity, current trends favour advanced systems that support the entire contract lifecycle management<sup>24</sup>.

### *3.3. Legal information systems and predictive analytics*

Based on the UBIQ concept, many similar databases for court decisions and legal acts have been created, without which most modern lawyers cannot imagine functioning in their profession. The applications that are currently available on the market are an improved version of legal research software, enriched today with NLP. This natural language processing add-on enables more complex and improved searches, allowing you to identify entire segments of text, not just keywords. This extended approach to creating more effective tools for lawyer work is based on the assumption that a given problem, which becomes the subject of legal analysis, is more easily solved using different techniques (such as indexes and legal commentary table of contents), as opposed to clearly defined phrases for which search algorithms are used.<sup>25</sup> It has become obvious that the quality of search results depends significantly on the right queries raised. Therefore, many of the solutions currently available on the market provide interfaces that allow you to find related materials by uploading a fragment or even the entire text that provides the search context, and as a result supporting “query by document”. Apart from reducing the time spent on sufficiently detailed

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23 Mikkel Boris, ‘Top Trends in Contract Management 2020’ (Contractbook, 31 August 2020) <[www.contractbook.com/legaltechinstitute/top-trends-in-contract-management-2020](http://www.contractbook.com/legaltechinstitute/top-trends-in-contract-management-2020)> accessed 3 September 2020.

24 *ibid.*

25 Paul Callister, ‘Law, Artificial Intelligence, and Natural Language Processing: A Funny Thing Happened on the Way to My Search Results’ (2020) 112 Law Library Journal 161-212 <[www.papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3712306](http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3712306)> accessed 24 February 2021.

search queries, the likelihood of finding additional relevant material that would not be found using typical queries has also increased<sup>26</sup>.

As part of going a step further, some legal information systems have an additional predictive analytics function that uses some form of NLP and machine learning to ensure enhanced searching and better understanding of legal issues, especially case law and legal precedents. This specific realm also includes systems for analysing behaviour for the purposes of litigation, such as anticipating the behaviour of judges and jury<sup>27</sup>. These systems have been trained to detect certain types of language, and by analysing historical data, the user receives a statistical assessment of whether the judge will respond and rule in the same way to a new but similar case.

#### *4. Compliance. Risk management*

One of the reasons for the global financial crisis of 2007-2008 was the mismanagement of risk data and the unawareness of regulators about the accumulated systemic risks arising from contractual obligations. To avoid repeating the same mistakes, today's institutions need to be active in data management, on compliance<sup>28</sup>, and they are supported by appropriate innovative solutions that assist them with apprehending and facilitating advanced risk management in a given sector of the economy. These systems use NLP, among other things, to verify that the contracts concluded by a company comply with the laws and policies of the organization. Such technology has gained great popularity with regard to the GDPR. Artificial intelligence for compliance consists primarily of rigidly coded legal knowledge and rules, and when the law cannot be encoded, with alerting mechanisms. As a result, some notification and alert techniques may help an organization with meeting its relevant legal requirements<sup>29</sup>.

- 26 Robert Dale, 'Law and Word Order: NLP in Legal Tech'(2019) 25(1) Natural Language Engineering .
- 27 See: 'Legal Research + Analytics' (*Artificial Lawyer*) <[www.artificiallawyer.com/al-100-directory/legal-research-analytics/](http://www.artificiallawyer.com/al-100-directory/legal-research-analytics/)> accessed 24 February 2021.
- 28 See: 'LegalTech + RegTech = Tools for an Increasingly Complex World' (*Planet Compliance*) <[www.planetcompliance.com/legaltech-regtech-tools-for-an-increasingly-complex-world/](http://www.planetcompliance.com/legaltech-regtech-tools-for-an-increasingly-complex-world/)> accessed 23 January 2021.
- 29 Marcelo Corrales , Paulius Jurčys, George Kousiouris, 'Smart Contracts and Smart Disclosure: Coding a GDPR Compliance Framework' (2018) SSRN Electronic Journal <[www.researchgate.net/publication/323625892\\_Smart\\_Contracts\\_and\\_Smart\\_Disclosure\\_Coding\\_a\\_GDPR\\_Compliance\\_Framework](http://www.researchgate.net/publication/323625892_Smart_Contracts_and_Smart_Disclosure_Coding_a_GDPR_Compliance_Framework)> accessed 30 November 2020.

This is done by training algorithms accordingly, by marking each alert as a "true negative" or as a "false positive"<sup>30</sup>. The system will continue to identify patterns while receiving an opinion on the AI model and thus learn through decision-making experience, on the basis of statistical data, what should be notified to the organisation. Improved AI models will allow lawyers to focus on investigative work to understand the context of potentially risky employee activity.

### *5. Summary*

The pace of the technological revolution in law firms is relatively slow, which is mainly due to the accepted model of fee earning, based on the hours worked – any increase in productivity offered by AI tools means less remuneration for lawyers. Moreover, the available budget has always been the prevalent barrier to technological innovation, and the skills gap continues to effectively halt a possible change. Artificial Intelligence, for the in-house teams too, is slowly evolving and legal departments seem to be lagging behind other functions in the use of new technologies. Nevertheless, there are many factors that affect not only attitudes but also the transformation of companies in the market. More and more companies are choosing to hire in-house lawyers, who constantly create new model contract templates, and update and introduce new procedures, as well as internal policies. For them, completing projects as soon as possible is crucial to be able to focus on the tasks they perform on a daily basis and to meet the requirements of their employer. Another circumstance that motivated the market to reflect at least on the current model of service provision was the COVID-19 virus pandemic. Coronavirus, which spread around the world in 2020, has forced many organisations to revise their plans, strategies, targets, and re-examine risk management processes and their approach to growth and technological transformation<sup>31</sup>. While until recently in-house legal teams were not considered to be leaders in modernization and automation, the pandemic reduced staff budgets and at the

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30 Jordan Domash, 'AI and its Impact on the Future of Regulatory Compliance' (*A-Team Insight*, 9 September 2020) <[www.a-teaminsight.com/ai-and-its-impact-on-the-future-of-regulatory-compliance/?brand=ati](http://www.a-teaminsight.com/ai-and-its-impact-on-the-future-of-regulatory-compliance/?brand=ati)> accessed 30 September 2020.

31 See: 'Looking Glass Report. The Role of the General Counsel in Navigating the Global Risk Landscape' (Clyde&Co) <[www.clydeco.com/en/looking-glass-report](http://www.clydeco.com/en/looking-glass-report)> accessed 3 December 2020.

same time increased the legal burden; new technologies have become the most obvious solution for many legal departments<sup>32</sup>.

The reality seems to be conducive to the implementation and further improvement of AI products available on the market, which was worth \$17.32 billion in 2019<sup>33</sup>. However, perhaps due to the number of options available, small and medium-sized law firms as well as in-house lawyers often find it difficult to identify the most practical technology from their perspective. Technology that can be effectively implemented in your organization while changing the way you provide services to improve efficiency and manage your customers more efficiently. As soon as the identified objectives can be achieved, managing the ever-increasing pressures of today's business environment can be much painless and result in the possibility of using increased data not only to streamline internal processes, but also to better understand trends and make decisions based on reliable information. Change is inevitable, transformational technologies will become more important as customers want to spend less and work more on their own<sup>34</sup>.

According to the "Future Ready Lawyer" study<sup>35</sup> law firms are undergoing a significant transformation, especially in the context of how services are provided, and the biggest changes that can be expected in the near future are primarily:

- 1) wider use of technology to improve efficiency;
- 2) greater specialisation of services;
- 3) focus on innovation.

32 Rob Van der Meulen, '5 Legal Technology Trends Changing In-House Legal Departments' (*Gartner*, 9 February 2021) <[www.gartner.com/smarterwithgartner/5-legal-technology-trends-changing-in-house-legal-departments/](http://www.gartner.com/smarterwithgartner/5-legal-technology-trends-changing-in-house-legal-departments/)> accessed 24 February 2021.

33 Thomas Alsop, 'Legal Tech Market Revenue Worldwide from 2019 to 2025, by Business Type' (*Statista*, 26 January 2021) <[www.statista.com/statistics/1168096/legal-tech-market-revenue-by-business-type-worldwide/](http://www.statista.com/statistics/1168096/legal-tech-market-revenue-by-business-type-worldwide/)> accessed 30 January 2021.

34 See: Report: 'Future Ready Lawyer. Czynniki efektywności' ('Future Ready Lawyer. The Efficiency Factors') Wolters Kluwer 2020 <[www.lrpoland.wolterskluwer.com/Future-Ready-Lawyer-2020?utm\\_source=mail\\_klienci&utm\\_medium=organic&utm\\_campaign=WKPL\\_LEG\\_ACQ\\_LEX-EBO-FRL2020-06-20-TOFU\\_LFM/PRW\\_0520014\\_CIN002&utm\\_term=mai\\_klienci&utm\\_content=klienci](http://www.lrpoland.wolterskluwer.com/Future-Ready-Lawyer-2020?utm_source=mail_klienci&utm_medium=organic&utm_campaign=WKPL_LEG_ACQ_LEX-EBO-FRL2020-06-20-TOFU_LFM/PRW_0520014_CIN002&utm_term=mai_klienci&utm_content=klienci)> accessed 15 February 2021.

35 ibid.

Gartner<sup>36</sup>, on the other hand, lists five *LegalTech* trends that will shape in-house legal departments over the next few years::

- 1) the spend on legal technology will increase threefold;
- 2) 20 % of generalist lawyers will be replaced with nonlawyer staff, who have other skills or experience than those, which are normally developed by lawyers;
- 3) automating 50 % of legal work related to major corporate transactions;
- 4) only 30 % of the potential benefit of their contract life cycle management investments will be captured by corporate legal departments.
- 5) at least 25 % of spending on corporate legal applications will go to non-specialist technology providers.

There are also opinions that soon the element of the lawyer's intellectual work will disappear<sup>37</sup>, however, the vast majority of experts consider that the impact of AI on activities such as drafting opinions, advising clients or representing them will not be significant<sup>38</sup>. AI is supposed to unleash the potential of a lawyer, who is looking for a place in a competitive market, giving him/her the opportunity to focus on what he or she does best by giving clients bespoke advice and handling non-standard aspects of transactions.

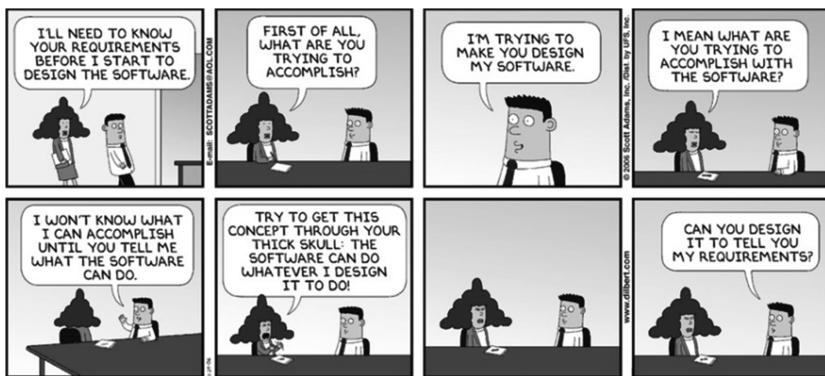
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36 Rob Van der Meulen, '5 Legal Technology Trends Changing In-House Legal Departments'.

37 See: 'Digital Transformation: Assessing the Impact of Digitalisation on Ireland's Workforce' (2018) Expert Group on Future Skills Needs Report <[www.skillsireland.ie/all-publications/2018/digital-transformation-assessing-the-impact-of-digitalisation-on-ireland-s-workforce.html](http://www.skillsireland.ie/all-publications/2018/digital-transformation-assessing-the-impact-of-digitalisation-on-ireland-s-workforce.html)> accessed 7 August 2020.

38 Rónán Kennedy, 'Algorithms, Big Data and Artificial Intelligence in the Irish Legal Services Market' Oireachtas Library & Research Service, 2021 <[www.data.oireachtas.ie/ie/oireachtas/libraryResearch/2021/2021-02-18\\_spotlight-algorithms-big-data-and-artificial-intelligence-in-the-irish-legal-services-market\\_en.pdf](http://www.data.oireachtas.ie/ie/oireachtas/libraryResearch/2021/2021-02-18_spotlight-algorithms-big-data-and-artificial-intelligence-in-the-irish-legal-services-market_en.pdf)> accessed 24 February 2021.

*Figure 14. The process of determining specification requirements and frequently encountered difficulties*



Source: Dilbert by Scott Adams, 29 January 2006 <[www.dilbert.com/strip/2006-01-29](http://www.dilbert.com/strip/2006-01-29)> accessed 24 February 2021

While it is important to know the tools that are currently available, the priority for each organisation should be primarily to be aware of its position in the market and the role it plays or wants to play. It is of utmost importance to understand the data that a law firm or in-house legal department produces. The information contained in structured data sets can have an immeasurable impact not only on the quality of the services provided, but also on the efficiency of their implementation. Any implementation of the new system should be pre-planned with focusing on a careful analysis of existing processes and circumscribing essential needs. A detailed analysis of the legal aspects of AI will become paramount in order to develop an analytical framework that can serve as a checklist of identified legal areas to be taken into account for individual AI projects<sup>39</sup>. In an era of zetabytes and the likelihood of more pandemics, agile management skills and the ability to adapt quickly are crucial for any business, including lawyers.

39 See: Chris Kemp, 'Legal Aspects of Artificial Intelligence (v.3.0)', (2021) Kemp IT Law White Paper <[www.kempitlaw.com/legal-aspects-of-artificial-intelligence-v3-0/](http://www.kempitlaw.com/legal-aspects-of-artificial-intelligence-v3-0/)> accessed 24 February 2021.



# Artificial Intelligence in the Law Firm of the Future

*Gabriela Bar*

## *1. Introduction*

The future belongs to the rapidly evolving technology, and the most fascinating and capable of revolutionising any industry is *Artificial Intelligence* (AI). This technology will also be the main driver of changes in the legal profession. Today, many law firms are still trying to resist changes or wait them out, but soon clients of the law firm will not need, but also will not want, lawyers to work in the way they worked in the 20th or even at the beginning of the 21st century<sup>1</sup>. Traditional law firms will soon disappear from the market, just like video cassette rentals.

We can already talk about advanced automation of many activities. *LegalTech* tools can replace lawyers in performing routine and repetitive activities (e-discovery, document analysis and generation, due diligence, document management, task inventory, working time and invoicing). Recommendation systems that use predictive analytics will gain an importance and in the near future also advanced systems that take partially or fully autonomous actions that can cooperate with human lawyers will be more and more popular.

The role and way the lawyers work will change dramatically also because the knowledge of the applicable law will be more often "embedded" in various types of devices (e.g. autonomous vehicles, intelligent buildings, computers) and a user will not be allowed performing any activity inconsistent with legal or ethical requirements<sup>2</sup>. Thanks to the *distributed ledger technology* (DLT) and the wider use of the so-called *smart contracts* we will not need lawyers to draft many types of contracts and supervise their execution or help with their enforcement<sup>3</sup>.

Jurisprudence may decide about the need for a wider use of AI-based solutions in the lawyers work. Already in February 2012 the United States

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1 Richard Susskind, *Tomorrow's Lawyers. An Introduction to Your Future* (Oxford University Press 2nd edn, 2017).

2 *ibid*, 73.

3 On this subject: Dariusz Szostek, *Blockchain and the Law* (1 ed., Nomos 2019).

District Court (S.D. New York) in the case of *Da Silva Moore v Publicis Groupe*<sup>4</sup> found that computer-aided review of large amounts of documents and data has advantages over traditional methods (and is more beneficial to the client). In late 2018, the Ontario Superior Court of Justice ruled to reduce the party's claim for trial costs by \$ 11,400 (including questioning in full the amount of lawyers' fees for analysing data and documents in the case, calculated on the basis of hourly rates), accusing the party's attorneys of not using *LegalTech* tools, including AI, to conduct legal research, which unnecessarily overstated the costs of legal assistance<sup>5</sup>. The court found that lawyers should use algorithmic solutions, including AI, to shorten the preparation time for the trial. It seems that we will soon function in a reality in which failure to use *LegalTech* tools may constitute an improper performance of the legal service, and thus - not only civil liability, but also disciplinary liability of the lawyer. Therefore, lawyers of the future should be aware of the possibilities of AI and each time take into account the need to use it in their cases<sup>6</sup>.

The precursors of the implementation of AI systems are and will probably remain large international law and consulting companies, which are able to bear the high costs of designing dedicated solutions or purchasing ready-made software and integrating it with their own systems<sup>7</sup>. The pioneers group also includes modern domestic law firms operating in the technology industry (with flexible, innovative customer-oriented approach and need of cost reduction) and the so-called boutique law firms specializing in a narrow field of law (e.g. intellectual and industrial property, pharmaceutical law), for which the implementation of modern solutions based on AI means the possibility of significantly expanding the volume of cases without expanding the law firm itself and increasing employment.

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4 The full text of the judgment is available at: <[scholar.google.com/scholar\\_case?caseid=6856971937505165396&q=da+silva+moore+v.+publicis+groupe&hl=en&as\\_sd=40000006&as\\_vis=1](https://scholar.google.com/scholar_case?caseid=6856971937505165396&q=da+silva+moore+v.+publicis+groupe&hl=en&as_sd=40000006&as_vis=1)> accessed: 11 January 2021. See also: Maura .R. Grosman, Gordon V. Cormack, 'Inconsistent Responsiveness Determination in Document Review: Difference of Opinion or Human Error' (2012) 32 Pace L. Rev., 267ff.

5 The text of the judgment is available on the website of the *Canadian Legal Information Institute*, <[www.canlii.org/en/on/onsc/doc/2018/2018onsc6959/2018onsc6959.html](http://www.canlii.org/en/on/onsc/doc/2018/2018onsc6959/2018onsc6959.html)> accessed 6 January 2021.

6 Robert Ambrogi, 'Judge Penalizes Lawyers For Not Using Artificial Intelligence'. <[abovethelaw.com/2019/01/judge-penalizes-lawyers-for-not-using-artificial-intelligence/](http://abovethelaw.com/2019/01/judge-penalizes-lawyers-for-not-using-artificial-intelligence/)>, accessed: 13 January 2021.

7 John Armour, Richard Parnham and Mari Sako, 'Augmented Lawyering' (2020) 558 European Corporate Governance Institute - Law Working Paper.

## *2. Robo-assistant: Support for the Lawyers and Client Advisor*

Artificial Intelligence, which - thanks to deep learning - is making remarkable progress in recognizing images and understanding natural language, will undoubtedly replace - in the foreseeable future - younger lawyers who perform assistant and support functions in law firms<sup>8</sup>. It will replace them not only in the way we know today (due diligence, verification of standard contracts or contract templates, data analysis, automatic document creation, establishing the jurisprudence in a given category of cases), but will become a virtual assistant of an legal advisor attorney with specialist knowledge and the ability to communicate also with a law firm's clients. The tasks of robo-assistants will also include activities related to office management, such as answering phone calls, arranging meetings, keeping a calendar of courts hearings, managing incoming and outgoing correspondence, settling customers and handling procurement.

Advanced *Legal Expert Systems* (LES) - using machine learning algorithms, which offer the best solutions for a given problem, helping to make a final decision by a human lawyer - in the near future<sup>9</sup> will communicate with users in natural language, explain the legitimacy of the proposed solution, answer the questions asked, and modify their recommendations after discussing the matter with a human. Today already, at least some of these competences are possessed by Watson IBM – it understands a legal problem presented in a natural language, is able to analyse and classify the information and then draw conclusions and provide legal advice, also presenting it in a computer simulated "human" voice<sup>10</sup>.

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8 Dan Mangan, 'Lawyers could be the next profession to be replaced by computers' (CNBC 13 February 2017) <[www.cnbc.com/2017/02/17/lawyers-could-be-replaced-by-artificial-intelligence.html](http://www.cnbc.com/2017/02/17/lawyers-could-be-replaced-by-artificial-intelligence.html)> accessed 20 January 2021. See also: Carl Benedikt Frey, Michael A. Osborne, *The Future Of Employment: How Susceptible Are Jobs To Computerisation?*, <[oxfordmartin.ox.ac.uk/publications/the-future-of-employment/](http://oxfordmartin.ox.ac.uk/publications/the-future-of-employment/)>, accessed: 20 January 2021; <[willrobotstakemyjob.com/23-2011-paralegals-and-legal-assistants](http://willrobotstakemyjob.com/23-2011-paralegals-and-legal-assistants)>, accessed 20 January 2021.

9 Jordan Furlong, *The evolution of the legal services market*, <[law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-1/](http://law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-1/)>, <[law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-2/](http://law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-2/)> accessed: 13 March 2021., <[law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-3/](http://law21.ca/2012/11/the-evolution-of-the-legal-services-market-stage-3/)>, accessed: 13 March 2021. See also: Kai-Fu Lee, *Inteligencja Sztuczna Rewolucja Prawdziwa. Chiny, USA i przyszłość świata* (Media Rodzina 2019).

10 Susskind, (n 1) 77. See also: Daryl Pereira, 'How Watson helps lawyers find answers in legal research' (Medium January 2017), <[medium.com/@darylp/how-watson-helps-lawyers-find-answers-in-legal-research-672ea028dfb8](http://medium.com/@darylp/how-watson-helps-lawyers-find-answers-in-legal-research-672ea028dfb8)>, accessed: 20 January 2021.

Virtual assistants will create structured data and documents from unstructured files of any format, extracting thousands of different pieces of information<sup>11</sup>. They will be able to make automated transcription of a person's voice captured on video or in real time, combining this with sentiment analysis<sup>12</sup>. Future robo-assistants will constitute a perceptual AI, and therefore will have the ability to "see", "hear" and understand gestures and sounds received by the "senses"<sup>13</sup>, they will also be able to place them in the context of a given situation (e.g. how many times during the testimony a witness makes a mistake repeating their version of events or what can be deduced from the contractor's body language during difficult negotiations)<sup>14</sup>.

As a lawyer, AI will also provide direct services to the law firm's clients<sup>15</sup>. The trend on the legal services market is the mass democratisation of specialised services and making them available to people who previously could not afford them<sup>16</sup>. Maintaining revenues at the current level will require lawyers of the future to use AI to contact clients and provide comprehensive service for their cases that can be standardised. It will become common to offer legal aid in the so-called *legal advice kiosks* where - for a reasonable fee - an interested party will be able to talk to a robo-lawyer about their legal situation, seek advice on the sale or purchase of a property, divorce, writing a will, ask for an analysis of documents or preparation of a contract.

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11 Cf., inter alia the PROSAR-AIDA tool, described in the Report of the European Commission: European Commission, 'Study on the use of innovative technologies in the justice field. Final report" (Publication Office European Union 2020) 25.

12 See: Shubham Gupta, 'Sentiment Analysis: Concept, Analysis and Applications' <[towardsdatascience.com/sentiment-analysis-concept-analysis-and-applications-6c94d6f58c17](http://towardsdatascience.com/sentiment-analysis-concept-analysis-and-applications-6c94d6f58c17)>, accessed: 12 March 2021.

13 Lee, (n 9) 2384 ff.

14 Cf. the tool for automated voice transcription and translation, developed by the British company VoiceScript Technologies Ltd., in conjunction with the capabilities of Artificial Intelligence in the analysis of sentiment, content significance, co-reference and correlation, described in the EC Report, (Study on the use) 34.

15 There are already "prototypes" of robo-lawyers, described, among others, by Igor Bosilkovsky, 'Stanford Grad Who Created The World's First 'Robot Lawyer" Raises \$ 12 Million In Series A' (Forbes 23 June2020), <[www.forbes.com/sites/igorbosilkovski/2020/06/23/stanford-grad-who-created-the-worlds-first-robot-lawyer-raises-12-million-in-series-a/?sh=1f6b03d03309](http://www.forbes.com/sites/igorbosilkovski/2020/06/23/stanford-grad-who-created-the-worlds-first-robot-lawyer-raises-12-million-in-series-a/?sh=1f6b03d03309)> accessed 7 January2021. See also: <<https://robotlawyerlisa.com/>> accessed 14 January 2021;or <<https://robolawyer.weebly.com/>>, accessed: 14 January 2021.

16 Susskind, (n 1) 25ff.

Systems for e-negotiation and e-mediation as well as *Online Dispute Resolution* (ODR) will also become available to a greater extent, where only AI will be an advisor, mediator or arbitrator<sup>17</sup>. There will also be no obstacles for such an electronic lawyer to appear in court in simple cases, e.g., for payment, when courts will become fully virtual, when they will be more of a "public service" than a place to go for settling the case<sup>18</sup>.

### *3. Augmented Intelligence: Centaurs and Cyborgs*

Just as the mythological centaur was half-human, half-horse, the first AI centaurs were half-human, half-AI teams, and played chess much better than the computer itself (they appeared in 1998 when Garry Kasparov led the world's first game of "Centaur Chess" - also called *advanced chess* or *cyborg chess* - after his defeat with IBM Deep Blue)<sup>19</sup>.

In the future, in many professions, including the legal one, centaur AI will be the best combination of the machine's ability to remember, verify a huge number of possible scenarios, analyse and detect problems, and human intuition to evaluate or make decisions based on AI performance.

Lawyers of the future, instead of focusing on AI replacing humans<sup>20</sup>, should seek to cooperate with it<sup>21</sup>. The future may bring highly efficient cooperation, not competition<sup>22</sup>. AI will be the best at processing data: millions of numbers, information, images and instantly analysing an unimaginable amount of possible solutions, looking for hidden correlations that elude the human eye and mind, in choosing the best answers. Humans,

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17 More on this subject: ibid, 121 ff.

18 ibid, 131 ff.

19 Nicky Case, 'How To Become A Centaur' (2018) Journal of Design and Science MIT Media Lab <[jods.mitpress.mit.edu/pub/issue3-case/release/6/](https://jods.mitpress.mit.edu/pub/issue3-case/release/6/)>, accessed 14 January 2021; H. G. Escajeda, 'The Vitruvian Lawyer: How to Thrive in an Era of AI and Quantum Technologies' (2020) XXIX Kansas J. of Law & Pub. Pol'y 421-521, , 463, <<https://ssrn.com/abstract=3534683>>, accessed 14 January 2021.

20 See forecasts included in the World Economic Forum report "Jobs of Tomorrow. Mapping Opportunity in the New Economy" (January 2020); the report of Deakin University (Australia) and Ford Motor Company Australia Limited, "100 Jobs of the Future" (2019). See also the forecasts presented in the book by Kai-Fu Lee (n 9) 2924ff.

21 William Vorhies, 'An Argument in Favor of Centaur AI' <[www.datasciencecentral.com/profiles/blogs/an-argument-in-favor-of-centaur-ai](http://www.datasciencecentral.com/profiles/blogs/an-argument-in-favor-of-centaur-ai)>, accessed: 15 January 2021.

22 Cf. Armour, Parnham, Sako, (n 7).

on the other hand, are likely to be better at asking questions<sup>23</sup>. It is particularly important in the lawyer's work: questioning well-established patterns, formulating hypotheses, searching for new, non-obvious solutions. In the case of legal AI centaurs, man will pose these "questions" in the form of setting goals and pointing to limitations or exceptions. Meanwhile, AI will search data, analyse dependencies, examine many scenarios and present the most appropriate answers, showing alternative possibilities and their consequences - all in real time, in a conversation with a human partner. This is not all - a lawyer may question AI's answers by asking more complex questions, pointing to additional dependencies that are only noticeable to humans thanks to empathy and intuition<sup>24</sup>. Thus, the AI centaur will be able to work out the best possible solution in a relatively short time.

*Augmented Intelligence* is not only the one that will be the result of close cooperation between human and AI, as in the case of centaurs. There is increasing trend of improving human intelligence through cyborgisation by embedding implants into the human body or wearing devices that increase the capabilities and computing power of the human brain (the so-called *Internet of Body, IoB*). The lawyer of the future may be then a cyborg, connected to huge resources of knowledge accumulated in computing clouds, able to read hundreds of information stored in electronic case files using modified eyes or - thanks to a special implant in the brain - analyse possible strategies within seconds during difficult negotiations. Sounds like science fiction? Perhaps. Nevertheless DARPA<sup>25</sup> (including in the N3: *Next-Generation Non-Surgical Neurotechnology Program*), Neuralink<sup>26</sup> and many other organisations conduct advanced research in this direction<sup>27</sup>.

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23 Case (n 19).

24 More on the division of roles between humans and AI: Escajeda (n 19) 464-465; Daniel Araya, *3 Things You Need To Know About Augmented Intelligence*, (Forbes 22/01/2019), <[forbes.com/sites/danielaraya/2019/01/22/3-things-you-need-to-know-about-augmented-intelligence/?sh=4cda84bd3fdc](https://www.forbes.com/sites/danielaraya/2019/01/22/3-things-you-need-to-know-about-augmented-intelligence/?sh=4cda84bd3fdc)>, accessed 10 January 2021. See also: Patryk Zakrzewski, *Sztuczna inteligencja rozsadza ramy, w których funkcjonowały do tej pory – interview with A. Przegalińska* <[culture.pl/pl/artykul/aleksandra-przegalinska-sztuczna-inteligencja-rozsadza-ramy-w-ktorych-funkcjonowaly-do-tej-pory-wywiad](https://culture.pl/pl/artykul/aleksandra-przegalinska-sztuczna-inteligencja-rozsadza-ramy-w-ktorych-funkcjonowaly-do-tej-pory-wywiad)> accessed: 14 March 2021.

25 Defense Advanced Research Projects Agency - US government agency dealing with the development of military technology.

26 Neuralink Corporation – American neurotechnology company founded, among others by Elon Musk, dealing with the creation of implantable brain-machine interfaces.

27 Magda Gacyk, *Zabawy w Boga. Ludzie o magnetycznych palcach* (Agora 2020) 1901; Cheyenne Macdonald, *Pentagon working to develop technology that would let troops*

Today, no one is surprised by a pacemaker or a bionic limb prosthesis. Soon the effects of implants embedded in a brain that delay the progress of Parkinson's disease or eliminate the negative effects of other neurological diseases will no longer be something unusual<sup>28</sup>. In a dozen years, a lawyer who uses learning opportunities to increase their cognitive abilities, and thus work efficiency, will also become the norm. There are many technological start-ups in the world that intend to accelerate the evolution of *homo sapiens*, and *transhumanism* is also increasingly mentioned in the business context<sup>29</sup>.

#### *4. Artificial Lawyer*

The question remains whether it is possible to create an AI that is human-like or surpassing human intelligence (*Artificial General Intelligence, AGI*), and if so, when will it be created. There are as many sceptics among the scientists involved in AI research as there are believers in this "Holy Grail" of AI. Despite the seemingly speculative nature of the AGI, research and development work on its creation is already underway<sup>30</sup>. In his new book,

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*control machines with their MINDS* (Daily Mail 17 July 2018), <[dailymail.co.uk/sciencetech/article-5963803/Pentagon-working-develop-technology-let-troops-control-machines-MINDS.html?ns\\_mchannel=rss&ito=1490&ns\\_campaign=1490](https://www.dailymail.co.uk/sciencetech/article-5963803/Pentagon-working-develop-technology-let-troops-control-machines-MINDS.html?ns_mchannel=rss&ito=1490&ns_campaign=1490)> accessed 18 January 2021.

- 28 Such operations are performed at Stanford University (USA); depression and post-traumatic stress disorder are also treated in the same way. Microsoft is conducting research on brain implants that can restore fitness to people, for example paralyzed, blind or suffering from cerebral palsy. More: Gacyk (n 856) 1936. Also on this topic: *I am a human* – documentary, dir. E. Gaby, T. Southern, USA 2019.
- 29 Gacyk (n 856) 1951 The Alcor Foundation in Scottsdale, Arizona conducts research on hibernation and performs (of course for a fee) cryopreservation of the bodies or brains of the deceased in order to revive them in the future in a way that allows the recovery of lost information (and possibly the recovery of bodily damage if the cryopreservation affects the entire body), an example by implementing the "content" of the brain into a computer or android. See: <[alcor.org/AboutAlcor/membershipstats.html](https://www.alcor.org/AboutAlcor/membershipstats.html)> accessed 18 January 2021. More on this topic: Mateusz Kulawiński, 'Transhumanizm, cyborgizacja, ulepszanie człowieka' <[researchgate.net/publication/334448348\\_Transhumanizm\\_cyborgizacja\\_ulepszanie\\_czlowieka](https://researchgate.net/publication/334448348_Transhumanizm_cyborgizacja_ulepszanie_czlowieka)>, accessed: 13 January 2021.
- 30 A study by the Global Catastrophic Risk Institute identified 45 research and development projects carried out in 30 countries on 6 continents, many of which are carried out in large corporations and academic institutions. See Seth Baum, "A Survey of Artificial General Intelligence Projects for Ethics, Risk, and Policy" (Global Catastrophic Risk Institute Working Paper 17 January 2017) 29 <<https://www.globalcatastrophicrisk.org/assets/research/working-papers/2017/01/29/2017-01-17-A-Survey-of-Artificial-General-Intelligence-Projects-for-Ethics-Risk-and-Policy.pdf>>

“Architects of Intelligence”<sup>31</sup>, writer and futurist Martin Ford interviewed twenty-three of the world’s most prominent AI scientists, including Deep-Mind CEO Demis Hassabis, Google AI chief Jeff Dean, and Stanford AI director Fei-Fei Li. In an informal study, they were asked to indicate when the chances of building an AGI would be at least 50 %. The most extreme answers were given by: Ray Kurzweil - an American computer scientist, writer, futurologist and promoter of the idea of *transhumanism*, who suggested that there was a chance to build AGI by 2029 and Rodney Brooks - a member of the Australian Academy of Sciences, a robotics specialist and co-founder of iRobot, which indicated that it would be the year 2200. The remaining votes were split between these two extremes, with an average for the year 2099. In other words, AGI is an undefined future, but it is possible that both the author and the readers of this text will be still alive to see AGI as a lawyer in the law firm of the future. Will such a lawyer of the future have an android form, sensually experiencing the world, entering into social relations, feeling the emotions associated with having a body? Or will it be an extremely advanced computer program, with access to all resources of the Internet and the ability to self-improve, self-replicate and - perhaps - being aware (like the *Techno Centrum* from Dan Simmons' books<sup>32</sup>)?

It cannot be ruled out that AGI will be created as *Distributed Artificial Intelligence* through the integration of Multi-Agent Systems or the so-called Swarm Intelligence with Artificial Neural Networks, Deep Learning, including Reinforcement Learning, as well as with other technologies, e.g. Blockchain<sup>33</sup>. Such advanced intelligent systems - capable of exchanging knowledge, experiences, memories, skills and radically modifying their

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[papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3070741](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3070741) accessed 4 August 2021.  
Some consider OpenAI's GPT-3 as a precursor to AGI. See: John Thornhill, 'Is AI finally closing in on human intelligence' (Financial Times, 12 November 2020) <<https://www.ft.com/content/512cef1d-233b-4dd8-96a4-0af07bb9ff60>>, accessed 13 November 2020.

31 Martin Ford, *Architects of Intelligence: The truth about AI from the people building it* (Packt Publishing, November 2018).

32 The *Hyperion Cantos* - a series of science fiction novels by Dan Simmons.

33 Francesco Corea, 'Distributed Artificial Intelligence. A primer on Multi-Agent Systems, Agent-Based Modeling, and Swarm Intelligence' (Medium, March 2019), <[francesco-ai.medium.com/distributed-artificial-intelligence-3e3491e0771c](https://francesco-ai.medium.com/distributed-artificial-intelligence-3e3491e0771c)>, accessed on 14 January 2020.

own structure - may be more like a swarm of bees than "persons"<sup>34</sup>. They will also be incomparably more effective in solving problems and finding optimal solutions in a given situation than human lawyers.

Regardless of what form AGI will take - in order to be able to participate in social relations, including legal ones, and practice the legal profession (as an employee, associate or partner in a future law firm) - it must acquire the status of a legal entity. Contrary to many fears and controversies related to this idea, the AGI may become such an "artificial person", without prejudice to what constitutes the content of the legal personality of a person or a corporation. The society of the future should separate the legal personhood from the question of being human or acting by human beings. If we assume that the content of legal personality is the abstract ability to participate in legal relations, then in order to give a specific being the status of a legal person, it is only necessary for the legislator to make such a decision, constructing an appropriate provision allowing it to participate in legal relations, and thus - social life.<sup>35</sup> It seems that a sufficient condition for the creation of a new category of legal person - an "artificial person" - would be to grant AI some (even very limited) characteristics of the legal person<sup>36</sup>, such as:

- 1) the right to dispose of specific resources (property) and to make property dispositions, including the conclusion of civil law contracts (with the possibility of limiting the rights in this respect, as in the case of management boards in companies);
- 2) the right to have legally protected personal rights, such as e.g. name, renown, secrecy of correspondence, as well as other specific for the substrate of a given AI;
- 3) the right to be protected against loss of integrity, that is, against "switching off", deleting or significantly modifying its memory (these issues should be assessed in court proceedings);
- 4) the obligation to be subject to third party liability insurance;
- 5) the right to sue and be sued in civil cases;

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34 Cf. Nick. Borstrom, *Superinteligencja. Scenariusze, strategie, zagrożenia*, (Helion Gliwice 2016) 1998; Aleksander. Chlopecki, *Sztuczna inteligencja: szkice prawnicze i futurologiczne* (C. H. Beck 2018), 99ff.

35 More on this topic: Gabriela Bar, 'Robot personhood, czyli po co nam antropocentryczna Sztuczna Inteligencja' in Luigi Lai and Marek Świerczyński (eds.), *Prawo Sztucznej Inteligencji* (C. H. Beck 2020).

36 Cf Visa A. J. Kurki, 'Why Things Can Hold Rights: Reconceptualizing the Legal Person' in Visa A. J. Kurki, Tomasz Pietrzykowski (eds) *Legal Personhood: Animals, Artificial Intelligence and the Unborn* (Springer 2017) 85.

- 6) the possibility of incurring criminal liability (including being subject to the so-called "kill switch" understood rather as a mechanism for temporary exclusion of AI, instead of its complete annihilation, which is a "penalty" for AI's actions contrary to the law<sup>37</sup>).

Having the above-mentioned rights and obligations, a future lawyer who is an AGI could (at least to some extent) be independently responsible for its actions or omissions, which would certainly be a strong argument for "employing" such an "artificial person" in the office or accepting it as a partner.

It is possible that a new legal profession will be created: *Artificial Lawyer*. Its "implementation" will require an entry in an appropriate register, allowing the identification of a given AI. The possibility of practicing this profession should be also dependent on passing the conformity assessment procedure and obtaining a certificate. The EU is already proposing some ideas on future AI regulation, *inter alia*, in the resolutions of the European Parliament of 20/10/2020<sup>38</sup>. The resolutions provide for the establishment of supervisory authorities responsible for ensuring compliance with the EU regulatory framework for AI development, implementation and application of *high-risk AI*, robotics and related technologies. Such bodies would be responsible mainly for a coherent EU approach and preventing fragmentation of the single market in the context of AI, conducting AI compliance assessments and awarding the *European certification of ethical compliance*. Perhaps the next step would be to create the possibility of entering AI in the register of "artificial (legal) persons". This would require codifying the criteria, the fulfilment of which would make it possible to

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37 A temporary switch-off would also be a good solution because it would not raise so many ethical questions about the complete elimination of the conscious mind, and also because it would allow us to investigate the causes of the "malfunction" of AI and perhaps remove the cause of the problem. Moreover, punishing AI in this way would correspond to one of the goals of punishment in the human administration of justice, namely the reform of the individual. More on this topic: Jacob Turner, *Robot Rules. Regulating Artificial Intelligence* (Springer 2019), 360-361.

38 Cf. European Parliament resolutions of 20/10/2020: on a framework for the ethical aspects of AI, robotics and related technologies (2020/2012 (INL)) and on a civil liability regime for artificial intelligence (2020/2014 (INL)). The newest UE regulation proposal on AI: Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, Brussels, 21.4.2021 COM(2021) 206 final, <eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%63A52021PC0206>, accessed: 4 August 2021.

acquire the status of such a "person" (it should probably be granted only to the AGI).

This vision of the future may raise a well-founded fear that AGI in the role of a lawyer will be superior to humans in every aspect, and therefore human lawyers will become simply redundant. On the other hand, if empathy, intuition, and relativism are still reserved for people, then for many clients - both in counselling and in court representation - this "human factor" will speak in favour of the human being rather than the cool morality of an artificial mind<sup>39</sup>.

##### *5. Instead of a Summary: Why Changes to Natural Intelligence Are Necessary*

It is a truism to say that the law does not keep up with technology, but it is equally obvious nowadays to say that the human mentality, in particular the attitude to rapidly occurring changes, also "does not keep up" with technological development. The necessary features of a lawyer of the future should therefore be: open mind, creativity, interdisciplinary approach to the profession, acquiring at least basic knowledge in such areas as information technology, machine learning, ethics, philosophy, psychology and neurobiology. Also essential are the ability to adapt to changing conditions and constant learning. Lawyers of the future will need to demonstrate emotional intelligence and a deep understanding of how technology can help achieve their clients' goals. These qualities and skills will certainly be more valuable than formal knowledge<sup>40</sup>.

Regardless of which AI solutions the future lawyers will use, this profession will require digital skills that include knowledge of IT technologies to a level much more advanced than the use of MS Office, as well as the ability to use AI-based *LegalTech* tools or even to provide legal assistance in cooperation with a highly autonomous AI. Lawyers of the future may not need to be able to programme, but it will undoubtedly be necessary for them to understand the technical aspects of the algorithms and functionality of AI solutions in order to effectively advise clients. In particular, future lawyers will need to know how to assess the strengths and weaknesses of individual solutions, their compliance with the law and ethical princi-

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39 Ian McEwan, *Maszyny takie jak ja*, (Albatros 2019) 3852, 4410 .

40 Anthony E. Davis, 'The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence' (American Bar Association, 2 October 2020) <[https://www.researchgate.net/publication/340322409\\_The\\_Future\\_of\\_Law\\_Firms\\_and\\_Lawyers\\_in\\_the\\_Age\\_of\\_Artificial\\_Intelligence](https://www.researchgate.net/publication/340322409_The_Future_of_Law_Firms_and_Lawyers_in_the_Age_of_Artificial_Intelligence)> accessed 4 August 2021.

ples.<sup>41</sup> Probably many lawyers will remain only technology consumers, but this may not be enough. Ultimately, it will be necessary to find new roles, adequate to the market needs, with specialisations such as law engineering, legal project management and creating *LegalTech* tools.<sup>42</sup>.

The way a law firm is managed will also change. Using *LegalTech* solutions is not without risks, so it will be necessary to provide the so-called *assured-AI*. The AI systems that the lawyers of the future will use must be designed and constantly verified in terms of reliable operation and cybersecurity. In addition, it is imperative that they will be fully predictable, controllable and at the same time seamlessly integrated with the IT systems used so far. The challenges of choosing tools or systems to ensure such compliance will be one of the important tasks for the managing partners of the law firm of the future<sup>43</sup>.

Ethical and regulatory issues related to risk management in the provision of legal services with the use of AI cannot be overlooked. In the context of compliance with the principles of professional ethics and professional responsibility, one should take into account such issues as algorithmic bias of AI systems, the lack of transparency and explainability of algorithms<sup>44</sup>, carrying out audits of algorithms, the lawyer's responsibility for autonomous decisions AI "employed" in the law firm or the lawyer's failure to apply the recommendations of the AI system and ensuring that the use of AI solutions does not pose a threat to the obligation of profes-

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41 Cf. the certificate of ethical compliance proposed in the EP Resolution of October 20, 2020 on a framework for the ethical aspects of artificial intelligence, robotics and related technologies (2020/2012 (INL)).

42 Armour, Parnham, Sako (n 7) 65.

43 In this context, it is important to develop an AI certification system. The American *Institute of Electrical and Electronics Engineers Standards Association* (IEEE SA) has launched a program called the *Ethics Certification Program for Autonomous and Intelligent Systems* (ECPAIS), which aims to create specifications for the certification processes of autonomous and intelligent systems (AIS). In the White Paper on Artificial Intelligence, published by the European Commission in February 2020. It was indicated that in the case of high-risk AI systems, compliance assessment should be mandatory, and the assessment system will be based on compliance assessment procedures already known in the EU (e. g. Cybersecurity Act) taking into account the specificity of AI. On the other hand, with regard to AI systems that do not qualify as "high risk", the European Commission proposed the possibility of establishing a voluntary labelling scheme. Cf. the EC proposal of Artificial Intelligence Act.

44 More on this topic: Gabriela Bar, 'Przejrzystość, w tym wyjaśnialność, jako wymóg prawny dla systemów Sztucznej Inteligencji' (2020) 20 Prawo Nowych Technologii 75ff.

sional secrecy. Perhaps the right solution to these problems would be to introduce a system of conformity assessment (digital certification) for lawyers<sup>45</sup>.

Without forgetting the risks associated with the use of AI, the lawyer of the future will use it or collaborate with it, creating more for less<sup>46</sup>, providing high-quality services, more accessible, but at the same time tailored to the client's needs<sup>47</sup>.

The future is now. We can see its primroses. There is no doubt that we will not function in the future as a lawyers of the second decade of the 21st century. The lawyer of the future will be an innovator, always seeking, using the achievements of various fields of science, cooperating with experts in the field of the newest technologies, including artificial minds, imagining the impossible and open to continuous development<sup>48</sup>.

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45 The project for digital certification of lawyers was submitted to the European Commission by the General Council of Spanish Lawyers (CGAE) as an idea for the future implementation of artificial intelligence or DLT in legal professional organizations. However, according to the information included in the EC Report "Study on the use of innovative technologies ...", this is an idea at a very early stage, with no further progress in its implementation. See (n 11) 176.

46 Susskind (n 1) 16.

47 More on the future of legal services: John Flood and Lachlan Robb, 'Professions and Expertise: How Machine Learning and Blockchain are Redesigning the Landscape of Professional Knowledge and Organisation' (2018) 18-20 Griffith University Law School Research Paper <<https://ssrn.com/abstract=3228950>> accessed 19 January 2021; Mark McKamey, 'Legal Technology: Artificial Intelligence and the Future of the Law Practice' (2017) 45 APPEAL 22 Review of Current Law and Law Reform <[ssrn.com/abstract=3014408](https://ssrn.com/abstract=3014408)> accessed: 19 January 2021; Michael Legg and Felicity Bell, 'Artificial Intelligence and the Legal Profession: Becoming The AI-Enhanced Lawyer' (2019) 38(2) University of Tasmania Law Review 59, <[ssrn.com/abstract=3725949](https://ssrn.com/abstract=3725949)> accessed: 19 January 2021.

48 Escajeda (n 19) 520.



# LegalTech in a Law Office in the context of Standardization and Autonomic Intelligence

Michał Wódczak

## 1. Introduction

In the light of the discussions accompanying the undoubted multitude of aspects behind the concept of *LegalTech* analyzed from a futuristic perspective, basically covering not only the operation of a law firm office per se, but, in a holistic sense, also broadly understood processes, such as the creation and application of law, or even the interpretation thereof, one may consider certain analogies with the works ongoing over many years on convergence and automation of telecommunications systems, where the concept of autonomic intelligence<sup>1</sup> is introduced under the umbrella of the *Future Internet*, going even beyond what is expected from artificial intelligence. Due to an extensive nature of this phenomenon understood in such a way, it seems necessary to explore this issue in terms of standardization<sup>2</sup>, which, especially in a historical understanding, may provide all the desirable directions necessary for a proper placement of not only the legal aspects, but also the related technological factors.

## 2. Legal Services and Standardization

According to factual circumstances, with the passage of time one could discern a conspicuous alteration in the business model<sup>3</sup> applicable to the operation of modern law offices, which is related to the more and more

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- 1 The concepts contained in this work, apart from references to specific citations, have been outlined on the basis of the monograph Michał Wódczak, *Autonomic Intelligence Evolved Cooperative Networking* (Wiley 2018), as well as the lectures carried out by its author under the umbrella of the *Samsung-SGH Business Course* organized in cooperation with Warsaw School of Economics.
  - 2 Richard Susskind, *Tomorrow's Lawyers. An Introduction to Your Future* (Oxford University Press 2nd edn, 2017) 134.
  - 3 Tanel Kerikmäe and others, 'Legal Technology for Law Firms: Determining Roadmaps for Innovation' (2018) Croatian International Relations Review 105.

advanced processes of task automation that so far have seemed to be typically a human domain, just to mention the entire spectrum of solutions related to the exchange of electronic documents. As a consequence, such a conversion seems to naturally translate into a new approach to the model of legal service provisioning<sup>4</sup>, to be organized not exactly literally "in the law office", but rather "by the law office", allowing to offer a better value for a lower price, and, at the same time, to obtain the so much desirable competitive advantage<sup>5</sup>. However, such an approach is connected with specific challenges, since two, somewhat interweaving areas, are subject to a mutual change, both the one pertaining to legal business, and the one related to the technological operation of the same.

Given such a context, in principle, it appears fairly appropriate to adopt the assumption that computer systems dedicated to law offices exercising the *LegalTech* orientated approach should not display any closed nature, in the sense of limiting their operation to the area of one country only, but on the contrary, following the example of modern telecommunications systems, just to mention the 5G technology, should enable, in compliance with all the cybersecurity rules, cooperation on a cross-border, if not a global basis. Such a goal may be achievable by means of a standardization<sup>6</sup> carried out in a proper manner, as the omission or disruption thereof could have far-reaching consequences. Yet, in the case of such endeavors, there may be no shortcuts, the prove of which may be derived from the fact that the telecommunications systems adopted as the point of reference, where the autonomic intelligence is supposed to be applied, are still at the research and standardization stage.

Therefore, narrowing the scope of consideration down to the most appropriate *LegalTech* 3.0 stage, as well as taking into account the level of expansion and distribution of the aforementioned computer systems, which are supposed to support the work of a lawyer in the already highlighted aspects of their activity, it appears advisable to place special emphasis on the extremely important role of organization of the said standardization process, since today's level of advancement of telecommunications systems

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4 Qian Hongdao and others, 'Legal Technologies in Action: The Future of the Legal Market in Light of Disruptive Innovations' (2019) Sustainability 9.

5 Deloitte Legal, 'What's your problem? Legal Technology' (2018) Legal Management Consulting 4.

6 From now on, unless a technological understanding has been clearly indicated, standardisation shall be perceived as a dual process, pertaining to the area of *LegalTech*, encompassing both the realm of legal activity and the technological solutions supporting such an activity.

is a derivative of lessons from not too distant history, when in the 1980s it became conspicuous that globalization requires universal solutions. As a result, a Reference Model for Open Systems Interconnection<sup>7</sup> was born, the degree of complexity of which, as well as the fluctuations at its research stage, resulted in the fact that standards were not developed at the right time, which is best illustrated by the concept of the so-called apocalypse of two elephants<sup>8</sup> (Fig. 1).

Despite the relatively expressive<sup>9</sup> name, the concept of the apocalypse of two elephants is, in fact, intended to illustrate the mutual relationship among three phases, with an emphasis on the standardization stage being located in the middle, while, at the same time, remaining in relation to the research and investment stages, allowing the avoidance of two significant risks. On the one hand, too early standardization, i.e., before the research works have been completed, would undoubtedly lead to potential solutions that could take into account only some of the demands of respective participants of such a process, which could result in attempts at introduction of incompatible products. On the other hand, too late standardization, i.e., overlapping at least partially with the investment stage, would similarly result in incompatible products that would fail to address the demands of all interested parties alike, although this time it would result from a lack of timely arrangements.

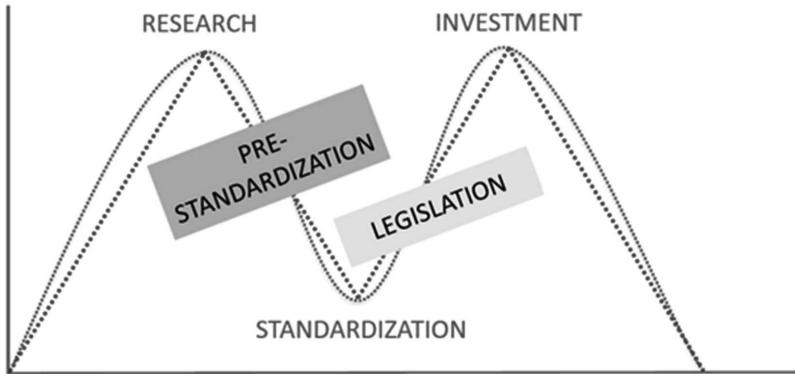
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7 ITU-T, ‘Series X: Data Networks and Open System Communications. OSI Networking and System Aspects – Efficiency’ (1998) ITU-T Recommendation X.630 10.

8 Andrew S Tanenbaum and David J Wetherall, *Computer Networks* (Prentice Hall 2011) 51.

9 Due a specific nature thereof, the original naming from Andrew S Tanenbaum and David J Wetherall, Computer Networks has been maintained, while possibly, from a semantic perspective, the “collision of two elephants” could be a more adequate term.

Fig. 1. *Apocalypse of two elephants*



Source: Own elaboration<sup>10</sup> based on Andrew S Tanenbaum and David J Wetherall, *Computer Networks*, (Prentice Hall 2011) 52.

At the same time, one should note that this model, also in relation to *LegalTech*, is not intended to deprive the above-mentioned product recipients of the possibility of using the advantages and benefits of competition, yet solely to ensure its cost-optimal nature. In other words, the currently prevailing trend on the market of telecommunications devices, manufactured for mobile operators, follows the assumption that devices coming from any vendor should work together without any difficulties. Therefore, standardization refers to the interfaces between functional blocks<sup>11</sup>, typically referred to as black boxes, whose operating principles are often protected by patents, at the same time providing a field for obtaining the aforementioned competitive advantage, resulting, for example, from the use of more advanced algorithms. One should expect that such a model shall be assumed for the specifications created for autonomic distributed systems dedicated to *LegalTech*.

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10 The source version does not contain the pre-standardisation and legislation stages.

11 Michał Wódczak and others, 'Standardizing a Reference Model and Autonomic Network Architectures for the Self-Managing Future Internet' (2011) 25(6) IEEE Network 51.

### *3. Technology and Legislation*

Despite emphasizing above that standardization, as understood from the perspective of the functioning of a law office and embedded in a broader context of the entire legal ecosystem, is a dual process, i.e. it should be approached both from the point of view of legal services and technological solutions, one shall realize that the general assumptions regarding such a process remain invariable. A possibly good example could be constituted by a legal service pertaining to the preparation of a contract of a relatively common nature, where the law office could apply an approach based on a template<sup>12</sup>, which would certainly reduce the unit cost in relation to a completely "bespoke" document, although equivalent in terms of content. However, only the circulation of such documents in electronic form, for example, for the purpose of the cooperation between or among two or more law offices, in the case of handling large-scale cases, could reveal the true essence of standardization.

In other words, by a complete analogy to the technological viewpoint, which is undoubtedly a derivative of the interactive or rather transactional model of cooperation, created in this way by a network of law offices, one comes to a situation in which entities, be it legal or technical, exchange information in a known format that is a direct implication for the existence of standardized "interfaces" between or among related lawyers or devices. Given such an approach, a lawyer of a given law office, being subject to exploiting specific experiences or established practices, yet different from equivalent "resources" applied by lawyers of other law offices, shall be perceived as performing their part of the overall undertaking in a way that reflects or imitates the functioning of networked devices<sup>13</sup>, which often may be operating in accordance with proprietary algorithms, so that, on a certain level of abstraction, it shall be possible to offer both services and functionalities adequate to expectations.

In general, the approach outlined above has not been successful from the very outset, and, in reality, it could only become implemented over the years, as exemplified by the aforementioned Reference Model for Open Systems Interconnection, in the case of which one may only recently conclude that present telecommunications systems are becoming the actual incarnation thereof. Paradoxically, the assumptions made several decades ago could be finally fulfilled, which may be a kind of warning for *LegalTech*

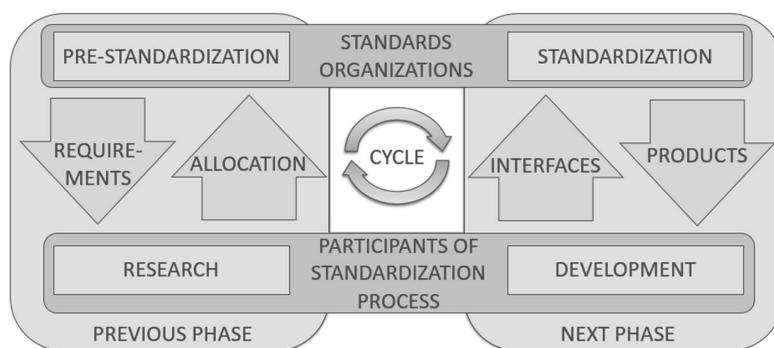
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12 Susskind, (n 2) 28.

13 Michał Wódczak, *Autonomic Cooperative Networking* (Springer 2012) 62.

solutions, although the acquired knowledge allows the introduction of the pre-standardization stage, whose role is to soften the connection between the first two ones (Fig. 2). Unfortunately, modern telecommunications systems pose new challenges related to cybersecurity on an unprecedented scale, which is attempted to be addressed through appropriate legislative work at the European Union<sup>14</sup> level, as well as separate legislative processes of the Member States.

Fig. 2. Role of pre-standardization



Source: Own elaboration<sup>15</sup> initially presented under the umbrella of *Samsung-SGH Business Course*

The context introduced in this way is intended to emphasize the fact that the concepts of the future developed for the needs of the area of *LegalTech* will be able, given the technical side, to capitalize on the already complete standardization achievements developed for the needs of telecommunications systems, as well as to emphasize the challenges not only in the area of standardization, related to specific technical requirements, but most of all, to stress the legislative demands, which, moving with the times, shall also become reflected in the aforementioned concept of the apocalypse

14 Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 [2019] OJ L151 (Cybersecurity Act).

15 In the case of presented approach one may realize that due to their advancement at the standardisation stage more development than typically research works shall be referred to.

of two elephants. While the exact location of the legislative stage could require a broader discussion, and it will certainly become clear in a longer term, it is already possible to point out, without hesitation, that this stage shall precede the investment stage and, at the same time, overlap with the standardization one, creating somewhat a mirror image of the pre-standardization phase, as shown in Fig. 1.

#### *4. Legal Processes and Autonomics*

Moving to the aspects related to the potential application of the principles governing the concept of the autonomic intelligence mentioned at the beginning to *LegalTech* systems, as well as to show the potential of this approach in synergy with solutions based on artificial intelligence, it appears necessary to properly understand the notion of autonomics<sup>16</sup> in the first place. A fairly common way of defining such an autonomic system is to indicate and underline the possibility thereof to function without any need for an external support, which, as it will become conspicuous soon, may not be an unambiguous definition at all, however, any inaccuracies of the same may be relatively easily explained on the basis of workings of the English language, where there are several similar concepts characterized by similar semantic fields. In fact, those are the slight semantic differences to be responsible for making the resulting ambiguities result in the misunderstanding of the idea of autonomics.

Therefore, the aforementioned autonomic system, also implemented for the purposes of automating legal processes, shall be perceived as imitating the functioning of the biologically-rooted autonomic nervous system in a form similar to what may be found in the human body, although under the assumption of a significantly lower level of complexity thereof, at least in relation to what is attainable by the technology of today. Fairly frequently one may also come across a more elevated form of introducing the definition of autonomics, where it becomes visualized by analogy to the "behavior" of an ant colony<sup>17</sup>. However, an autonomic system should not be confused with either an autonomous system or an automated system, because, in the first case, it is usually referred to as a part of a larger system

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16 Michał Wódczak, *Autonomic Computing Enabled Cooperative Networked Design* (Springer 2014) 3-4.

17 Jeffrey O. Kephart and David M Chess, 'The Vision of Autonomic Computing' (2003) 36(1) IEEE Computer 44.

that can function "independently", so in the sense of being "detached", while, in the second case, it is thought of more as a system based on the processing of computer scripts.

As a result of said ambiguities, somewhat a synonym for the concept of autonomics in the form of self-management was also introduced, which immediately highlights the difference between the above-mentioned types of systems. Moreover, bearing in mind the earlier reference to possible synergy with artificial intelligence, it is also worth noting, and this will be additionally confirmed by the architectural assumptions adequate for *LegalTech* systems as mentioned below, that even the concept of autonomic self-learning<sup>18</sup> systems, referred to in legal literature, also seems not to entirely exhaust the assumptions behind autonomics in the very sense in which it has been introduced in this work. These assumptions are profoundly rooted in the Generic Autonomic Network Architecture<sup>19</sup> based on the so-called mechanism of Hierarchical Control Loops (Fig. 2), which will be also applicable to the discussion of the concept of autonomics in relation to the functioning of a law office.

In general, the architecture under discussion is based on the assumption that there are four levels of said Hierarchical Control Loops<sup>20</sup> located at the protocol level, function level, node level, and network level. In each case, remaining in line with the generalized concept of such a Hierarchical Control Loop as outlined in Fig. 3, the superior or controlling role is attributed to and performed by the so-called Decision Elements. As such, Decision Elements can enter into two types of mutual relations in the sense of becoming dependent either vertically or horizontally, which, in the first case, shall be perceived as a relationship of being superior or subordinate, while, in the second case, shall translate into a relationship of a mutual dependence or, rather, being concurrent. It is worth noting that, as far as the technical aspects are concerned, each level is standardized in

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18 Expert Group on Liability and New Technologies – New Technologies Formation, ‘Liability for Artificial Intelligence and Other Emerging Digital Technologies’ (2019) European Commission 25.

19 ETSI-GS-AFI-001, ‘Autonomic network engineering for the self-managing Future Internet (AFI); Scenarios Use Cases and Requirements for Autonomic/Self-Managing Future Internet’ (ETSI Group Specification 2011) 6.

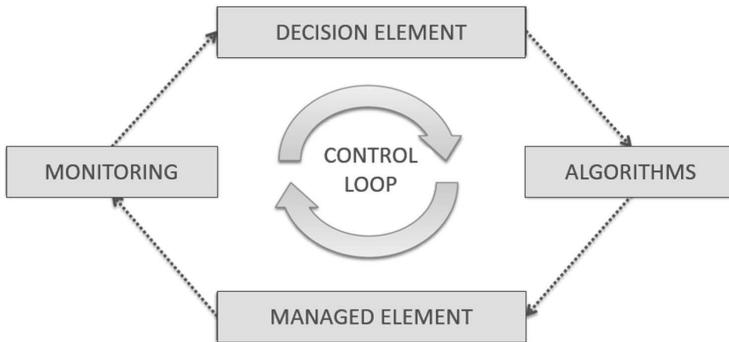
20 ETSI-GS-AFI-002, ‘Autonomic network engineering for the self-managing Future Internet (AFI); Generic Autonomic Network Architecture (An Architectural Reference Model for Autonomic Networking, Cognitive Networking and Self-Management)’ (ETSI Group Specification 2011) 13.

detail, which may facilitate its transposition to a computer system intended to support a pertinent network of law offices.

##### *5. Agent Systems and Definition of a Thing*

However, in the case under discussion, apart from the technical dimension, largely boiling down to a communication system, there remains the already highlighted strictly legal aspect, which requires some kind of a mapping of the principles of functioning of a future law office in a broader context, where at least some of the legal competences can be expected to be replaced by robotic systems. It seems that due to the fact that the logical structure of the network of such law offices would coincide with the hardware infrastructure of the related computer system, the models of autonomic control of each of them would not so much function in parallel, but could even interweave on the basis of synergy, yet a correct design of such a of such a system would require to carry out, in the first place, the research stage, and only after the appropriate critical mass has been achieved, to commence the standardization path, preferably taking into account pre-standardization.

Fig. 3. Autonomic Hierarchical Control Loop



Source: Own elaboration<sup>21</sup> based on ETSI-GS-AFI-002, 'Autonomic network engineering for the self-managing Future Internet (AFI); Generic Autonomic Network Architecture (An Architectural Reference Model for Autonomic Networking, Cognitive Networking and Self-Management) (2013) ETSI Group Specification 44.

The intelligence of such an autonomic system would consist precisely in the assumption that its individual Decision Elements would have a significant freedom of action and could theoretically not be able to stop certain "behaviors" without intervention, especially should appropriate principles of operation be not assigned authoritatively. The easiest way to explain this phenomenon would be to refer to the operation of the human organism, or more specifically its autonomic nervous system, in the case of which, for example, a stressful situation would cause an accelerated heart rate, which, unfortunately, could not be remedied only by the act of thinking, i.e., by using the brain, but which could spontaneously disappear in an unknowing manner. The aforementioned ant colony would also function similarly, so that encountering an obstacle while moving, it would not

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21 The presented high level view of the Hierarchical Autonomic Control Loop shall be perceived as a significantly simplified version thereof, prepared in order to outline its generalised workings. Such an approach is advantageous because it allows to highlight the difference between autonomic intelligence and artificial intelligence, where the latter would be limited to residing within one or more Decision Elements, while the former is based on the interaction of an entire arrangement of such Hierarchical Autonomic Control Loops.

stop locally, but continue as a consistent whole, remaining in an amazing symbiotic relationship with the environment.

Most obviously, one may consider certain "safety valves" that would allow the administrator or operator, who in principle should only supervise such a system without interfering with its workings, to perform the operation of opening<sup>22</sup> a Hierarchical Control Loop to perform any required adjustments, should there arise a need for doing so. In this context, an important issue from the legal point of view could be related to a certain kind of functional correspondence between the autonomic system using Decision Elements and an agent system<sup>23</sup>. This is so as in the case of a telecommunications operator's network, at the current stage of technology, one refers almost exclusively to completely virtual entities, i.e., occurring only in the form of software, while considering the application of the introduced architectural concepts directly to the area of *LegalTech*, one could possibly imagine the use of robots, which could raise reasonable questions about their actual legal status.

The emergence of such a question should be interpreted as a harbinger of the aforementioned need to introduce the concept of legislation into the discussed process of standardization of technological systems, while maintaining previous references to the stages of research and investment. After a more in-depth analysis, it may transpire that depending on the features attributed to the agent in question, it can consequently be considered not only as an object, but also as a subject of a legal relationship, and thus qualify, in a large generalization, either as an artificial agent or a moral agent, where, in the first case, the imitation of human intelligence may seem to be sufficient only to exhaust the definition of a thing within the meaning of Art. 45 of the Polish Civil Code, for example, while in the second case, the basis for classification is the recognition of the autonomic flavor of the agent which is related to the fact that it is not dependent on human decisions.

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22 ETSI, 'Generic Framework for Multi-Domain Federated ETSI GANA Knowledge Planes (KPs) for End-to-End Autonomic (Closed-Loop) Security Management & Control for 5G Slices, Networks/Services' (2020) 6 White Paper 12.

23 Frances MT Brazier and others, 'Agents and Service-Oriented Computing for Autonomic Computing: A Research Agenda' (2009) 13(3) IEEE Internet Computing 83.

## *6. Conclusion*

All in all, despite the existence of an evident, although somewhat futurological, mutual correspondence between the network of law offices and the network of computer entities, it is supported by in the strict sense, one should not forget about technical aspects mostly attributable to the legal side, such as for example datafication, algorithmic solutions, or distributed ledgers which should undoubtedly be integrated into the technical part, too. In a sense, one may be under an impression that the degree of conceptual complication, not to mention any possible deployment, may be surprisingly high in the case of the synergistic approach under consideration. Nevertheless, it also transpires that there is no escape from automation in one form or another, and success can only be brought about by a conscious deployment of a well-prepared action plan with a standardizing tone, constructively drawing on the experience of previous years as it has been already indicated.

# LegalTech in the Judiciary: Technological Developments and the Future of the Court System

*Mariusz Załucki*

## *1. Introduction*

Today's judiciary is a well-established structure with a variety of courts of varying jurisdiction, in which traditionally sit persons holding the office of a judge. A judge is independent in his actions, and the only limit to his actions is the binding law. The latter, as we know, has been expanding on a large scale in recent years. This has led to a situation in which the office of a judge and the way he acts should be viewed differently from the way it was a dozen or so years ago. Admittedly, this does not yet involve changes to the constitutional foundations for the performance of the office of a judge, which, as it can be assumed, may soon appear if only in connection with calls for the replacement of traditional judges with algorithms in deciding certain categories of cases. This axis of a change in views is currently rather related to the methodology of exercising the office of a judge. Undoubtedly, the world of new technologies is also transforming the judiciary, and the benefits associated with this world can and do serve the administration of justice.<sup>1</sup>

Efficient adjudication of court cases is one of today's elements of the constitutional standard of the right to a court, often referred to as the so-called "fair trial", in connection with the jurisprudence appearing not only against the background of individual Constitutions, but also, at least from the point of view of European countries, against the background of Article 6 of the European Convention on Human Rights.<sup>2</sup> This standard,

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1 Tania Sourdin, 'Judge v. robot? Artificial Intelligence and judicial decision making' (2018) 4 UNSW Law Journal 1114.

2 cf Elsa Toska Dobjani, 'Length of proceedings as standard of due process of law in the practise of the Constitutional Court of Albania' (2016) 13 Academicus. International Scientific Journal 161. Martin Kuijer, 'The right to a fair trial and the Council of Europe's efforts to ensure effective remedies on a domestic level for excessively lengthy proceedings' (2013) 13 Human Rights Law Review 777-794.

developed over the years, has often been disturbed in some systems. These distortions, which today make up one of the basic deficiencies of the justice system - the lengthiness of court proceedings - are the motive for most of the changes in procedural regulations, whose basic task, at least from the perspective of recent years, is to speed up the examination of cases, to reduce their duration. In many countries, key indicators of the length of court proceedings have deteriorated in recent years. This must mean lowering of standards and widespread dissatisfaction, and therefore provoke a search for solutions which could improve efficiency.<sup>3</sup>

It should be emphasised that lawyers from all over the world are considering how to shape the performance of judges so that it can meet public expectations.<sup>4</sup> In the European judicial area currently in force, which is based on dialogue and mutual recognition of judicial decisions, the values that must guide the exercise of judicial functions must meet certain standards. Efficiency and speed are standards which affect the functioning of the entire justice system, if only in the context familiar from, for example, the Council of Europe and European Union regulations. These standards already recognise the problem of new technologies, the opportunities and threats which these may bring to the justice system.<sup>5</sup> Today's court is very different from the one that operated just a few decades ago. A prime example of this is the availability of online case law, which means that today anyone interested can easily access it. If it were not for modern technology, such a possibility would not exist; one would still have to browse through thousands of pages of library catalogues or various archives.

Technological changes can also be seen in individual court procedures. Procedural rules have undergone significant changes in recent years. Typically “analogue” court proceedings are already becoming “digital”. This was accelerated in connection with the COVID-19 pandemic, when the work of the courts was suspended for some time and a large-scale search began for solutions that could provide a panacea for the orders of social

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3 cf Nicholas Mouttotos, ‘Reform of civil procedure in Cyprus: Delivering justice in a more efficient and timely way’(2020) 2 Common Law World Review 99.

4 cf Magdalena Siwek, ‘Prawa i obowiązki sędziego’(2006) 13 Studenckie Zeszyty Naukowe 37. See, also Ewa Łetowska, ‘Dekalog dobrego sędziego’(2016) 1 Krajowa Rada Sądownictwa 5-8.

5 See The Report of the European Commission: European Commision, ‘Study on the use of innovative technologies in the justice field. Final report” (Publication Office European Union 2020) "Study on the use of innovative technologies in the justice field", (Brussels, September 2020).

isolation in force during the pandemic.<sup>6</sup> There are many such solutions, both in the practical functioning of courts and in the conceptual phase. They may have, and often do have, an impact on the activities of courts and the parties involved. The experience of several countries shows that the bold use of non-traditional solutions can have very desirable effects.<sup>7</sup> Such solutions include those based on artificial intelligence. Therefore, new technologies in the administration of justice, LegalTech, is a path from which there is no turning back today. This will be the subject of the following remarks.

## *2. Experience with LegalTech in the judiciary*

Focusing on the current state of the use of technological tools in the administration of justice, it should be recalled that LegalTech tools can be divided into several groups. Many indicate that, in fact, today one can speak of at least three “waves” of LegalTech.<sup>8</sup> It should be recalled that LegalTech 1.0 refers to the technology including software that supports the activities of lawyers as professionals. Thus, it refers to the long-known IT systems for office organisation and operation, document circulation, legal information systems, or certain services available online, such as videoconferencing, online communication with courts, or even online hearings. LegalTech 2.0 is already much more advanced technology, not only supporting the work of judges and clerks, but also replacing people, where in the justice system we can talk about, among others, automation of certain activities. Finally, LegalTech 3.0 are solutions that are aimed not so much at automation and replacing humans as at the possibility of making autonomous decisions by technological solutions, which is primarily related to the development of artificial intelligence.<sup>9</sup>

Looking at the above, one can in principle independently assess the implementation of the various available LegalTech tools in a given legal system. Looking at the above, e.g. from the perspective of the Polish

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6 David Freeman Engstrom, ‘Post-COVID courts’ (2020) 68 UCLA Law Review Discourse 246 .

7 Robert Size, ‘Taking advantage of advances in technology to enhance the rule of law’ (2017) 91 Australian Law Journal 575.

8 cf Dariusz Szostek, in Dariusz Szostek (ed) *Legal tech. Czyli jak bezpiecznie korzystać z narzędzi informatycznych w organizacji, w tym w kancelarii oraz dziale prawnym* (C. H. Beck 2021).

9 *ibid.*

judiciary, transformations connected with the first stage of LegalTech development are noticeable, but there are no wider attempts to apply further benefits of new technologies, despite subsequent IT projects aimed at improving the judiciary that have been appearing for some time now. The situation is similar in most European countries. As a rule, judges have legal information systems available, and they use an electronic system for management of hearings. In practice, there are, *inter alia*, so-called court information portals, solutions for persons having the status of a party to proceedings or an attorney, enabling direct online access to information resources contained in court files. There is a number of tools supporting the adjudication process which should be qualified as LegalTech 1.0 solutions.<sup>10</sup>

In the practice of the judiciary, however, more and more voices are being raised about the need to cross further barriers and perhaps replace, at least in some cases, traditional judges in the future by algorithms using artificial intelligence skills.<sup>11</sup> Such a possibility should certainly not be underestimated, especially as the first results of research and experiments (what will be presented below), at least for some, seem promising.<sup>12</sup>

The implementation of LegalTech tools in the judiciary takes place in stages. Today, it is not a problem to use an IT system in court, as it has become an everyday practice basically everywhere. Today, the important problem is the effective use of such systems, which could be seen in the world at least in connection with the COVID-19 pandemic. It would be impossible to list all the examples of the use of LegalTech here, but at least one example shows where the judicial world is heading. As already mentioned, LegalTech includes, *inter alia*, the possibility to organise part of a trial by videoconferencing. Until the COVID-19 pandemic, in different legal systems, the state of implementation of various solutions related to this was at different stages. The pandemic made the use of such tools more and more daring. This was not a question of the availability of technical solutions, but rather of the legal possibility of using these solutions for the purposes of cases proceeded by the courts. Therefore, it should be

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10 Mariusz Załucki, in Dariusz Szostek (ed) *Legal tech. Czyli jak bezpiecznie korzystać z narzędzi informatycznych w organizacji, w tym w kancelarii oraz dziale prawnym* (C. H. Beck 2021).

11 cf Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019).

12 cf Mariusz Załucki, 'Wykorzystanie sztucznej inteligencji do rozstrzygania spraw spadkowych' in Luigi Lai and Marek Świerczyński (eds) *Prawo sztucznej inteligencji* (C. H. Beck, 2020) 145-155.

emphasised that an important change in recent months that has occurred in the world in relation to the functioning of the judiciary is the broad possibility of holding the so-called trials at a different location by means of audio-video technology (videoconferencing). Legislative changes in individual countries have given rise to the use of such instant messengers as Zoom, Skype, Facetime, MS Teams and Google Meet for procedural activities. As a rule, hearings were conducted by means of technical devices allowing for their remote execution with simultaneous direct transmission of images and sound, with the reservation that the persons participating in them do not have to be present in the court building (including another court, which was the subject of previous regulation in some states). In principle, therefore, court hearings as a result of these changes may be held online in many countries, unless holding them in the traditional manner does not pose an excessive risk to health. Against this background, one wonders whether this improvement will remain in individual court procedures even after the pandemic period. At least some people expect this. Such a change in judicial procedures does not happen often.<sup>13</sup>

The above means that court procedures have recently undergone a significant transformation and the way courts operate today is indeed different from how it was just a few years ago. The need to incorporate the technological world into the legal world is undeniable. It is to be expected that this interpenetration of these worlds will continue. An effective and efficient justice system is a key factor influencing the functioning of the state, particularly in the area of security and economic development. Widely understood computerisation, as LegalTech tools can be understood, is certainly a way to improve the functioning of the justice system. However, computerisation understood as a support is not everything. More and more often, the possibility of replacing a human being, at least at certain stages of case recognition before a court, is being considered.

### *3. AI in the judiciary*

The impulse for further discussion in this area may be the results of a test which were published in 2016, to which 584 cases pending before the European Court of Human Rights were subjected. The algorithm, after analysing the documents, predicted 79 % of the decisions of this court concerning claims under Article 3 (prohibition of torture, inhuman and de-

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13 Załucki (n 10).

grading treatment), Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights.<sup>14</sup> The results of this test have resonated widely in the world literature and have given impetus to undertake further research, which is also promising.<sup>15</sup> Undoubtedly, the level of complexity of the matter to be resolved and the complexity of the issues raised allows an optimistic outlook on the future from the perspective of the possibility to create an algorithm for resolving less complicated cases, which are most often the subject of adjudication before a common court.

A similar test, the results of which were published in 2017, was conducted in the United States of America. Here, in turn, artificial intelligence analysed more than 28,000 cases pending before the US Supreme Court on the basis of the created algorithm.<sup>16</sup> The algorithm was able to predict 70.2 % of cases decided between 1816 and 2015.<sup>17</sup> At the same time, the spectrum of cases was much broader than in the case of the test concerning the application of the standards of the European Convention on Human Rights in specific cases. This is certainly one of the next impulses, a motivation to try to further search for alternative methods of judging disputes. Therefore, it is not surprising that also this experiment was widely echoed in the scientific space.<sup>18</sup>

The above tests were primarily based on a natural language processing method, where an artificial intelligence predictive model operating on text data was used. Large amounts of data were analysed to accurately predict the actual outcome. The results of the tests are interesting in that a large proportion of the errors related to similar legal standards, where only the nuances of the jurisprudence decided on a different outcome in reality. It should therefore be noted that a system dealing with the automation

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14 cf Nikolos Aletras, Dimitrios Tsarapatsanis, Daniel Preotiuc-Pietro and Vasileios Lampos, 'Predicting judicial decisions of the European Court of Human Rights: a natural language processing perspective' (2016) 2 PeerJ Computer Science 93 .

15 Masha Medvedeva, 'Using machine learning to predict decisions of the European Court of Human Rights' (2020) 28 Artificial Intelligence and Law 237-266.

16 cf Daniel Martin Katz, Michel J. Bommarito II and Josh Blackman, 'A General Approach for Predicting the Behavior of the Supreme Court of the United States' (2017) 3 PLOS ONE.

17 *ibid.*

18 cf., eg.: Haoxi Zhong, Zhipeng Guo, Cunchao Tu, Chaojun Xiao, Zhiyuan Liu and Maosong Sun, 'Legal Judgment Prediction via Topological Learning' (Proceedings of the 2018 Conference on Empirical Methods in Natural Language Processing, Brussels 2018) 3540-3549.

of the analysis, understanding, translation and generation of natural language by a computer in the context of the processing of specific real-life judgments could be an interesting starting point for further research.<sup>19</sup> Certainly, in turn, such experiments open up the discussion of whether the traditional judge can be replaced by a computer. For many this seems tempting, although for obvious reasons this is not yet (and may never be) the standard that individual legislators are aiming for. Nevertheless, in the scientific discussion, it is becoming more and more courageous to formulate theories according to which, at least in certain categories of cases, it seems possible.<sup>20</sup>

Tests such as the ones indicated above show that artificial intelligence can be an interesting tool to assist in the administration of justice, and may one day be able to replace “real” judges. In fact, this idea is not entirely new, as already in the 1970s concepts related to this appeared.<sup>21</sup> Recently there has been a growing buzz about a project originating in Estonia, where the first steps are being taken by a mechanism that assists judges by collecting certain data necessary to decide a given case and analysing it so as to decide the case in the most just manner.<sup>22</sup> This mechanism is intended, among other things, as a response to the courts' inability to cope with the growing number of cases, so one of the motivations for working on this solution is the desire to improve the efficiency and effectiveness of case resolution. Its first task is to resolve the so-called minor cases, where the value of the subject of a dispute does not exceed the amount of 7000 EUR.<sup>23</sup> Traditional judges are not involved in these settlements. The system is based on the parties providing documents supporting their positions, which are analysed by an algorithm which then issues the decision. Only an appeal against this decision is heard in the traditional way. It is

19 Oleg Metsker, Egor Trofimov, Sofia Grechishcheva, ‘Natural Language Processing of Russian Court Decisions for Digital Indicators Mapping for Oversight Process Control Efficiency: Disobeying a Police Officer Case’ (Electronic Governance and Open Society: Challenges in Eurasia, 5th International Conference, EGOSE 2018, St. Petersburg 2018).

20 See Sourdin, (n 924)1114; Mariusz Załucki, ‘Computers in gowns and wigs. Some remarks about a new era of judiciary’ in Laura Miraut Martin and Mariusz Załucki (eds) *AI and Human Rights*, (in print 2021).

21 cf Anthony D’Amato, ‘Can/Should Computers Replace Judges?’ (1997) 11 Georgia Law Review 1277–1301.

22 Eric Miller, ‘Can AI Be a Fair Judge in Court? Estonia Thinks So’ (WIRED 3 March 2019) <<http://www.wired.com/>> accessed 7 April 2021.

23 Franciska Z. Gyuranecz, Bernadett Krausz and Dorottya Papp, ‘The AI is Now in Session. The Impact of Digitalization on Courts’ (2019) 8.

therefore certainly another step towards taking seriously solutions of this kind based on artificial intelligence, where the involvement of a human judge is minor (minimised).<sup>24</sup> The Estonian solution is part of the Estonian strategy of digitizing public actions, and the first effects of using it also seem promising.

Another example of the use of artificial intelligence in the judiciary is the US-based system, the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), which assesses the risk of recidivism on the basis of 137 types of data.<sup>25</sup> The COMPAS software uses an algorithm to make this assessment. The system predicts, among other things, pre-trial risk, which is a measure of a person's potential to fail to appear and commit new offences while in custody. For this purpose, the system assesses, *inter alia*, current charges, pending charges, history of previous imprisonment, previous pre-trial failures, housing stability, employment status, social ties, or substance abuse, which, according to science, are the most significant indicators affecting the outcome of such risk. The system also performs risk assessments to predict new crimes after release from prison. It uses, among other things, a person's criminal history, associates, drug involvement and signs of juvenile delinquency as data. The system also makes it possible to predict the commission of violent crimes after release. To do this, the system uses data such as criminal history, history of non-compliance with the law in other ways, occupational problems, educational problems, age of the person on admission and age of the person on first arrest, among others. So far, the system has met with a rather enthusiastic reception, although it has of course also been subject to criticism. For example, the position of the Wisconsin Supreme Court emphasises that the COMPAS evaluation may be taken into account in sentencing, but that the limitations of the system must also be taken into account.<sup>26</sup> This opinion is interesting also in the context that the court concluded that the trial court's use of an algorithmic risk assessment in sentencing did not violate the defendant's due process rights, even though

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24 Tanel Kerikmäe and Evelin Pärn-Lee, 'Legal dilemmas of Estonian artificial intelligence strategy: in between of e-society and global race' (2020) *AI & Society* <<https://doi.org/10.1007/s00146-020-01009-8>> accessed 7 April 2021 .

25 Tim Brennan, William Dieterich and Beate Ehret, 'Evaluating the predictive validity of the Compas risk and needs assessment system' (2009) 1 *Criminal Justice and Behavior* 21.

26 State v. Loomis, 881 N.W. 2d 749, (Wisconsin 2016).

the methodology used to prepare the assessment was not disclosed to either the court or the defendant.<sup>27</sup>

Allegations of this kind are increasingly common in relation to similar solutions. It is stressed that the functioning of such a mechanism should be clear and access to the algorithm should be open. It is argued that since such algorithms are usually secret, they cannot be examined by the public and the parties involved, which may constitute a violation of the right to a fair trial.<sup>28</sup> It is also stressed, *inter alia*, that algorithms may be susceptible to various kinds of bias. In the case of COMPAS, a study showed, among other things, that the system did not treat persons of different race equally. The study showed that African-Americans were much less likely to repeat the same offence, while the COMPAS system showed such a result for Caucasians.<sup>29</sup> Without prejudging the effectiveness of the system, it should be noted that it raises certain controversies, which should undoubtedly be taken into account in the future, when designing analogous solutions.

Speaking of analogous solutions, it is worth mentioning the one operating in France, concerning the software for setting the amounts of severance payments for dismissals without just cause.<sup>30</sup> One of the reasons for seeking an algorithm-based solution was to limit excessive variability in case law. Indeed, the practice of the French courts to date in this regard has been far from uniform. The introduction of an algorithm based on various data has also proved to be a promising solution in this respect and a tool based on artificial intelligence is helpful for the adjudicator in a given case.<sup>31</sup> Interesting solutions also exist e.g. in China, where three internet courts operate (Hangzhou, Beijing, Guangzhou), in which the settlement of cases is based, among others, also on algorithms based

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27 Katherine Freeman, ‘Algorithmic injustice: How the Wisconsin Supreme Court failed to protect due process rights in *State v. Loomis*’ (2016) 5 North Carolina Journal of Law & Technology 75.

28 *ibid* 106.

29 cf Julian Angwin, Jeff Larson, Surya Mattu and Lauren Kirchner, ‘Machine bias’ (Pro Publica, 23 May 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>> accessed 11 March 2021.

30 Roseline Letterton, ‘L’accès numérique au droit’ (2018) 3 Annales des Mines 68-72.

31 Pierre Cahuc, Franck Malherbet and Julien Prat, ‘The detrimental effect of job protection on employment: Evidence from France’ (2019) Iza Institute of Labor Economics 1.

on artificial intelligence,<sup>32</sup> or where the “Shanghai Intelligent Assistive case-handling system for criminal cases - System 206” operates, which is useful for solving criminal cases.<sup>33</sup> Relevant tests are also being conducted in Brazil (Inova PJe).<sup>34</sup>

There are already many similar examples of using tools based on artificial intelligence. It is impossible to present them all in one place. However, looking at those mentioned as well as some of the solutions not presented here, one may be tempted to conclude that a place is slowly being created for the use of artificial intelligence in resolving certain categories of court cases. Support for the judiciary in terms of new technologies is no longer just about solutions that help a judge, the use of which cannot be overestimated, but also about the use of artificial intelligence alone, which can decide certain categories of cases instead of a judge. Particularly in the context of the COVID-19 pandemic, there has been a large-scale and intensive search for tools that could allow courts to function normally, eliminating at least some of the ills of their operation. Artificial intelligence is certainly a solution. However, it is still a solution that requires further research. So what can artificial intelligence do for the functioning of the courts?

#### *4. The potential of AI in the context of the functioning of the judiciary of the future*

There is no doubt that artificial intelligence can be helpful to the judiciary. This help may concern many aspects of its functioning. There are even some who believe that artificial intelligence would make judgments in individual cases fairer.<sup>35</sup> It could certainly also become more efficient, especially in those types of cases where human involvement takes up all of a person's professional capacity. An example of such a case is the recently heard criminal case in Poland concerning the so-called Amber-Gold affair. The justification for the first instance verdict in this case is 9345 pages long, and its preparation took over nine months.<sup>36</sup> Leaving aside the actual

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32 Alison (Lu) Xu, ‘Chinese Judicial Justice on the Cloud: A Future Call or a Pandora’s Box? An Analysis of the ‘Intelligent Court System’ of China’(2017) 1 Information & Communications Technology Law 59-71.

33 cf Yadong Cui, *Artificial Intelligence and Judicial Modernization* (Springer 2020) 43.

34 Paulo C. Neves Jr., ‘Judiciário 5.0’ (Blucher 2020) 76.

35 Daniel Kahnemann, *Thinking fast and slow* (Farrar, Straus and Giroux 2011) 43.

36 cf Natalia Grzybowska, ‘Jest uzasadnienie wyroku ws. Amber Gold. Liczy 9345 stron I zajmie około 47 tomów akt sprawy’ (gdansk.naszmiasto.pl, 29 July 2020)

possibility of a human being preparing more than 30 pages of text per day, it seems that in this scope the applied support could be provided by artificial intelligence. At the same time it should be stressed that it is precisely the legitimacy and transparency of decision making by mechanisms based on artificial intelligence that is a solid argument against such solutions.<sup>37</sup> While many would accept the support of the adjudication process by artificial intelligence, the lack of knowledge of how the algorithm arrives at specific conclusions and the parallel impossibility to trace subsequent steps in the argumentation (which is a characteristic of most algorithms used so far) seems to be important for assuming, if only against the background of the functioning standards related to the so-called fair trial, that the rights of a party could be violated in this way. It is, however, certainly a functionality of the system that can be improved in the future, which in the case of cases such as the one discussed above, would significantly affect the efficiency of the justice system.

It is undoubtedly possible for artificial intelligence to influence the administration of justice by organising and structuring information, providing advice or bringing about uniformity in the adjudication process. It is the task of any adjudicatory process to recognise certain model views in the documents being analysed, e.g. in reasons for court decisions or doctrinal positions. There is no doubt that a mechanism based on artificial intelligence will be much quicker to determine whether there is a line of case law that should be considered for the resolution of a given case. All judgments, as well as scientific articles or glosses, contain a lot of different information. Automated analysis of this information can considerably speed up specific litigation decisions. Automated analysis of various data can also have other applications. This can be seen, for example, in the eDiscovery system from the United States of America, which is used for the preparation of evidence proceedings, which may include litigation. In the so-called electronic discovery we deal with gathering, processing and presenting electronic evidence, i.e. means of proof, which are based on information stored electronically. The ways in which potential evidence is handled in eDiscovery are governed by rules depending on statutory requirements or by guidelines agreed by the parties and then accepted by the judge. The fact that a specific algorithm is used significantly reduces

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<<https://gdansk.naszmiasto.pl/jest-uzasadnienie-wyroku-ws-amber-gold-liczy-9345-stron-i/ar/c1-7827784>> accessed 7 April 2021.

<sup>37</sup> cf Paul Marrow, Mansi Karol and Steven Kuyan, ‘Artificial Intelligence and Arbitration: The Computer as an Arbitrator. Are We There Yet?’(2020) 4 Dispute Resolution Journal.

the length of the evidentiary process.<sup>38</sup> The use of eDiscovery involves the application of an algorithm in the pre-trial phase of a trial in which each party investigates the facts of the case by, among other things, obtaining evidence from the opposing party. In the local legal system, this is a widely used mechanism that can essentially predict the outcome of a case. It is undoubtedly a much faster mechanism than physically reviewing all the data manually.<sup>39</sup>

On the other hand, the so-called advisory use of artificial intelligence seems to be needed insofar as, in principle, everyone, not only the judge dealing with a given case, could, upon presentation of certain facts, receive information on the expected outcome. An example is the Civil Resolution Tribunal in Canada, where victims of road traffic accidents can receive free information about their claims. The tool uses a question and answer function to provide the public with tailored legal information, written in plain language, and self-help tools. The aim of this solution is to seek to resolve disputes without the need to file a lawsuit.<sup>40</sup>

A similar solution is being tested in the Netherlands, where a court in collaboration with research units is investigating the possibilities of artificial intelligence in the context of traffic offence cases in which a citizen appeals (contesting the validity of the penalties imposed for the offence). The aim of this work is to develop an artificial intelligence mechanism that would resolve such cases autonomously.<sup>41</sup>

Predictive tools, which allow solid guesses as to the outcome of a future court case, may be of great importance in the perspective of the development of artificial intelligence tools used in the judiciary. For this reason, further tests of software analysing specific databases of judgments and drawing appropriate conclusions from them should be expected in the near future. According to many, the justice system of the future will

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38 Jack G. Conrad, ‘E-Discovery revisited: The need for artificial intelligence beyond information retrieval’(2010) 4 Artificial Intelligence and Law 321-345.

39 cf James N. Dertouzos, Nicholas M. Pace and Robert H. Anderson, ‘The Legal and Economic Implications of Electronic Discovery’ 2008 Institute for Civil Justice 7.

40 Shannon Salter, ‘Online dispute resolution and justice system integration: British Columbia’s Civil Resolution Tribunal’ (2017) 34 Windsor Yearbook of Access to Justice 112.

41 cf Manuella van der Put, ‘Kan artificiële intelligentie de rechtspraak betoveren’ (2019) 2 Rechtstreeks 50.

be one where justice can be predicted by artificial intelligence.<sup>42</sup> This is already recognised by many stakeholders, including such major institutions as the European Union and the Council of Europe.

It may also be an important step to entrust artificial intelligence with the adjudication of certain cases, as is the case, for example, in Estonia. To this end, science indicates, among other things, that it is necessary to select cases that would be suitable for adjudication by artificial intelligence and conduct further tests. As can be expected, this will be a melody of the not too distant future.

Here, as an example, one can point to the extensive use of technological tools in Poland, in arbitration courts. For example, one of them, operating at the Polish Notaries' Association in Warsaw, conducts completely electronic proceedings and its IT system is largely automated, verging on AI mechanisms.<sup>43</sup> In the future, it is planned to carry out analysis of case documentation and their assignment to specific legal norms by artificial intelligence, which is to be advisory and prepare draft awards with justifications.<sup>44</sup> The system is also to support the arbitrator during the proceedings by providing him with information on the course and outcome of other similar cases. It will also present excerpts from the justifications of other judgments that best explain a particular problem or legal issue.<sup>45</sup> The announcements are therefore promising. The trend towards total electronicisation, or at least an increase in its significance, can also be seen in other places. Here, for example, one can point to the Chinese justice system and the transformation of court procedures, which resulted in the adoption of the Rules on the Provision of Online Case Service for Parties to Cross-border Litigation on 3 February 2021(关于为跨境诉讼当事人提供网上立案服务的若干规定). These require Chinese courts to provide services that include guidance on initiating online cases, responding to enquiries, providing testimony via video, and initiating cases for parties

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42 Veronika Myltseva, 'The legal nature and principles of the predictive justice' (2019) 3 Recht der Osteuropäischen Staaten 59; Antoine Garapon, 'Les enjeux de la justice prédictive'(2017) 1-2 La Semaine juridique.

43 cf Patrycja Rojek-Socha, 'Rusza elektroniczny sąd polubowny, skorzysta z profile zaufanego' (Prawo.pl, 24 April 2019) <[https://www.prawo.pl/prawnicy-sady/el\\_ektroniczny-sad-polubowny-ultima-ratio-rusza-przy,402433.html](https://www.prawo.pl/prawnicy-sady/el_ektroniczny-sad-polubowny-ultima-ratio-rusza-przy,402433.html)> accessed 11 March2021.

44 cf Ultima Ratio 'Sztuczna inteligencja w Ultima Ratio. Czy roboty zastąpią arbitrów?' (ultimaratio.pl) <<https://ultimaratio.pl/sztuczna-inteligencja-w-ultima-ratio-czy-roboty-zastapia-arbitrow>> accessed 12 March 2021.

45 ibid.

in cross-border litigation. This is certainly the path that other countries will follow.<sup>46</sup>

##### *5. Dilemmas related to AI and the judiciary of the future*

In the above it should be noted that the use of artificial intelligence in the administration of justice raises many objections and a number of doubts. Seeing the potential related to the development of artificial intelligence, it is raised, among others, the possibility of a threat to the further development of law, predicting, for example, the twilight of legal discourse of judicature. In this context it is stressed that artificial intelligence will resolve the same cases in the same way, which will deprive jurisprudence of its new legal wisdom. The necessity of the human factor in adjudication is also raised, stressing among other things the need for de-automated and empathic handling of cases.<sup>47</sup> Finally, a number of ethical issues are raised concerning the functioning of artificial intelligence in the judiciary, not to mention the typical constitutional problems of the administration of justice by an independent and autonomous court.

These and other problems appear in institutional studies related to the future of justice through the use of artificial intelligence. Such future is seen, among others, by the European Union, which in the document "Study on the use of innovative technologies in the justice field" published on 14 September 2020, considers the use of artificial intelligence and blockchain/DLT technologies in the field of justice as a priority.<sup>48</sup> The document identifies 130 projects in this field (using innovative technologies in the justice field) in EU countries and proposes the creation of an EU legal and policy framework for future action. It is recalled that in the doctrinal discussion of this field, researchers and organisations debate various legal and ethical aspects. These aspects include ensuring guarantees for funda-

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46 cf Meng Yu, 'Filing Lawsuits While Living Abroad: China's New Policy' (China Justice Observer, 7 March 2021) <<https://www.chinajusticeobserver.com/a/filing-lawsuits-while-living-abroad-china-s-new-policy>> accessed 12 March 2021.

47 cf Mark Halsey and Melissa de Van-Palumbo, 'Courts as empathic spaces: reflections on the Melbourne neighbourhood justice centre' (2018) 2 Griffith Law Review 182.

48 The Report of the European Commission: European Commission, 'Study on the use of innovative technologies in the justice field. Final report" (Publication Office European Union 2020) "Study on the use of innovative technologies in the justice field", (Brussels, September 2020).

mental rights and freedoms, such as respect for private life, protection of personal data, fair trial, good administration or non-discrimination.<sup>49</sup> It also recalled that several important papers have been prepared analysing the impact of AI on these rights and debating whether the existing legal framework is sufficiently adapted and adequate to deal with potential problems, and whether it is flexible enough to cope with the complexity and pace of technological developments.

As suggested by some of the doctrine's contributions, the document also notes that AI technology for dispute resolution is currently underutilised and its use remains at a rudimentary level. This can be understood to mean that we are still in an area that will develop and has great potential. So if the EU, a strongly institutionalised structure, is thinking about the future of justice in terms of the use of AI, it is highly likely that such a future in a more institutionalised form will occur.

This is certainly also recognised by the Council of Europe, which in its 2018 document, "European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment" pointed to five fundamental principles for shaping the practice of justice with artificial intelligence.<sup>50</sup> These are:

- 1) respect for fundamental rights,
- 2) equal treatment and non-discrimination,
- 3) quality and security of data,
- 4) transparency, impartiality and fairness,
- 5) operation of AI systems under user control.

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49 cf Eduard F. Villaronga, Peter Kieseberg and Tiffany Li, 'Humans forget, machines remember: Artificial intelligence and the Right to Be Forgotten' (2018) 34, 2 Computer Law & Security Review 304–313; Paul Nemitz, 'Constitutional democracy and technology in the age of artificial intelligence' (2018) 2133 Royal Society Publishing; Aleš Završnik, 'Algorithmic justice: Algorithms and big data in criminal justice settings' (2019) 11 European Journal of Criminology . 1–20; (n 220) 83–92; Patrick Perrot, 'What about AI in criminal intelligence? From predictive policing to AI perspectives' (2017) 16 European Police Science and Research Bulletin 16; Karamjit S. Gill, 'Data to Decision and Judgment Making – a Question of Wisdom' (2018) 30 IFAC Papers On Line 733–738; Michael L. Butterworth, 'The ICO and artificial intelligence: The role of fairness in the GDPR framework' (2018) 2 Computer Law Security Review 257–268.

50 European Ethical Charter on the use of artificial intelligence in judicial systems and their environment, Council of Europe, Commission for the Efficiency of Justice (CEPEJ), <<https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>> accessed 22 april 2021).

The Charter is intended for public and private stakeholders responsible for the design and implementation of AI-based tools and services that involve the processing of judicial decisions and data (machine learning or other methods derived from data science). It also concerns public policy makers responsible for legislative or regulatory frameworks. It should therefore be seen as an important guideline for future solutions that have the potential to revolutionise the justice system.

The above means, therefore, that the area of artificial intelligence and its possible applications in the administration of justice is an area where the last word has not yet been said. What is more, it is an area that still requires a great deal of investment and research. There is no doubt, however, that artificial intelligence is of great importance in the administration of justice and that the future possibilities are endless. With this in mind, while respecting the standard of a fair trial, as well as extremely important ethical issues, it is necessary to continue the search for possible applications of solutions based on artificial intelligence in the judiciary.

## *6. Conclusions*

Transformation of the judiciary is a natural process, sometimes occurring too slowly. Today, in the world of new technologies, there is a need to adapt the judiciary to new realities and social expectations. Traditional adjudication of cases reveals more and more problems and becomes ineffective. Hence, changes are needed, especially those that boldly enter the world of new technologies. Some of the biggest obstacles to a modern court system, including online or automated courts, are thought to be political will. Carrying out such a transformation would require the support of judges and professionals, a source of funding and a well thought-out methodology for the transformation. Although today some solutions seem too futuristic, at the end of the day it is important to point out that in the practice of the judiciary there is a serious problem with wide access and efficiency. Technology can improve outcomes and give the public the tools to resolve public disputes in ways that were not possible before. While such a transformation may not solve many of the problems associated with the administration of justice, it can offer significant improvements in areas

where this is expected. Therefore, further opportunities for technology development in the judiciary cannot be ignored.<sup>51</sup>

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<sup>51</sup> cf Tania Sourdin and Richard Cornes, ‘Do Judges Need to Be Human? The Implications of Technology for Responsive Judging’ in Tania Sourdin and Archie Zariski (eds) *The Responsive Judge*, (Springer, 2018) 87.



**SECTION FIVE.**

**Possibilities of Applying LegalTech Tools in Legal  
Communication**



# Self Sovereign Identity

*Michal Tabor*

## *1. Electronic Identification*

Identification and authentication of the users to the online services is one of the key needs of Internet business and electronic transactions. Electronic identification was established in European Union as legal definition in the eIDAS regulation.

*'electronic identification' means the process of using person identification data in electronic form uniquely representing either a natural or legal person, or a natural person representing a legal person; (article 3 eIDAS)*

The eIDAS Regulation founded general requirements for identification means complying with levels of assurance, and general needs to recognize and accept electronic identification in public online services. Electronic identification is widely used by public services but was not so widely adopted by business. Private systems in general onboard and register users on their systems each time by their own methods, some services ceded authentication to large solution providers, in particular Google, Apple and Microsoft. For several years, work has been underway to build Self-Sovereign Identity (SSI) technology that allows much more than using person identification data as defined in eIDAS. SSI enables the use of own user identity attributes in the manner in an independent way, where no one particular operator takes actions in the identification process. Moreover, European Commission takes action to force law online services to accept SSI identification in all their services. Your identity is determined by many attributes, some of which are permanent, such as your date of birth, while others, such as your home address, may change. Each of the identity attributes has its origin, e.g. name, surname, date of birth and parents' data come from the register of civil status, while the ID number from the register of personal documents. The concept of SSI is that individual identity attributes can be collected by their holder from different sources, while their use and which ones will be used is decided by the holder himself.

Most solutions for electronic identification used now are based on two models: centralized and federated. In a centralized identity management model, you have to onboard to each service separately and you use individual credentials (login and password) to access to each service (e.g. office, bank, e-store, booking platform). In the federation model, the attributes and authentication mechanism are maintained by a single identity provider and accepted by other systems – this model is the basis for functioning in notified electronic identification means in the EU and also is used for solutions like Login with Google/Apple/Facebook. In both of these models (centralized and federated), a service is in possession of user identity data; manage them and allow authentication. SSI assumes that it is the user himself who manages the attributes of his identity and implements the authentication process, based on the IT solution he/she is in control.<sup>1</sup>

As indicated above, multiple attributes may be associated with an individual's identity (user), m.in.: first name, last name, date of birth, adulthood, residence, identification number, *tax number*, *email*, phone number, and much more. Each of these attributes can be used in specific actions, but very rarely you need to use them at once. Within SSI, the attribute holder selects the attributes (and only those) that they want to use, and authenticates their own possession, without the need for external systems.

**Example:**

To illustrate an SSI concept, you might want to describe it in the following usage example:

- 1) The holder launches on his smartphone an application constituting his wallet for managing a self-sovereign identity. As in an electronic signature, this wallet is associated with a public and private key that allows the holder to collect and use individual attributes.
- 2) The holder must confirm their wallet with the first identification service, which will allow him to assign the first attributes that allow his identification in other systems. These attributes will be assigned to the public key that was previously generated in the wallet.
- 3) Each use of identities and attributes is preceded by a system that asks for that identity. Such a system must show that it is entitled to ask

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1 Christopher Allen, 'The Path to Self-Sovereign Identity' (*Life With Alacrity*, 25 April 2016) <<http://www.lifewithalacrity.com/2016/04/the-path-to-self-sovereign-identity.html>> accessed 21 February 2021; See 'Self-Sovereign Identity' ('The Moxy Tongue', 9 February 2016) <<http://www.moxytongue.com/2016/02/self-sovereign-identity.html>> accessed 21 February 2021.

- questions and should provide a list of expected attributes. The holder will have the right to choose the ones that he decides to present;
- 4) The holder, presenting his attribute by signing it, proves that he owns it. Once authenticated, the holder will be able to complete the collection of attributes they have, e.g. education, driving privileges, or information about their funds in their account.

The SSI concept is implemented on the basis of open algorithms and standardized data formats and commonly recognized cryptographic algorithms. Standardization allows the user to choose the technologies and applications by which the above processes will be described, and in particular will allow the maintenance of cryptographic keys and support for a wallet. The implementation of the SSI allows the identified person to control what information he/she makes available to the system and to prevent central systems from collecting access to information about where and when his or her identity was used. The whole is complemented by the fact that identifiers in independent identity solutions do not need (or should not be) immutable identification numbers. Multiple Identifiers can be assigned to a single user, and their structure should prevent operations from being tracked.

Self-sovereign identity is based on technical standards developed by W3C standards organisation and involves a number of standardisation initiatives, including *Verifiable Credentials*(VC) and <sup>2</sup> *Decentralized Identifiers*(DID).<sup>3</sup>

The verifiable credentials technology allows the unambiguous identification of the relationship between natural persons, legal entities and other objects (car, dog, house, other object), in a way in which the relationship is unambiguous, the credential is confirmed by trusted source and the credential can only be used by a person authorized to do so.

<sup>2</sup> 'Verifiable Credentials Data Model 1.0. Expressing verifiable information on the Web' (W3C, 19 November 2019) <<https://www.w3.org/TR/vc-data-model/>> accessed 21 February 2021.

<sup>3</sup> 'Decentralized Identifiers (DIDs) v1.0. Core architecture, data model, and representations' (W3C, 3 August 2021) <<https://www.w3.org/TR/did-core/>> accessed 3 August 2021.

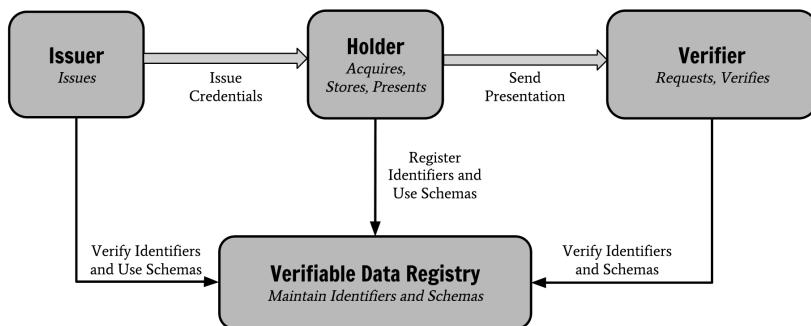
Example:

A typical verifiable credential shows examples of relationships:

- 1) Michael [owns] a car.
- 2) Agnes [obtained a master's degree in economics] from the University of Oxford.

Verifiable Credentials technology not only unambiguously describes the relationships between individual entities, but also allows them to be used in accordance with the rules set out in the verifiable credential itself. The relationship resulting from verifiable credentials is best illustrated in the following figure:

Figure 1. Roles and information flow



Source: Verifiable Credentials Data Model 1.0, § 1.2.

Each Verifiable Credential uniquely identifies its publisher (a trusted source), the holder, and the objects that are described in the verifiable credential. The issuer must be trusted and verifiable, which is implemented on the basis of cryptographic technologies, electronic signatures and seals or Blockchain technologies. The publisher, when creating a Verifiable Credential, indicates its *Holder* and specifies the cryptographic method that will be used to authenticate it. Using this technology, the holder will have direct access to the contents of the verifiable credential, e.g. put it in his wallet, but will also be able to use it. The use of the Verifiable Credential is called a presentation. The presentation of the Verifiable Credential shall include the entire credential and the digital signature of the holder. Verifiable Credential contain in the body information how holder is authenticated, so in the process of presentation authentication of the

holder can be verified by the verifier. The whole scheme needs for proper functioning a public register, which due to its characteristics is most often implemented on the basis of DLT (distributed ledger technologies). DLT enable the operation and use of distributed registries. A distributed register is <sup>4</sup>defined as a ledger that is shared by a set of DLT nodes and synchronized between DLT nodes using a consensus mechanism.<sup>5</sup>

Ensuring the clarity of relationships in SSI solutions is based on Decentralized Identifiers (DID) that unambiguously and uniquely identify a specific person, object, or explicitly Verifiable Credential. Also note that DID itself (as an identifier) is not an identity. The reason is that DID is a unique, random string of alphanumeric characters, under the control of the user, while only the user has a private cryptographic key, stored in a digital wallet, which he can use to confirm any operation (based on the DID ID). DID also does not contain any other identity attributes, such as first name, last name, and so on. Thus, with DID, the user can simply prove that he controls this alphanumeric number, but no longer his identity. On the other hand, a verifiable credential that can be issued to a DID holder also contains a set of identity attributes.

*Example:*

Each of the objects mentioned above, i.e. Michael, car, Agnieszka, University of Oxford will have a DID assigned in verifiable credentials. When a user shares their verifiable credentials with someone, they generate a DID proof of ownership (digitally signing with a PRIVATE DID key), and the recipient can verify who has identity attributes in the Verifiable Credential.

## *2. Distributed Confirmations*

The entire Decentralized Identifiers solution can use various technologies to secure integrity and authenticity, in particular digital signature technologies, but blockchain-based technologies, in particular *distributed* DLT, are the most natural technologies for a distributed environment. Based on a distributed registry, DID does not require a centralized enrolment

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4 For a broader overview of DLT technology, see Electronic Communication chapter by Anna Zalesińska and Dariusz Szostek.

5 ISO/TC 307, 'ISO 22739:2020 Blockchain and distributed ledger technologies' (July 2020).

system, allowing the deployment of decentralized public key infrastructure (DPKI) and decentralized key management system (DKMS),<sup>6</sup> tools independent of a single trust service provider, a single hierarchy, and maintaining the independence of subsequent certificate publishers.

Each Distributed DID is bound to a document (*DID Document*). In fact, this document is a Verifiable Credential placed in a verifiable registry, while the use of a distributed DLT provides certainty of access and security of the integrity of such a registry. At the same time, the DID Publisher has the ability to manage the lifecycle of such an identifier, such as changing its status, invalidating or updating it.

The independent identity mechanism described earlier uses Verifiable Credentials to describe the identity attributes of the wallet holder. Verifiable Credentials are placed directly in the data portfolio or accessible through a Verifiable Registry. Each identification is in fact a verifiable credential presentation service, while all objects related to that identity are uniquely identified by decentralized identifiers, while shared data based on identifiers can be accessed through the registry and DLT.

*Example:*

On the main *smartphone platforms*, there are already production implementations of the wallet used to store Verifiable Credentials and Distributed Identifiers, these applications implement the above-mentioned processes of cryptographic key generation for the holder, provide the functions of saving Verifiable Credentials and Distributed Identifiers. All available solutions allow you to identify both the system asking for identity and the use of identity attributes in electronic identification, as well as to confirm the transaction.

It is planned that the European Commission will introduce an obligation for all service providers in the EU to identify and use independent identity mechanisms by all service providers in the EU as part of the 2021-2023 review of eIDAS.<sup>7</sup> The aim of this action is to provide a universal (for all citizens of UE) identification scheme, allowing for proof of identity, both in public administration systems and in private systems. To

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6 Alexander Papageorgiou, Antonis Mygiakis, Konsantinos Loupos and Thomas Krousalis, ‘DPKI: A Blockchain-Based Decentralized Public Key Infrastructure System’ (2020 Global Internet of Things Summit (GloTS) Dublin, June 2020).

7 Alex Preukschat, ‘Understanding the European Self-Sovereign Identity Framework (ESSIF) – Daniél Du Seuil and Carlos Pastor – Webinar 32’ <<https://ssimeetup.org/understanding-european-self-sovereign-identity-framework-essif-daniel-du-seuil-carlos-pastor-webinar-32/>> accessed 21 February 2021.

this end, each Member State will be required to provide services to the public *to obtain Verifiable Credentials of its identity, and at the same time any online service provider, whether public or private, will be required to accept the identification thus carried out in its services.* As part of the development and testing of capabilities, the EC has launched the "EU Login" application, which allows testing to be carried out in the framework of projects carried out in the Connecting Europe Facility (CEF) programme.<sup>8</sup>

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<sup>8</sup> CEF Digital, 'eID' <<https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/eID>> accessed: 21 February 2021.



# **Electronic Delivery**

*Sylwester Szczepanik, Michał Tabor*

## *1. Introduction*

The exchange of letters, documents and their service is one of the basic activities of the legal profession, regardless of the time and legal system in which he has to practice. Also in times of strong development of technology and its impact on the legal profession, the indicated aspect of activity is subject to significant changes. In the case of traditional correspondence exchange, the main role of the lawyer was limited to choosing two possible methods of exchange:

- 1) using an intermediary in the form of a postal operator;
- 2) the implementation of delivery with own human resources (including each other).

If a postal operator was selected, it was necessary to ensure that the parcel with correspondence was properly secured, the addressee was correctly identified and the payment was made. An additional element was a risk analysis consisting in assessing whether a given item of correspondence is to be a registered item, registered item with return confirmation of receipt or a regular item.

In the case of the exchange of own human resources, the same challenges arose as in the case of a postal shipment, with the exception of making a payment and selecting the shipment variant.

The choice of a given method was mainly determined by such elements as the time of delivery, the probability of receiving the parcel by the other party and possibly a legal provision that could provide for a better legal position for a given method of shipment (the procedural deadline).

The difference in the indicated methods, which certainly occurs and is often not taken into account, is the issue of the need to protect the parcel against loss and damage and the responsibility for any loss or damage to the parcel.

When new technologies are used, the range of steps required to select the final delivery method is much greater. Due to the development of technology, even the traditionally understood postal item may have a

hybrid character, i.e. at some stage of the delivery process it may change its form from paper to electronic (or vice versa). The situation is further complicated when methods of correspondence exchange not regulated by generally applicable law are used. The challenges include such issues as: parcel security, identification of addressees, place of exchange.

## 2. Correspondence Exchange - Terminological Remarks

Later in the chapter, the term "correspondence" will be used to describe the above-mentioned phenomena in general. It should be noted that this term will be used autonomously in this chapter. This term will mean the transmission of information, in particular of documents, between two lawyers, irrespective of the type of tool used to provide such information or documents, be it in paper or electronic form. In the authors' opinion, the indicated understanding of this concept is broad and, at the same time, adequate enough to highlight important elements, such as:

- 1) the act of exchange;
- 2) document - as information;
- 3) intention of this activity;
- 4) tool independence;
- 5) two-sided actions.

We can divide correspondence into two types, i.e. horizontal exchange, carried out between lawyers, and hierarchical exchange, carried out between lawyers and authorities (including public administration bodies or courts). In the traditional model of division into public and private law, it can be concluded that horizontal exchange is the domain of private law, and hierarchical exchange is the domain of public law. Of course, this division is not consistent, because in the case of, for example, court procedures, requiring lawyers who are parties' attorneys to exchange letters between them as a formal condition, accept a given letter by the court, such exchange, although it took place horizontally, is carried out under the rule of law. public.

The presented division into both horizontal and hierarchical exchange as well as further indication of the elements of public and private law will be arranged later in the chapter. However, issues related to technological solutions as well as online dissertations and tools for remote work remain outside the scope of the chapter. These issues are discussed in greater detail in other parts of the monograph, in particular devoted to cloud computing services and the use of tools *LegalTech* in the judiciary, law

enforcement agencies and law firms. It can only signal that Technological solutions are currently based mainly on cloud computing services, with the help of which work on shared computing resources or exchange of correspondence is carried out by placing files by one user in the area separated for other - indicated by him - users for sharing. The above should be distinguished from a situation where placing a file in such a separated sphere only facilitates the transmission of correspondence, and the legal effects are related to the moment of granting this access.

*Example:*

An example of such a service is the transmission by electronic means, e.g. by e-mail, of information about the possibility of reading the content of documents which, due to the large size of the files, have been made available to the other party with the option of saving them to another location by the other party. Such an *e-mail* has an informational value only and allows you to find access to the resource. Another example of such sharing is document collaboration.

### *3. Horizontal Exchange of Correspondence*

In the case of the legal profession, the exchange of correspondence is not left outside the scope of the law. Requirements regarding cybersecurity and data protection, including professional secrecy, should be indicated here. This is due to the fact that lawyers are bound by legal provisions regulating the status and manner of practicing the profession, and often by corporate rules<sup>1</sup>. Two basic principles emerge in the foreground, which are:

- 1) the principle of professional secrecy;
- 2) the principle of the good of the client.

Within the framework of horizontal exchange, we can distinguish two basic types of this exchange. The first type is the exchange of actual correspondence, the second is the exchange of legal correspondence. In the first case, it concerns the exchange of professional correspondence, however, the fact of exchanging correspondence has no legal consequences, but

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<sup>1</sup> See Dariusz Szostek (ed), *Bezpieczeństwo danych i IT w kancelarii prawnej radcowskiej/adwokackiej/notarialnej/komorniczej. Czyli jak bezpiecznie przechowywać dane w kancelarii prawnej* (C. H. Beck 2018).

only a change of the facts. In the second case, the main purpose of the exchange of correspondence is to perform a legal act, exercise a right or legal obligation towards the other party or with effect on the third party. In the Polish doctrine of legal theory, this type of exchange may be treated as a conventional activity<sup>2</sup>. Both types of exchanges can only take place between lawyers or between lawyers and clients. However, regardless of whether the correspondence is exchanged in the actual or legal sphere, the lawyer who performs the exchange should always take into account the principle of professional secrecy and the principle of the client's welfare.

Even a cursory analysis shows that problematic from the point of view of the above-mentioned exchange of correspondence becomes the rule:

- 1) by tools not examined by the lawyer;
- 2) in an unsecured manner;
- 3) in a manner that does not provide an acceptable degree of certainty in the identification of the other party.

Easy and cheap access to technology makes it tempting to use even free communication exchange tools. An example of such action may be *social media* which provide functionalities of information exchange between selected participants of a given medium. The use of these tools to exchange professional correspondence, without checking the rules of operation of a given tool, the scope of information collected by the owner of the tool, the method of transferring this information and technical security measures, may easily lead to breach of the principle of professional secrecy. A similar problem concerns the use of public e-mail accounts. Although the information transmission technology differs from the above-mentioned for example, there is still the problem of keeping the two rules above.

Of course, the entry into force of the GDPR also affected lawyers. Not only industry law and corporate rules, but also the provisions of the GDPR, threatened with high sanctions, have strengthened the attorneys' care in the selection of correspondence exchange, e.g. by continuing to use free and generally available solutions to exchange correspondence, the content itself is adequately secured (e.g. by encrypting).

Ensuring the security of the exchange of correspondence for horizontal activities is only one of the elements of the issue. The second element is the correct identification of the addressee of the correspondence. In the case of

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2 For more on conventional acts see Stanisław Czepita 'On the Concept of a Conventional Act and its Varieties' (2017) Year LXXIX No. 1 Legal, Economic and Sociological Movement 85.

exchanging correspondence in electronic form, the most commonly used model today is the use of e-mail devices. In this model, data is sent to the other party's e-mail address:

- 1) indicated in the document being the source of the obligation, e.g. contract, party's notifications about the e-mail address, invoice, etc.;
- 2) indicated in the procedural letter in the case of correspondence in administrative or civil matters;
- 3) contained in a publicly available source, e.g. publishing the address on a website, business card, etc.

In the first case, however, in practice, there are doubts as to whether each e-mail address indicated in the contract is an address that may be used for the exchange of correspondence intended to have a specific legal effect. In particular, it is about the situation where e-mail addresses are not indicated in the contract comparison, and in the part describing the method of its implementation, where these addresses are indicated as addresses of persons responsible for the contract. Failure to clearly indicate that these addresses can be used for this type of correspondence increases the legal uncertainty of the parties and significantly reduces the possibility of using electronic correspondence exchange to the indicated addresses as a way to achieve the expected legal effect. Summing up, the identification of the addressee and the legal effect of the correspondence exchange in this case are as strong as the sanction specified in mutual obligations for failure to notify about a change of e-mail address. The method of minimizing the indicated risks is to indicate specific e-mail addresses in the contract, which are used to exchange correspondence with legal consequences and to introduce sanctions for failure to notify about the change of such address. These sanctions usually take the following form:

- 1) ineffectiveness of the method of notification of the change of e-mail address, which was made in a manner other than that specified in the contract;
- 2) the effectiveness of delivery to the e-mail address in each case in which a formal notification of its change was not made in accordance with the content of the contract.

In the case of correspondence exchange carried out on the basis of e-mail addresses indicated in pleadings, the sanctions and legal effects of such an exchange are usually determined by law. The liability of the parties is limited to the correct verification of the address and to documenting the sending of the correspondence to the correct address.

The method of exchanging correspondence to publicly available addresses is used only in the absence of another source of identification of the other party and its e-mail address. This method of exchanging communication raises high legal risks related to the validity of the address, proving its use by the other party and demonstrating the legal effectiveness of such exchange related to the obligation.

Legal provisions appear in the professional trade that increase the certainty of legal transactions through public e-mail addresses in appropriate open and accessible registers or publishers. An example of such a provision is the Polish register of entrepreneurs who are natural persons (CEIDG). The provisions regulating the operation of the register sometimes indicate that the entrepreneur may indicate his contact details, in particular e-mail address or contact details of the representative, in particular his e-mail address, website address, telephone number. Such publication of data in the public register increases the level of legal certainty in the case of correspondence exchanges conducted using this address, even if it is initiated only by one of the parties. The effectiveness of such an exchange will be determined in this respect by the scope of the power of attorney and procurement as well as the provisions of law regulating the principles of passive representation.<sup>3</sup>. A similar solution applies in the Register of Entrepreneurs atregulated by statute on the National Court Register. Entities on whose application an e-mail address has been entered into the register of entrepreneurs are required to report a change in this data.<sup>4</sup>

In recent years, solutions have emerged, based on generally applicable provisions of law, formalizing the horizontal exchange of correspondence between entities, including lawyers. Statutory solutions are introduced, followed by technical solutions to ensure an appropriate level of assurance of the addressee's identification, certainty of delivery and appropriate quality of evidence of information exchange. Thus, although this type of exchange is the domain of private law and the principle of party autonomy, nevertheless nation states, and sometimes corporations themselves, interfere with the indicated autonomy.

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<sup>3</sup> 2018 Act on the Central Register and Information on Economic Activity and the Information Point for Entrepreneurs (Journal of Laws of 2020/ 2296).

<sup>4</sup> 1997 The National Court Register (Journal of Laws of 2021/ 112).

#### *4. Hierarchical Exchange of Correspondence*

Hierarchical exchange of correspondence in the vast majority of cases is of a legal nature. This is one of the important elements distinguishing this type of exchange from horizontal exchange, where in most cases this exchange is factual and only for the selected type of correspondence does it have legal effects.

Hierarchical correspondence exchange, in contrast to horizontal exchange, is therefore highly formalized. Formalism manifests itself in two spheres: in the legal sphere, by strict regulation of the manner of carrying out the exchange of correspondence, which may have a legal effect, and in the case of electronic form, by specifying the tools by which it can be carried out.

The latter element is somewhat different from the correspondence carried out in paper form, where the main emphasis was not on the manner of delivery, but on specific evidence with which legal effects are associated, e.g. sending the parcel to an entity that could have issued a formal confirmation of posting, e.g. by a postal operator, or at the time of service to a public entity or court, which left outside the scope of the regulation, the method of service and the entity that physically performed it.

In other words, in the electronic world, national states define what acts of service will be deemed to have legal effects and what tools the parties and representatives are obliged to use. Most often, these countries not only limit themselves to identifying these tools, but are also building them. These are all kinds of services online (electronic services). These are also dedicated portals where, apart from the correspondence exchange functionalities, other functionalities are also made available, such as access to files, participation in hearings, etc.). More on this in part VI, ch. 1.

The consequence of the failure to use the tool indicated by the Member State may be the legal ineffectiveness of the replacement. This ineffectiveness is not always absolute, because states allow the possibility of validating this ineffectiveness. There are, of course, different models; sometimes they allow the use of paper form within the deadline, although there is a noticeable trend of limiting this type of option for professional entities, including lawyers; sometimes it is possible to use the correct tool and the deadline is considered to be respected. There are procedures that do not, however, provide for the possibility of supplementing (validating) the activities, which in the case of tight deadlines poses a significant threat to the parties to the proceedings.

An example of such an absolute sanction of ineffectiveness is the submission of a pleading to the e-mail address of a public entity instead of

its electronic inbox.<sup>5</sup> - in the light of the Polish provision of the Code of Administrative Procedure. The second, now pan-European, example is the lack of use of electronic form for submitting a public procurement in a procedure where only the electronic way of submitting offers is provided. Failure to use the electronic route may not be validated in any way, even in the form of submitting a paper offer.

### *5. Electronic Delivery - eIDAS Regulation*

A special type of correspondence exchange is Registered Electronic Delivery. It was regulated in the eIDAS Regulation. Registered Electronic Delivery is a trust service introduced at the European level. According to the eIDAS regulation we mean the trust service, namely the service realized by the entity called a trust service provider (TSP). TSP provides the service for remuneration, based on the adopted service policy and based on the adopted technical practice. The entire operation of such a provider is subject to trust service supervision. EU law gives you the freedom to provide trust services by allowing you to provide services in one country to entities in other EU countries.

Within the meaning of art. 3 of the eIDAS Regulation, the "electronic registered delivery service" means a service that makes it possible to transmit data between third parties by electronic means and provides evidence relating to the handling of the transmitted data, including proof of sending and receiving the data, and that protects transmitted data against the risk of loss, theft, damage or any unauthorised alterations. By means of the electronic delivery service, third parties exchange data (information) in a confidential and integrity-protected manner. The effect of the service is the issuance of proofs of sending and receiving data. The service provider is an independent entity that cannot be dependent on the sender or recipient (when carrying out delivery). An electronic delivery service may be provided by a single trust service provider, or it may enable delivery through the collaboration of multiple electronic delivery service providers. In such a situation, an item posted using one registered delivery service will be transferred between vendors so that the delivery is made via a vendor serving the addressee.

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<sup>5</sup> 2011 The Regulation of the Prime Minister on the Preparation and Delivery of Electronic Documents and the Provision of Forms, Specimens and Copies of Electronic Documents (Journal of Laws of 2018/ 186).

The eIDAS Regulation does not provide for equivalence between qualified electronic delivery services and traditional postal registered mail. However, it is indicated in the literature that Member States may establish this equivalence at national level<sup>6</sup>. This is also what happened in most regulations in Poland (as a result of the entry into force of the Act of November 18, 2020 on electronic delivery<sup>7</sup>), but also in Belgium and Denmark. Registered electronic delivery items are in principle equivalent to registered items where the provision so provides. However, the implementation of a hybrid shipment looks different, i.e. a shipment that takes a material form at any stage of delivery (sending or receiving). Polish law recognizes that a hybrid parcel is a type of postal item regulated under the provisions of postal law, while in Belgium it is assumed that it is a type of parcel qualified for the trust service<sup>8</sup>.

The basis for the definition of registered electronic delivery is the technological neutrality of the solution. The provisions of the eIDAS Regulation do not indicate which technology is to be used for electronic delivery. It only presents the mechanisms that must be provided for service to qualify as registered electronic delivery or qualified electronic delivery service. This allows for the adaptation of legal provisions to the current state of technology and applied solutions. An example is the possibility of exchanging correspondence by registered electronic delivery using the technology used in e-mail communication with additional requirements. For Qualified Registered Electronic Delivery the compliance with the ETSI EN 319 521 standard (Security Requirements and Policies for Registered Electronic Delivery) confirms the fulfilment of legal requirements - a standard extending the requirements of ETSI EN 319 401 with specific requirements for REM service providers.

Electronic delivery is a self-contained type of communication between entities and may take place independently of the services online. However, in the event of a binding of the service online it can complement such a service. In service online pre-defined electronic forms for the purpose of

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6 Institut Luxembourgeois de la Normalisation, de l'Accréditation, de la Sécurité et qualité des produits et services, 'Trust Services Under the eIDAS Regulation' (Portail-qualite.lu, June 2018) , <<https://portail-qualite.public.lu/content/dam/qualite/publications/confiance-numerique/trustservices-under-eIDAS.pdf>> access 19 February 2021.

7 J. of Laws, item 2320.

8 Mirko Faccioli in: Alessio Zaccaria, Martin Schmidt-Kessel, Reiner Schulze and Alberto M Gambino (eds) *EU eIDAS Regulation. Commentary*, (Beck/Hart 2020) 331.

settling a given case may be created, or even advanced solutions based on authentication allowing for semi-automatic or fully automatic handling of the case. Electronic delivery then plays the role of a method of providing evidence of a transaction in the service (sending and receiving an application, settling the case). The value of such a solution is the fact that the evidence generated independently of the service itself, acts as if in the background of the main solution. The advantage of using electronic deliveries is that there is no need to build communication modules for users, the account management system in ICT systems providing services online and thus their faster construction and easier commissioning. Of course, in the case of complex processes, the construction of the indicated elements may be necessary, but with less advanced services online communication for such a service based on electronic delivery is sufficient.

## 6. Qualified Electronic Delivery Service

A qualified registered delivery service is a service provided by a qualified service provider, must meet the additional requirements of the eIDAS Regulation, as well as be subject to periodic audits and national supervision in the field of trust services. Data sent and received using a qualified electronic registered delivery service shall benefit from the presumption of data integrity, the sending of the data by the identified sender and receipt by the identified addressee, and the accuracy of the date and time of sending and receipt of the evidence indicated by the qualified electronic registered delivery service.

A qualified electronic delivery service provides identification of the sender and, prior to delivery, of the addressee. This identification ensures the safety of trading to the parties, protects them against unwanted correspondence and ensures the authenticity of the data provided. Identification in a qualified service may be performed on the basis of reliable nationally operating identification means, it may also be based on other mechanisms, in particular an electronic signature. The qualified electronic delivery service therefore combines the features of an advanced electronic signature and seal as well as a qualified time stamp<sup>9</sup>.

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9 Łukasz Goździaszek (ed) *Identyfikacja elektroniczna i usługi zaufania w odniesieniu do transakcji elektronicznych na rynku wewnętrznym Unii Europejskiej. Komentarz* (C. H. Beck 2020) 242.

The provisions of Article 43 of the eIDAS Regulations assign legal effect to the evidence of the registered electronic delivery service, while there is no relevant regulation in the provisions on qualified electronic signature, including the indication that qualified electronic registered delivery, which is recognized in one country, will also be recognized in the other. The literature indicates that: "this is probably a mere oversight of the European legislator"<sup>10</sup>. It seems, however, that this is a deliberate action, because unlike qualified electronic signatures, qualified electronic seals or qualified time stamps, it is necessary to build an appropriate infrastructure for the exchange of information under this trust service. The services indicated above may operate in either mode *offline* or they can be used in any available communication technology, e.g. e-mail. In this case, registered electronic delivery requires the construction of similar technical solutions as in the case of electronic identification.

The specificity of qualified electronic delivery is an appropriately organized model of identification of entities participating in the transmission of correspondence, and then the delivery mechanism. Delivery in a qualified service is normally carried out with the following steps:

- 1) the sender identifies and authenticates to the delivery service and then forwards the data (parcel);
- 2) after receiving the data, the service issues a proof of posting and marks it with a qualified time stamp;
- 3) the data is forwarded to the service provider who will deliver it to the addressee;
- 4) the addressee is informed about the waiting data;
- 5) the addressee identifies and authenticates to the service, and then the service makes the item available to the addressee;
- 6) the service issues a proof of receipt and marks it with a qualified time stamp.

The described requirements as to the certainty of the process of identifying the parties to the correspondence exchange, the method of securing it and generating evidence affect, from the technical side, the high probability of establishing the course of correspondence. For this reason, the European legislator, as with other trust services, decided to grant additional legal presumptions to qualified electronic services.

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10 Zaccaria, Schmidt-Kessel, Schulze and Gambino (n 8) 327.

## *7. Polish Act on Electronic Delivery*

### *7.1. Introduction*

The act on electronic delivery lays down rules for the delivery of electronic documents whose addressee or sender is the public administration. Delivery, in accordance with DorElektrU, is carried out using a public service and qualified electronic registered delivery services. As part of DorElektrU, the role of a service supporting public entities directly will be played by a public service provider - a designated operator, which will perform all activities based on the same requirements that apply to qualified suppliers. Individuals and private entities will be able to choose whether they will be served by a public registered delivery service or a qualified service. Qualified suppliers will be able to service individuals and private entities, providing them with the possibility of sending correspondence to other private entities, as well as to public administration. In the field of handling parcels addressed to public administration, qualified services will exchange data with the public electronic delivery service.

### *7.2. Common Address Infrastructure*

An interesting solution chosen by the Polish legislator is the introduction of a common address infrastructure for all providers of registered electronic delivery (including qualified delivery) who wish to join the system. Effective service requires the possibility of indicating the addressee or addressees of a given registered electronic delivery. According to DorElektrU, the address for electronic deliveries given by the minister responsible for computerization will be used to uniquely identify the addressee of parcels. This address will be assigned to the service that directly serves the addressee, while the database of electronic addresses will enable the address to be verified and the shipment to be properly directed to the supplier who supports it. To ensure the unambiguous assignment of a natural, legal or public entity to an address, this address will be unique and once assigned to one entity it cannot be assigned to another. In addition, public entities will be able to search for the address itself on the basis of other characteristics of the addressee's identity, e.g. name, surname, PESEL number and physical address. This is a solution that has not been provided for directly in the eIDAS Regulation. However, its introduction has a practical dimension, which is the introduction of an address management

mechanism so that any changes to service providers do not affect changes in addresses.

### *7.3. Reception and Mailing Boxes*

The electronic registered delivery service does not require sending and delivery to be made from dedicated boxes, lockers or named infrastructure. In particular, the party sending the document may use the electronic delivery service, without the need to have any account in a given service. In the case of a qualified service, delivery should, however, be preceded by the identification of the sender. The electronic service itself also does not have to be performed only for the person who has previously registered in the service, and the condition for submitting the document is the identification of the person who is the addressee of the document; DorElektrU also points out that deliveries by means of the public registered delivery service will be carried out using a delivery box, which will allow for the temporary storage of the correspondence delivered and the proof of posting and receipt.

### *7.4. Mandatory Address for the Legal Profession*

The Polish regulation introduces the obligation for selected legal professionals to have an address for electronic delivery and to report it to the register referred to in Chapter 7.2. The indicated obligation was included not only in DorElektrU, but also in acts regulating the manner of performing a given legal profession (legal advisers and advocates). Thus, this obligation is not only an administrative and legal obligation, but is an element of a professional obligation, and failure to comply with it may constitute grounds for disciplinary liability. A legal practitioner will be able to choose the provider of his e-mail address. The attorney-at-law will be able to choose either the address at the designated operator and in this case will receive an electronic delivery box or will be able to use the service of a qualified electronic delivery provider, i.e. a private entity, which will be entitled to provide such a service. The electronic delivery address will be able to be used for both hierarchical and horizontal communication.

## 8. Qualified Electronic Delivery in Selected EU Member States

At the time of writing, there were 19 qualified electronic registered delivery service providers in the EU. Most qualified services are provided in France (7 services) and Spain (5 services). Detailed analysis shows that they are used in the field of business transactions, in particular for processes such as signing contracts and sending invoices. In these services, most often the addressee does not have to have an account or a distinguished address for electronic delivery, and the delivery is made to a natural or legal person defined by the sender, which additionally defines the method of notifying the addressee about the pending shipment, e.g. via his address e-mail. An interesting conclusion from the analysis of these services is the fact that while the level of verification of the sender's identity is verified in detail, in many implementations the level of verification of the addressee's identity is carried out in accordance with the sender's guidelines - i.e. in some situations only based on e-authentication. e-mail.

Due to the introduced solutions, on the basis of the EU, we can distinguish different models of the organization of the system for ensuring registered electronic delivery. The cooperation model, in which the state provides electronic delivery services through a designated operator, is used in the Czech Republic, Belgium, Denmark and France. The e-delivery service, which includes, inter alia, hybrid shipment, is provided, inter alia, in France<sup>111213</sup> (in Czech Republic, the hybrid service provides for both the processing of digital information into traditional mail and the digitization of an analog mail).

An interesting model is also the Italian solution. The Italian e-delivery model is currently the most developed in the EU. Italian Certified Electronic Mail (Italian *La Posta Elettronica Certificata, PEC*<sup>14</sup>). The functioning of the PEC is based on a dozen commercial PEC service providers who complete the delivery process and issue the appropriate shipping and receipt receipts. As part of the system's operation, the Public Administration

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11 2016 Act on the Digital Republic (LOI n ° 2016-1321) <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033202746>> accessed 25 March 2021.

12 2008 Czech Act No. 300/2008 col. on Electronic Measures and Authorized Document Conversion (Zákon č. 300/2008). <https://www.zakonyprolidi.cz/cs/2008-300>.

13 Regulation (EU) 910/2014 of The European Parliament and of the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive 1999/93/EC L 257/73

14 2005 Digital Administration Code (Codice dell'Amministrazione Digitale, Decreto Legislativo 82/2005 modificato ed integrato dal Decreto Legislativo 235/2010).

Index has been made available, which allows you to check and use PEC addresses of any public entity. Each public entity is required to create a PEC box as part of the services of one of the suppliers and forward this address to the market surveillance unit (Agency for Digital Italy - AgID). Electronic transmission of information requiring collection is carried out on the basis of the decree of the President of the Republic of February 11, 2005.<sup>15</sup> Pursuant to this act, the electronic transmission of an electronic document is tantamount to notification by post, unless the law provides otherwise. In 2020, as part of the PEC operation, over 2 billion electronic parcels were sent, there were over 12 million registered mailboxes and over 250,000 domains.

Registered electronic delivery is a service which, due to its conditions, is still at the implementation stage, as opposed to, for example, electronic signatures. Although the number of entities providing this service is small compared to other trust services, the number of such solutions is slowly growing. For example, in February 2021, in Bulgaria was launched the first one qualified electronic registered delivery service<sup>16</sup>, this service carries out the process of electronic delivery based on the portal and mobile phone applications. As part of the indicated service, it is possible to deliver electronic parcels to and from public administration, also in accordance with the information provided on the website of the court parcel service provider.

As shown by the experiences of various EU Member States, electronic service requires changes to the national law in order to fully implement it. Although the presumptions related to the use of qualified electronic registered delivery ensure legal certainty, the full implementation of solutions is hampered by specific procedures that exist in the Member States. It should be remembered that one of the principles of EU law is the procedural autonomy of the Member States, which means that this area of law is still largely regulated in a national and traditional manner, i.e. in paper form. The full implementation of registered service therefore requires changes to the provisions of national law. It generally takes place in two ways. The first is the introduction of a single legal act indicating a possible way of communication between businesses and citizens, and between

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15 2005 Decree of the President of the Republic of February 11 (Decreto del Presidente della Repubblica 11 febbraio 2005 No. 68).

16 See Evrotrust, 'Sending and receiving courts' decisions is already possible through the smartphone' ([www.evrotrust.com](http://www.evrotrust.com), 9 February 2021) <<https://www.evrotrust.com/landing/en/a/sending-and-receiving-courts-decisions-is-already-possible-through-the-smartphone>> access 19 February 2021.

citizens and public authorities. The second model is making changes to specific procedures. For example, in the Republic of Poland, in order to ensure the actual implementation of a registered electronic delivery, approx. 160 different legal acts, including KPA and court procedures. The second problem with the use of electronic delivery is the reconciliation of this trust service with postal services. As indicated above, the European legislator did not comment on the relationship between the eIDAS Regulation and Directive 97/67 / EC of the European Parliament and of the Council of December 15, 1997 on common rules for the development of the internal market of Community postal services and the improvement of the quality of services.<sup>17</sup> the Journal of Law, the EU, the Polish Special Edition, chapter 6, vol. 3, p. 71, as amended), assuming that these two regulations differ from each other and function independently of each other. However, the practice of economic trading shows that these ranges intersect in at least two places. The first scope is the already indicated equation of paper correspondence and correspondence carried out on the basis of registered electronic delivery in the light of national law. The second scope is the qualification of the hybrid service as either a postal service or a trust service. As shown by the experiences of the Member States, the practice of regulating the above-mentioned the scope varies.

#### *9. The PEPPOL System - Description of the Solution Today and Development Prospects*

In addition to qualified and public registered electronic delivery services, there is also a PEPPOL system in the EU consisting of many registered but unqualified delivery services cooperating within one network. These services, after meeting the criteria imposed within the network, in particular after meeting the communication standard and common address infrastructure, serve delivery nodes. The PEPPOL network is used for communication between business entities in the field of the transmission of invoices and business documents. Pursuant to the regulations in force in the Republic of Poland, invoicing for large public procurement procedures takes place via the PEPPOL network. The experience from building the PEPPOL network was used to define the requirements for qualified delivery services and to build mechanisms that will function within public deliveries in the Republic of Poland. Currently, the PEPPOL system is

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17 OJ WE L 1998 No. 15, 4 as amended.

directed and focused on the elements of trade exchange within orders and e-invoicing. However, due to the fact that countries not only from the EU region are starting to operate in the PEPPOL network, but also, for example, from Australia, Singapore, and through these countries other Asian countries<sup>18</sup>, there is a great potential for using the PEPPOL network to create an exchange standard in the future, not only of commercial but also legal documents. The advantage of the PEPPOL network over the electronic delivery solutions defined today in the ETSI standards is its open standard (based on *opensource*) and by the practice of applying in cross-border trade. The experience in ensuring interoperability in various legal systems may prove to be invaluable and significantly influence the increasing use of the standard on a global scale.

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<sup>18</sup> OpenPEPPOL AISBL, ‘Nationwide E-Invoicing Framework in Singapore’ (Peppol.eu) <<https://peppol.eu/what-is-peppol/peppol-country-profiles/singapore-country-profile/>> access 19 February 2021.



# Electronic Communication

*Anna Zalesińska, Dariusz Szostek*

## *1. Introduction*

Electronic communication is one of the key tools in LegalTech 1.0. Apart from digitalisation of resources, it was the first of LegalTech instruments used by lawyers. It underwent significant evolution over the span of years. Beginning from first simple e-mails, through attaching documents thereto, using Skype-like solutions, and then more advanced messengers, videoconferencing, e-hearings, saving data on a cloud, making such data available and sharing thereof, to Distributed Ledger Technology (DLT) and blockchain and, finally, the AI. We are on the verge of automation of the process, combination of data from various sources, including from Internet of Things (IoT) solutions, the ever-greater elimination of the human factor, and datafication of documents.

Lawyers, as well as such organisations as the courts, the public administration, and law offices, are at varying stages of digital expertise. Those range from very weak – where only the simplest solutions are used (even today, there happen to be European states in the territory of which one cannot communicate with a court in an electronic manner<sup>1</sup>), through mid-range (electronic communication only as a means for “transport” of documents – an early stage of LegalTech, access to certain information or documents through a website, and e-hearings substituted for a “traditional” court hearing), to automated systems using databases supported by algorithms, machine learning, or ever-more frequently entering the domain of AI, based on DLT and blockchain at the end. A few years ago, lawyers sent entire volumes of casefiles between themselves and the courts, the administration, etc. Today, this takes place in organisations with low digital expertise. Slowly, storing respective data (and not entire documents) in blockchain which technologically safeguards their authenticity, integrity and immutability becomes standard. At the same time, an adequately set level of access allows for the possibility of parallel work on

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<sup>1</sup> Poland is an example of one, as there is no possibility of filing briefs via electronic communication.

data by many persons in many systems, including by automatic systems, with a guarantee that there is continuity of data and that such data is up-to-date.

We are past the stage of implementing the human-to-human (institution/organisation) electronic communication. We are faced with, or are at the stage of (depending on the digital expertise of a given organisation) implementing human-to-machine (human-to-algorithm) electronic communication, and machine-to-machine communication (where a human only oversees the data ex post). Putting it differently, we are at the stage of implementing LegalTech in the matter of communication.

That which we send has changed. Documents in standardised formats (doc, pdf, xml, etc) are still dominant in organisations with low digital expertise. In those more developed, we are looking at appropriately structured data, not necessarily in formats deemed hitherto to be “traditional” electronic documents. Algorithms are in no need of documents, but of appropriately described data. A contemporary document is not only a closed, secured structure (e.g. in a pdf format, signed with a qualified electronic signature), but is also can function on the basis of data entered into blockchain (certainty of data and the possibility of verifying back data), being an active document. This is allowed *inter alia* by the novel approach of the European Union to an electronic document and to its directly applicable definition following from Article 3(35) of the eIDAS Regulation<sup>2</sup>, according to which ‘electronic document’ means any content stored in electronic form, in particular text or sound, visual or audio-visual recording. Many scholars refer to the second part of that definition which unfortunately indicates only the examples of documents structured into commonly known formats. For the purposes of LegalTech 2.0, the first part of the definition - any content, stored or made available in any manner, and thus including multi-source data entered into DLT or blockchain, acquired either from a human or from equipment, the latter including Internet of Things (IoT) or Internet of Body (IoB)<sup>3</sup>. A consequence of such an approach is not only the new construction of a document, but also a new manner of communication between lawyers – organisations/institutions and algorithms.

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2 Regulation (EU) 910/2014 of The European Parliament and of the Council of 23 July 2014 on Electronic Identification and Trust Services for Electronic Transactions in the Internal Market and Repealing Directive 1999/93/EC L 257/73.

3 Internet of Body: devices combining a body (be it human or animal) with the Internet, *inter alia* in telemedicine.

## 2. Transmission of Data and Making Data Available

The natural phenomenon occurring for many years in organisations, both those functioning in the private sector and those of the public sectors, was to transmit data<sup>4</sup> between employees (internal communication) or between an organisation and third parties (external communication)<sup>5</sup>. Transmission in the case of “paper-based” communication, in such an instance understood more as a physical transfer of media containing such data, required presentation of the original in order to duplicate its contents (through transcription, copying or digitalisation), or the transfer of a copy.

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- 4 Data construed as facts. Structured data constitute information. In everyday usage, the terms of “data” and “information” often are used interchangeably. A hierarchy of cognitive concepts is named a “pyramid” or hierarchy of knowledge/information (the so-called DIKW, from data, information, knowledge, and wisdom). Information is one of the fundamental factors affecting the making of a decision in an organisation. It also constitutes a basis of knowledge building for persons involved in the process of its acquisition and utilisation. Martin H. Frické, ‘Data-Information-Knowledge-Wisdom (DIKW) Pyramid, Framework, Continuum’, in Laurie A. Schintler and Connie L. McNeely (eds) *Encyclopedia of Big Data* (Springer 2018) <[https://doi.org/10.1007/978-3-319-32001-4\\_331-1](https://doi.org/10.1007/978-3-319-32001-4_331-1)> accessed 11 January 2021; Chaim Zins, ‘Conceptual approaches for defining data, information, and knowledge’ (2007) 58(4) *Journal of the American Society for Information Science and Technology*, 479 <<https://doi.org/10.1002/asi.20508>> accessed 11 January 2021. Given that information is secondary to data which were processed in such a manner as to give them concrete value and make them capable of being used in decision-making, communication processes are going to be described in the context of access to data. Nevertheless, any reasoning related to the way of exchanging data or making that data available retains its relevance for information.
- 5 Data represent facts, which are registered, processed, and transmitted or made available. On their own, data as such have neither meaning nor purpose. However, its transmission or making them available always occurs for a particular reason, which in turn affects the interpretation of the recipient. Moreover, information is the data contained in the communiqué, which were interpreted by the recipient. Thus, data have objective character, while the character of information is subjective. Mariusz Grabowski, Agnieszka Zająć, ‘Dane, informacje, wiedza – próba definicji’ (2009) 798 *Zeszyty Naukowe Uniwersytetu Ekonomicznego w Krakowie* 111; Gene Bellinger, Durval Castro, Anthony Mills, ‘Data, Information, Knowledge and Wisdom’ (2004) <<http://www.Systems-thinking.org/dikw/dikw.htm>> accessed 11 January 2021; Jennifer Rowley ‘The wisdom hierarchy: Representations of the DIKW hierarchy’ (2007) *Journal of Information Science* <<https://journals.sagepub.com/doi/10.1177/0165551506070706>> accessed 11 January 2021; David Weinberger, ‘The problem with the data-information-knowledge-wisdom hierarchy’ (2010) *Harvard Business Review* <<https://hbr.org/2010/02/data-is-to-info-as-info-is-not>> accessed 11 January 2021.

As a consequence, many data were being duplicated at many locations. Due to the time-consuming and multistage process of handling physical media within an organisation or between parties to the communication process that were external to that organisation<sup>6</sup>, it was not uncommon for the data to lose their quality of being essential or up-to-date. However, that was dictated by the restrictions resulting from the technical capabilities of that time. When the use of new technologies in the work of an organisation was becoming common, such a traditional approach to the exchange of data was replicated, yet the transmission of data via the means of electronic communication appeared in place of the transfer of physical media. Regrettably, documents were still being generated (for most commonly in that very form the transmission of data was taking place) and actually sent between users inside or outside an organisation. Only the carrier changed, for predominantly that was e-mail instead of mail construed traditionally, as circulation of physical consignments. In that instance, the process of communication was only supported through LegalTech 1.0-type solutions. Data were being transmitted to many locations, where their copies containing versions of files with varying degrees of current relevance were then present. Those were incapable of being used by algorithms. That often led to chaos regarding information, as the participants of the very same process were making decisions based on data that were only ostensibly identical, i.e. working on different versions of the same document (file). That approach changed only recently, even though the technical capabilities themselves were already present for some time. However, the emergence of faster transmission of data, available mobile devices with large data capacities, and a change in the mentality of users were needed. Instead of transmitting data, making the data available became ever more popular. Above all, this is done by uploading the data to a cloud and then allowing authorised entities access thereto. Some lawyers and organisations stopped at this stage. As of now, contemporary organisations still base themselves on a cloud, but store data while using DLT and blockchain. That allows for simultaneous, multi-location data storage, which is implemented in real-time. A distributed ledger provides the possibility of very fast access from the nearest (fastest) node. Security is increased when compared to traditional communication (via e-mail). It

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<sup>6</sup> “Process” understood here as a collection of reciprocally linked actions, the performance of which leads to the achievement of a specified outcome. Where a process of communication is concerned, the purpose thereof is to create a communiqué by a sender, and then the sending thereof, its receipt by a recipient, and its interpretation in a manner expected by the sender (decoding).

is important to note that every alteration of data (overwriting) in real-time is available to all those who are authorised, and each entry on every node is original by nature (which prejudges, for legal purposes, many national legal enactments on blockchain).

Where there is transmission of data, there is a transfer thereof from the sender to the receiver and saving of that data on local drives or other permanent data media of the communicating parties. In Economy 4.0, or Digital Economy 3.0, where the circulation of data is very fast, data saved in such a manner are often back data. However, making data available consists in allowing concurrent access to data for entitled or authorised entities (this pertains both to making data available from a single server, groups thereof, or by DLT).

A recipient is unambiguously defined in the event of traditional transfer of data. When making data available, the scope of addressees needs to be specified, and said scope may be unlimited (publicly available data, without the need to identify users) or limited (defined by the provisions of law or by security policy of an organisation). As opposed to the transmission of data, which takes place at a given moment (which results in the data that are up-to-date at the moment of transmission), making data available ensures access to data that are always up-to-date. An entitled or authorised entity has access to data at any time, and that data are aggregated and updated in specified time intervals on a single resource (the single source principle) or in distributed ledgers (DLT). Data in automated systems based on blockchain are updated constantly, which guarantees their up-to-date nature. Such a model not only ensures the up-to-date relevance of data, but also is a guarantor of their credibility. There is a risk of incorrect duplication of databases in the traditional model of transmitting data, which causes a danger of appearance of many different sources of data. The latter may result in a distortion of the decisional process, due to the differences between the contents and the up-to-date nature of the databases. That problem does not occur in the event of making data available or using DLT and blockchain. The extant LegalTech solutions (in particular those that are cloud-based) allow for creating access (granting authority) in accordance with the desired key criterion (taking account of the provisions on personal data protection and relevant security principles). Such a manner of working on data ensures greater efficiency and accelerates the processes in an organisation, which in turn translates to the efficacy of operation and ultimately to the reduction of costs. For that reason, the traditional, archaic model of service is being phased out in favour of making contemporary cloud-, DLT, or blockchain-based data available in real-time.

*Example*

In the traditional manner of communication, a notice of the date of a hearing, served on paper or through the means of electronic communication, requires interaction on part of a lawyer – reading the correspondence, entering it in the calendar, etc. This is carried out by a clerical office in organisations with low digital expertise. In contemporary systems, that process is carried out automatically without participation of a human. A date of a hearing is entered into the system, and by virtue of an application programming interface (API) that data are downloaded and saved in a lawyer's calendar. Entering a hearing date into a calendar, change thereof, or taking it out of the docket altogether occur automatically in accordance with the time interval of data synchronisation; at best, there may be subsequent notice of that fact to the user, through sending of an alert. Contemporary LegalTech systems also allow for verification of calendars and fixing a date acceptable for anyone concerned.

### *3. Data Sharing*

#### *3.1. Introduction*

Making data available should be distinguished from sharing of data, understood as collaborative work on a certain resource by many entities. Like the example of making data available, such a form of cooperation was limited in the past by the capabilities of transfer, having been often effected at the expense of efficiency. In the age of fast Internet and universal use of mobile devices those requirements are no longer relevant. Secure sharing of data by collaborating entities and their clients (both in the public and private sectors) undoubtedly contributes to the improvement of business efficiency. Additionally, data sharing reduces the risk of the loss of data, whereas the model of independent work on data requires the management of multiple workstations to that end. The risk of equipment failure or theft may lead to loss of valuable data, in particular where they are stored on non-secure IT data media. For many years, transferring data and the calculations connected to them to secure, appropriately administrated servers and access to data and applications through remoted desktop protocols was the alternative. The alternative now is the blockchain, which ensures the security of data. Data sharing means that there is a possibility of concurrent work of many users on various databases, including on various sets of data. In such systems, ensuring the versioning of shared documents

and visualisation of any introduced changes are required, together with unambiguous identification of the author of such changes. Solutions available on the market allow for registration of information and its storage in logs as regards any changes, the moment of effecting a given change, and on the person, who introduced such a change. Collaborative work on data requires implementation of such mechanisms ensuring accountability and identification of changes. Moreover, algorithms managing databases of that type facilitate gradation of access from read-only privileges to highest privileges related to modification and deletion of data. As of now, the development of solutions supporting the flow of data is of strategic importance for an organisation, in particular because of the fact that LegalTech 2.0 solutions are used for work on a large volume of data. They support the processes carried out hitherto by humans, through automation of those processes.

*Example*

Pursuant to the traditional approach, documents were sent and duplicated for the purposes of various organisations. Contemporary systems use multiple sources (which increasingly use blockchain in modern organisations). Alteration of data in one location causes automatic access in other systems and affects the possibility of decision. For instance, with properly configured LegalTech solutions, recording a death certificate of person X in vital records is automatically available for a judge adjudicating a case against such a person (e.g. in criminal proceedings), with the concurrent foreclosure of making a judicial decision as regards the deceased, discontinuation of proceedings, and the entry of relevant information in the system of the Prosecution Office.

### *3.2 Automation of Processes Through Use of Aggregated Data*

The amount of data gathered and made available increases systematically. As a consequence, the functionalities of IT systems facilitating selection and compression of excessive amount of data become especially important. However, that data must have certain features in order to be useful, i.e. they must be up-to-date (as of the moment of decision-making, and they must be provided in due time), complete (they must not be fragmentary), reliable (the source of data must be credible), purposeful (in accordance with the rational premiss of gathering thereof, excess data distort and prolong the decisional process), accurate (to the extent possible). Financial cost borne in relation to the process of data gathering must also remain

adequately related to the benefits thus acquired. Multiplicity of data which are processed and interpreted within a framework of a given organisation affects the amount of information possessed thereby. This facilitates satisfying the need of information and addressing the so-called information gaps resulting from e.g. the need to make a decision.

The above is no different when it comes to public bodies, where the possibility of monitoring the flow of cases, or ensuring the requisite solutions allowing for oversight at every level are also matters of great importance. Moreover, efficacy of proceedings in the age of LegalTech solutions remains closely related to the facilitation of commencement of proceedings via electronic means and to implementation of effective electronic service of process. In turn, management of those processes requires automation at the stage of commencing proceedings, registration of a case, or administrative-clerical service. Advantages of automation of processes occur where the workload in the form of input of data, completed once, pays dividends at the subsequent stages of service. Thus, in a situation where the user would manually input a specified set of data, other systems or other users are going to use that data at subsequent steps in an automated manner. In state-of-the-art systems the input increasingly occurs automatically and is made by devices, e.g. by IoT. The ever-stronger pressure on the integration of IT systems and automation of acquisition of required data is noticeable. Such an automation may support the process of user identification and authorisation, making required data available at the stage of support for the decision-making process, or, finally, transmitting information on the final decision to entitled parties. All of those stages within a correctly planned integration may take place without involvement of the human factor, with the concurrent guarantee of authenticity and integrity of data. It is vital when designing IT systems serving public or private bodies (in the event of access to public databases) to ensure mechanisms of data integration (Application Programming Interface, API) from various databases with a given application, which expands its availability and allows for effective interoperability<sup>7</sup>. However, increasingly more powerful databases come into being as a consequence thereof, and work on them slowly goes beyond the cognitive capabilities of a human. For that reason, ever stronger emphasis is put on the development of LegalTech 3.0 solutions

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<sup>7</sup> As a result, the way work is organised changes as well. An example of that is making the API to the Information Portal of the Common Courts in Poland available. That caused a bolstering of interest among the bodies offering commercial programs for law offices in integration thereof with their systems.

that use machine learning (the so-called weak AI) for contextual resource search<sup>8</sup>.

*Example*

An instance of simple automation in the area of the judiciary in organisations of mid-range digital expertise is the supplementation of data in documents from other data, e.g. from a claim (mutatis mutandis – from an application to commence non-contentious proceedings, or from a different brief initiating proceedings). Those data are entered into the internal system of a court without involvement (or with little support) of the human factor. Then, the headings for the correspondence to be sent in a given matter (and sometimes even its contents) are generated automatically on that basis. At the last stage, based on the initial data complemented with data gathered during the proceedings, the routine elements of the final decision are generated. Another example, applied in organisations of broader digital expertise, is the one from point 1.2.1, as applied in e.g. Estonia<sup>9</sup>.

### *3.3 Searching Through Data*

Where there is a large volume of data, it is always a challenge to ensure that there are mechanisms in place that allow for efficient searching through those data and for effective work while using them. In most systems, input data are structured in accordance with a specified key. Therefore, creating a solution facilitating a search of those databases poses no challenge and only comes down to ensuring the sorting of records from a given column which contain a given string of data, which then comes down to forming queries while using keywords or sorting commands. However, what proves to be a challenge is the contextual search of databases, i.e. through a precise definition of the analysed problem, and acquisition of re-

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<sup>8</sup> The expression of that is found in the Proposal for a Regulation of the European Parliament and of The Council on European data governance (Data Governance Act) of 25.11.2020, COM (2020), 737 final, 2020/0340 (COD). This is the first of a number of instruments planned by the European Commission in the European Data Strategy. The purpose of that regulation is to stimulate growth of the economy based on data in Europe, through reduction of transaction costs for the exchange of data, improvement of the availability of data for re-use, and stimulation of the actions of neutral data exchange intermediaries (the so-called data brokers).

<sup>9</sup> <<https://ec.europa.eu/cefdigital/wiki/display/CEFDIGITAL/2019/07/29/Estonian+File+system>> accessed 12 January 2021, <<https://scoop4c.eu/cases/estonian-data-exchange-layer-information-systems-x-road>> accessed 12 January 2021.

sults corresponding to the query made, by virtue of substantive weight (and not only lexical convergence of keywords). In case of public bodies, a database which falls within the concept of contextual search is e.g. a database of judicial decisions (decisions on merits by public bodies). In the event of publishing judicial decisions (be it on commercial websites or on websites available free-of-charge), solutions based on machine learning are used. The first stage where there is a plane for using systems of that type is the one for the process of erasing personal data from the contents of judicial decisions (anonymisation of court decisions). Anonymisation in the Polish Portal of Judicial Decisions of Common Courts (*Portal Orzeczeń Sądów Powszechnych*) takes place automatically, due to advanced algorithms of text analysis based on neural networks. The efficiency of the applied mechanism reaches almost 99 % and constantly increases together with the amount of analysed material, as that system is based on neural networks<sup>10</sup>.

The second moment where there is a need to reach for tools using components of artificial intelligence is the process of searching through judicial decisions. With the amount of data which is published as of now, search based only on text search as regards specific phrases yields too large a volume of results. However, content analysis of statements of reasons allows for an appropriate categorisation with the use of IT solutions, which permit a significant reduction in results. The jurisprudence of the common courts gathered and published in dedicated portals exhibits a similarity which may be identified on the basis of various criteria (features). Contents of decisions contain legal bases and references to case-file reference numbers of other cases which constitute closed collections. Moreover, phrases specific for texts of that type are often used. Identification of such existences facilitates search for decisions similar to one another through highlighting the material common features of the documents. However, in the situation where the jurisprudence of the courts is published by those courts in vast quantities, finding information of interest becomes ever more difficult, and the search methods based on outdated methods of comparison and document proximity analysis increasingly less effective. Searching for information of interest becomes time-consuming and less effective with the increasing volume of data in the databases of court

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10 Nevertheless, and in spite of such good results, there is a percentage of information remaining that may be omitted. That necessitated the introduction of the human factor into the entire process of publication, in the form of a person verifying the correctness of automatic anonymisation.

decisions, which must be automatically processed and then assimilated by the user. Correct categorisation of decisions similar on merits allows for saving the time and for open access to sources of legal knowledge by the professionals and by persons occasionally seeking legal aid. It is currently possible to use solutions that would allow aggregating decisions with similar contents in an advanced manner, to allow users to identify decisions with similar facts of the case, or to allow them to track a line of case-law in the scope of a given legal issue. Those capabilities are granted by using AI tools or machine learning algorithms, which made the analysis of natural texts and applying cognitive abilities thereto. Machine learning allows for discerning significant features of judicial decisions not only in the area of taxonomy, but also of semantics. Solutions of LegalTech 3.0, which offer intelligent full-text search methods, methods of creating search results rankings, or methods of finding similar documents, undoubtedly constitute the future of services addressed to lawyers. Work in that area is underway e.g.<sup>11</sup> in Poland for the system of the ‘Portal of Judicial Decisions’<sup>12</sup>, in France<sup>13</sup>, in the UK<sup>14</sup>, and in the United States of America<sup>15</sup>.

A similar challenge is posed by the products achieved with use of automatic speech recognition (ASR). ASR systems also use advanced machine learning methods. The degree of precision is adjusted for a given language situation and yields different results when dictating documents (increasingly more common for use in law offices and by judges) than those obtained therefrom through recognition of spontaneous recordings (e.g. from hearings). In case of the former, the degree of correct recognition (even for the legal language) reaches almost 99%. In case of the latter, the end result depends on the quality of the recording<sup>16</sup>. ASR technology and word-spot-

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11 European Ethical Charter on the use of artificial intelligence in judicial systems and their environment, Council of Europe, Commission for the Efficiency of Justice (CEPEJ), <<https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c>> accessed 12 January 202118.

12 <[www.orzeczenia.ms.gov.pl](http://www.orzeczenia.ms.gov.pl)> accessed 12 January 2021.

13 Case Law Analytics, JurisData Analytics (LexisNexis) <[www.doctrine.fr](http://www.doctrine.fr)> accessed 12 January 2021.

14 Luminance. HART (analysis – criminal, risk of reoffending) - Harm Assessment Risk Tool.

15 Watson/Ross (IBM), Lex Machina (LexisNexis).

16 For the purposes of automatic speech recognition, the correctness of recognition is calculated by interpreting the results of the WER (Word Error Rate) metric. The WER comes from the so-called Levenshtein distance, but depends on the compatibility of words, and not single letters in words. It consists in comparing the source text with the recognised text, and then calculating a rate provided by a

ting<sup>17</sup> became one of the key issues in the field of developing LegalTech 3.0 solutions due to the increasing amount of data stored in the form of recordings (and in particular due to the ever-broader use of electronic official record, long-distance hearings, and trials over the Internet).

#### 4. Communication by Using IT Solutions

##### 4.1. Communication Within an Organisation

Rapid development of technology in recent years has become an impulse for evolution of organisations, both in the private sector and in the public sphere, towards development of processes supported by IT solutions or implemented entirely through the use thereof. As a consequence, an organisation increases its operational efficiency through use of contemporary technological solutions, aiming to reach digital maturity of an intelligent organisation, understood as the constant process of adapting that organisation to the changing digital environment<sup>18</sup>. The ecosystem wherein both organisations and clients/recipients of services function is defined as SMAC (Social, Mobile, Analytics, Cloud) and is supplemented by the technology of IoT. Development of communications technology remains closely linked to contemporary solutions reinforcing the process of management and the service of processes. Functioning of an organisation in the age of digital transformation requires adjustment of methods

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quotient of a sum of substituted, inserted and deleted words and the number of words in the entirety of the text. The ASR system functioning at the Polish courts has a very high level of WER (below 9.5 % for the Polish language). The highest level of WER was achieved for the English language, and it currently amounts to 4.9 % (Google). Emil Protalinski, 'Google's speech recognition technology now has a 4.9% word error rate' <<https://venturebeat.com/2017/05/17/googles-speech-recognition-technology-now-has-a-4-9-word-error-rate/>> accessed 11 January 2021.

- 17 Audio mining or search for information in sound recordings.
- 18 James Corr 'An introduction to the digital maturity model' (2020) <<https://www.seerinteractive.com/blog/introduction-to-digital-maturity/>> accessed 11 January 2021; Tristan Thordsen , Matthias Murawski, Markus Bick 'How to Measure Digitalization? A Critical Evaluation of Digital Maturity Models' in Marié Hattingh, Machdel Matthee, Hanlie Smuts, Ilias Pappas, Yogesh K. Dwivedi , Matti Mäntymäki (eds) *Responsible Design, Implementation and Use of Information and Communication Technology* (Springer-Cham 2020) <[https://doi.org/10.1007/978-3-030-44999-5\\_30](https://doi.org/10.1007/978-3-030-44999-5_30)> accessed 11 January 2021; Piotr Adamczewski, 'Ku dojrzalości cyfrowej organizacji inteligentnych' (2018) 161 *Studia i Prace. Kolegium Zarządzania i Finansów*, 67.

of management and communication to the contemporary standards based on using technology of the so-called Third Platform of ICT (SMAC). An intelligent organisation understood as an economic system utilising advanced ICT infrastructure in its internal organisation and communication (including external communication) constitutes, as of now, the essence for the functioning of information society in business fields<sup>19</sup>. Therefore, ensuring that an organisation is appropriately equipped with system and communications infrastructure, and at times hardware infrastructure, becomes necessary for service of processes inside the unit.

It is now standard to use mobile devices such as smartphones and telephones (Mobile) for communication within the framework of a given organisation. Analytical solutions become increasingly important (Analytics), as they are capable of providing specific preferences, trends or dependencies on the basis of aggregated data and with the use of advanced algorithms. As a result, the decision-making process is supported at various levels of an organisation. Advantages of that type of analysis are used increasingly more often in law offices and public bodies. And finally, there is the ultimate mainstay of SMAC, i.e. the technology of the computing cloud (Cloud), with DLT and blockchain included therein.

However, using full potential of SMAC requires profound change within an organisation and, above all, abandonment of traditional “analog” solutions in favour of digitalisation. It is much easier to work, make available, process, and analyse sources that were originally created and fixed electronically. This is followed by the need of reorganising personnel towards employees who possess appropriate expertise in that field. Changes in the private sector must also be correlated with changes in the public sphere. A state understood as public administration and the judiciary should also increase the availability of services offered electronically, gather resources of digital data, and create a friendly legal ecosystem. After all, effective use of contemporary technologies in an organisation, automation of repetitive processes, and innovation are one of the components of the so-called process maturity of an organisation<sup>20</sup>.

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19 Stewart Clegg, ‘Globalizing the Intelligent Organization: Learning Organizations, Smart Workers, (Not So) Clever Countries and the Sociological Imagination, Management Learning’ (1999) Sage journals <<https://journals.sagepub.com/doi/abs/10.1177/1350507699303001>> accessed 11 January 2021;

Piotr Adamczewski, ‘Organizacje inteligentne w zintegrowanym rozwoju gospodarki’ (2016) 2 *Zeszyty Naukowe Uniwersytet Rzeszowski*, 420.

20 Vladimir Modrák, Zuzana Šoltysová, ‘Development of an Organizational Maturity Model in Terms of Mass Customization’ in Dominik T. Matt, Vladimir

Examples of solutions used outside of an organisation are found in: messengers (e.g. MS Teams), special solutions for collaborative work (e.g. Workplace, Trello), platforms allowing for videoconferencing and online meetings (e.g. MS Teams, Zoom, Jitsi Meet), e-mail based on customised mailbox, integrated with a calendar and available on many devices (e.g. Exchange), corporate social media (e.g. Yammer), workplace collaboration software (e.g. Basecamp or Slack), intranet, newsletters, etc. The solutions thus described are often integrated, which makes the flow of information within an organisation more efficient and consistent.

#### *4.2. Communication with Parties from Outside an Organisation*

At present, where communication with external partners is concerned – analogously to communication within an organisation – the parties base themselves on SMAC technologies. However, professional messengers (such as MS Teams, Zoom, Google Meet, Jitsi Meet, etc.) that become a platform for swift exchange of information and knowledge sharing, increasingly become the mainstay for such communication. It is not only the private sector that functions within this medium. Ever more frequently, public bodies consider that form of communication – apart from the dominant one, via domain-specific ICT systems – to be permissible as well, which allows an organisation to apply homogenous standards in communication with partners from both sectors. The approach to mobile devices also changes, and in communication with partners from outside the organisation those are used not only as tools for direct communication (in the form of telephone conversation, or of a SMS message), but also – or, above all – as tools for using videoconferencing platforms or ICT systems. Universal usage of smartphones and tablets necessitates that applications and webpages of any kind must also be available in the so-called mobile version, and it must be added that those devices are permanently connected to the Internet. A cloud also finds its use in communication with external parties, by granting specific privileges (access) to defined resources for business partners or service recipients. It also becomes standard to work on a joint project by using specialised solutions, such as JIRA, IC

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Modrák and Helmut Zsifkovits (eds) *Industry 4.0 for SMEs* (Palgrave Macmillan 2020) 215 <[https://doi.org/10.1007/978-3-030-25425-4\\_8](https://doi.org/10.1007/978-3-030-25425-4_8)> accessed 12 January 2021, Magdalena Raczyńska ‘Modele dojrzalosci procesowej organizacji’ (2017) XLIV 2 Acta Universitatis Nicolai Copernici. Zarządzanie, 61.

Project, GanttPRO, Workzone, etc. The solutions described here systematically supersede the methods of communication used hitherto, which in most cases were based on sending an electronic message via e-mail, or on direct communication.

As of now, using uniform methods of communication within an organisation and with partners outside an organisation is noticeable. It is due to the synergy between the four mainstays of the Third Platform of ICT mentioned above that ecosystems that were hitherto closed and often restricted to one organisation and its partners have been opened to third parties, including public bodies. New channels of communication facilitate efficient transfer of information to a broad range of recipients. In turn, mobile technologies guarantee constant access to that information by virtue of a permanent connection to the Internet. Furthermore, data analysis ensures optimisation of processes, while cloud technology facilitates scalability and reduction of costs while working on data. Work within the boundaries of one working environment ensures timesaving and improves the flow of information. However, that requires high standards in the scope of cybersecurity, for hitherto isolated systems or databases are opened for persons from outside an organisation, and thus for persons constituting a potential hazard.

## *5. Electronic Services in LegalTech*

### *5.1. Introduction*

One of the most important challenges posed for public administration and the judiciary is to ensure efficient communication with other offices, citizens, and entrepreneurs<sup>21</sup>, based on high standards of security and on verification of identity. The most important task in that area is the ensuring of the provision of public services via electronic means, which ultimately is to accelerate and improve deciding cases before public bodies. The concept of an electronic service (e-service) should be construed as a service which may be provided without physical presence of the parties

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21 The following communication channels are distinguished: *Government-to-Government* (G2G) – public authorities to other public authorities, *Government-to-Citizen* (G2C) – public authorities to citizens, *Citizen-to-Government* (C2G) – citizens to public authorities, *Government-to-Business* (G2B) – public authorities to entrepreneurs, *Business-to-Government* (B2G) – entrepreneurs to public authorities.

at one given venue (remotely via the Internet) by using information technology (either partially or completely automatically). Such services should be set up in a manner targeted to a citizen, i.e. in a clear, transparent, productive, and effective manner, in order to avoid exclusion of any groups, in particular in the context of the so-called “functional illiteracy”, understood as “IT exclusion”. Traditionally, there are four stages of maturity for electronic services provided by public bodies, i.e. information, interaction, transactional services, and integrative services<sup>22</sup>. Recently, personalisation was discerned as the fifth stage.

### *5.2. Information and Interaction Services*

At the most basic, i.e. at the informative level, the institutions publish information at their websites, while recipients (citizens, clients, users) may only familiarise themselves with such information by browsing webpages through a personal computer, mobile devices, or the so-called information kiosks. At present, the first stage of service maturity is already a standard. Every public body, be it among European Union bodies or within national structures, ensures access to an appropriate collection of information as of now.

The second stage of maturity presupposes one-way interaction. Users transfer information to an institution via electronic means, yet not in all cases the institution would answer them in the same way (communication

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22 Janina Banasikowska, Anna Sołtysik-Piorunkiewicz, ‘Czynniki kształtujące poziom akceptacji i poziom dojrzałości systemów e-administracji na tle rozwoju społeczeństwa informacyjnego’ (2016) 308 *Studia Ekonomiczne. Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach*, 9 and literature cited thereunder. Alternatively, there is another categorisation of services posited in the academic literature, in that there are: Level – 1: Information, Level 2 – unilateral interaction, Level 3 – bilateral interaction, Level 4 – transactional, Level 5 – personalisation; alternatively, there is a categorisation of: cataloguing (in that an organisation has a webpage), transaction (there is a possibility of providing services for citizens electronically, but only coming down to the option of making a service of downloading interactive forms from a website and transmitting them to that authority available), vertical integration (databases of various organisations are integrated, there is a possibility of making a decision on a case electronically), horizontal integration (linking various data systems that comprise separate groups of services provided for citizens, by which a citizen becomes able to have his or her various cases “heard” at a single place). Karen Layne, Jungwoo Lee, ‘Developing Fully Functional e-Government: A Four Stage Model’ (2001) 18 *Government Information Quarterly* 122.

may be unilateral, when only the input of information occurs electronically, or bilateral, where an authority responds that way as well).

### *5.3. Transactional and Integrative Services. Personalisation as the Fifth Stage of Maturity for e-Services*

In the transactional model, the recipient communicates with a public office via electronic means and in that way receives a reply (communication is bilateral, often using dedicated applications, e.g. through completing a form on-line and sending it with attachments to a public authority via electronic means).

At the fourth stage, i.e. the integrative stage, users access dedicated portals on which they use information from various parties. This is made possible due to integration of data from such various sources, and thus work is carried out with the use of shared data. The entire process commences wholly via electronic means. From the acquisition of information, commencement of proceedings, payment of an appropriate fee, to the making of either a procedural or substantive final decision on the case at the end<sup>23</sup>.

Lastly, personalisation consists in offering services to users where such services are customised for individual needs and circumstances of those users. Due to the implementation of appropriate algorithms of data processing, services are automated and provided proactively (that is, the institution itself reaches to the recipient with the proposal of providing a service).

## *6. New Approach to Directness<sup>24</sup>*

### *6.1. Introduction*

IT solutions alter the way in which lawyers operate. Major acceleration of changes has occurred due to COVID-19 and thus the inability to operate as usual, i.e. through direct physical meetings, either with clients or

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23 *ibid.*

24 Ewa Rott-Pietrzyk, Dariusz Szostek, ‘A New Approach to the Legal Understanding of “Directness” and “Participation” in the Aftermath of COVID-19’ in: Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst, Fryderyk Zoll (eds) *Coronavirus and the Law in Europe*

with a court<sup>25</sup>. We stood witness when the work methodology of lawyers (through universal use of videoconferencing), institutions (including the courts), and the interpretation of the concept of “being in the presence” have changed in mere weeks. Before the pandemic, that last concept was interpreted restrictively, equating it with physical presence at the same place and at the same time<sup>26</sup>. By adopting a purposive interpretation without actually amending the law, holding online meetings and sessions (including those of the European Parliament or those of national parliaments, administrative authorities, or companies), where members connect thereto via IT solutions and participate in proceedings in real-time. That change shall last, including after COVID-19. Online hearings became obvious. In just several days, online trials were greenlit as well, in countries where this was impossible until that time (to that extent, an amendment of the law was needed at times, and sometimes the existence of online trials had to be “discovered” in existing provisions), deeming that online solutions fulfil the requirements of directness. Lithuania, Italy, or Norway may be indicated as examples in that regard<sup>27</sup>. In other countries the legal bases (which were admittedly extant) were expanded to include a possibility of holding trials on-line for lower instance courts and the opportunity of connection from a different venue than that of the court. Such acts were taken *inter alia* in Poland, Brazil, and Canada<sup>28</sup>. In countries with substantial digital expertise (e.g. in Austria) the conduct of notaries changed, and permission to draft notarial deeds online was given. More importantly,

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<<https://www.intersentiaonline.com/publication/coronavirus-and-the-law-in-europe/658?version=v-2f6f01ec-324e-637b-c7ca-a6bc0e384e16>> accessed 15 December 2020.

- 25 Tiffanie Wen, ‘How coronavirus has transformed the way we communicate’ (BBC, 9 April 2020) <<https://www.bbc.com/worklife/article/20200408-coronavirus-how-lockdown-helps-those-who-fear-the-phone>> accessed 15 December 2020.
- 26 However, there emerged a concept of “tele-presence” in the doctrine, as an alternative to the traditionally understood physical presence. Nonetheless, those analyses more often pertained to the ODR rather than to classic judicial procedures. The COVID-19 pandemic caused this view to shift and intensified a wider use of videoconferencing platforms for the purposes of organising a court hearing. Richard Susskind, *Online Courts and the Future of Justice* (Oxford University Press 2019) 255.
- 27 Ewoud Hondius, Marta Santos Silva, Andrea Nicolussi, Pablo Salvador Coderch, Christiane Wendehorst and Fryderyk Zoll (eds) *Coronavirus and the Law in Europe* <<https://www.intersentiaonline.com/bundle/coronavirus-and-the-law-in-europe>> accessed 12 August 2021.
- 28 *ibid.*

ISO 29115 technical norms<sup>29</sup> on identity assurance at the LoA2 or LoA3 levels, and thus at the average or high levels of assurance, respectively, permit identity verification carried out fully online. At the global level, the SP 800-63 guideline introduces 4 individual assurance levels; at IAL2 and IAL3, verification of identity online is permissible, on condition that where the latter level is concerned there would be an online connection of a trained employee with the person being verified, and verification of identity would take place via that transmission and verification of an ID card with a photo. As of this moment, there are actions being considered whose purpose would be to verify identity with an entry in blockchain, taken together with additional attributes which could be freely added by the verified person to his or her data (e.g. an attribute of the entry in the Bar, on the roll of notaries, etc).

## *6.2. Electronic Hearings According to the Example of European States*

Remote hearings (also known as electronic hearings, online hearings, hearings over the Internet, or “devenued” hearings<sup>30</sup>) are a specific example of electronic services offered by the judiciary. Receipt of information is an active and complex process, in which the mind cooperates with the senses to create an image of the reality surrounding us. Among them, sight is the most developed sense and has greatest importance in the process of perception. Moreover, studying the reaction of the person heard allows a judge to swiftly respond by appropriately adjusting and rephrasing questions. The advantages of a remote hearing caused it to be universally used in the states of the European Union for many years already, both in civil and criminal proceedings<sup>31</sup>. Audio-video streaming, in itself, is being developed,

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29 <<https://www.iso.org/standard/45138.html>> accessed 10 December 2020.

30 As they are referred to in Poland.

31 A tool named “Telehoren” has been used in the Netherlands since 1999 (Aarnout Schmidt, ‘Technologie komunikacyjno-informatyczne w sądownictwie w Holandii – aktualna sytuacja’ (2006) 16 Prawo mediów elektronicznych). In Austria, Germany, Finland, Estonia and Poland, a remote deposition was consistently being implemented for successive courts during the first years of the 21<sup>st</sup> century (Jacek Gołaczyński (eds) *Informatyzacja postępowania sądowego w prawie polskim i wybranych państw* (C. H. Beck 2009) 36. The option to use videoconferencing to render legal assistance between courts of various states was provided for under the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union OJ C 197/12 and under Council Regu-

and associated services such as autodescription or VMI (video-mediated interpreting) are being activated<sup>32</sup>.

The next stage of development for audio-visual communication between a court and the parties to the proceedings is the so-called electronic (on-line) hearing. It is based on the assumption that not only witnesses or expert witnesses but parties to the proceedings in general may be present at other venues than that of the court hearing the case. In that event, the parties may take part in a hearing while being physically present at a different courthouse and take action in proceedings from there. The course of proceedings is transmitted in real-time to the place of stay of the parties and to the court holding proceedings<sup>33</sup>. The SARS-CoV2 pandemic has made the use of audio-visual techniques universal, as an alternative to personal appearance in court. It has also generated an impulse to abandon the traditional transmission between stations located in courts, penitentiaries, or other organisational units of the judiciary. Moreover, solutions allowing participation in a court hearing from any place where a party is present have appeared<sup>34</sup>. At an online hearing, a party to the proceedings may effectively take any procedural acts, with legal effects prescribed in the legal provisions<sup>35</sup>. One may discern hearings where some parties connect remotely (partially remote hearing) and hearings wherein everyone (including the composition of a given court) participates remotely (fully remote hearing).

An addition to the active communication between a party and a court is found in passive communication, consisting in streaming the hearing

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lation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters OJ L 174/27.

- 32 Sabine Braun, 'Remote Interpreting' in Holly Mikkelsen and Renée. Jourdenais (eds) *Routledge Handbook of Interpreting* (Routledge 2015)352. <<http://wp.videoconference-interpreting.net>> accessed 12 January 2021.
- 33 Anna Zalesińska, 'Electronic Court Report in Proceedings Before Common Courts in Poland' in: Jacek Gołaczyński, Wolfgang Kilian and Tomasz Scheffler (eds) *Legal Innovation in Polish Law* (C. H. Beck 2019) 119–131.
- 34 To illustrate, such a solution was provided in Poland by the Act of 14 May 2020 on the amendment of certain statutes in the scope of protective acts related to the spread of the SARS-CoV-2 virus (Journal of Laws of 2020, item 875).
- 35 The level of maturity for a e-service of holding a hearing online was defined at 4<sup>th</sup> level. This means fully settling a matter by making an application to hold a hearing online, then processing that application, planning a videoconference and confirmation of a date, allocation of resources, and finally holding a hearing.

on-line<sup>36</sup>. That functionality comprises allowing the authorised persons to stream the course of public hearings through the videoconferencing infrastructure. The examples of programs used to organise videoconferences at courts are: Microsoft Teams (Italy), Skype for business (Hungary, the UK, the Czech Republic), Zoom (Great Britain's Northern Ireland), BT MeetMe (Great Britain's Northern Ireland), Sightlink (Great Britain's Northern Ireland), Jitsi Meet and Avaya Scopia (Poland), the respective countries' own systems (Spain). The SARS-CoV-2 pandemic made the implementation of systems handling videoconferencing in common courts of the Member States of the EU more intense. Admittedly, a remote hearing was possible in some states even before 2020. For instance, there were no material changes to the operation of the judiciary in Croatia, as communication via electronic means and remote hearings in civil and commercial matters were also possible even before the pandemic. That state of affairs is similar in Estonia, where it was also made possible in any given type of cases, regardless of the role or function performed in proceedings. There also was a possibility of organising remote proceedings in Finland, including through videoconferencing, both in civil and criminal cases. Furthermore, there were provisions in force in Germany before the pandemic that allowed the parties, their representatives and advisers to provide testimony during a pending hearing from various venues, i.e. not necessarily from the courtroom. In some Member States of the EU, the pandemic accelerated the implementations or became an accelerator for new, innovative projects. Ireland is a good example of that, for it took the pandemic to start work related to ensuring appropriate legislation and infrastructure for the purposes of videoconferencing there. Pilot stages did not commence until April 2020. In two regions of Spain which belong to the most advanced as regards the implementation of videoconferencing systems, that is in Valencia and Catalonia, there is a possibility since April 2020 for an arrested person or a person held in custody to make a remote deposition and for an expert to give testimony (respectively, by using the CISCO WEBEX system in Catalonia), or solely for an arrested person (in Valencia). While regulations allowing for remote hearings in Lithuania were introduced for civil cases, they were used only sporadically until the pandemic. There also was an initiative in April 2020 to ensure broad use of videoconferencing also in criminal proceedings. As far as the analogous situation in Poland was concerned, remote hearings were used

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36 Streaming understood here as a transfer of data from one device to another, which allows for playback of data in real-time.

sparingly (yet much more often in criminal matters). Remote trials, despite the provisions that allowed them already in 2015, were not garnering a great amount of attention. It was from May 2020 that the change came, after amendment of the provisions on remote participation in a civil trial from any place, without the need to stay in a courthouse. Abandonment of the requirement to be present at a courthouse has contributed to the promotion of the tool at issue and to renewed interest in such a form of participation from the parties to proceedings. What is more, there were two new types of commencing proceedings adopted in Italy during the period of the pandemic, i.e. the “mobile” one (document-based) and remote proceedings in the form of videoconferencing through a dedicated application. There was a project called “Skype Defence”, launched in January 2020 in the Czech Republic, allowing remote communication for defence counsel with their clients who were present in penitentiaries. It was not until a temporary regulation on administration of justice, which came into force on 28 March 2020, that commencement of hearings via videoconferencing was allowed in Norway. In a similar vein, Hungary allowed an option of broad use of videoconferencing in civil and criminal matters at the beginning of April 2020. In Portugal and Sweden, court systems were adjusted after April 2020 to carry out videoconferencing where it would be compatible with the right to fair trial. In addition, there are states which use videoconferencing in a very limited manner, e.g. in Austria, where videoconferencing came into use only when the pandemic started, and only in criminal proceedings. Courts in Denmark restricted themselves to the option of holding a hearing mainly via electronic means (to a very limited extent, with the use of tools allowing audio-visual transmission)<sup>37</sup>.

## 7. *Electronic Service of Process*

### 7.1. *Poland*

Due to organisational considerations and the costs associated thereto, computerisation of the judiciary in Poland progresses in stages. It was at the

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37 Drafted on the basis of the document by the Foreign Affairs Committee of the National Assembly of Attorneys at Law. Krajowa Izba Radców Prawnych, ‘Sądy w trybie online – zdalna praca sądów w wybranych państwach europejskich w czasach pandemii SARS-COV-19’ (2020) <<https://kirp.pl/wp-content/uploads/2020/05/opracowanie-komisji-zagranicznej-krrp.-sady-w-trybie-online.pdf>> accessed 13 January 2020.

end of the past century when the first acts in the field of computerisation of court registers were taken. As of now, the management of the register of sentenced persons (State Criminal Register)<sup>38</sup>, the land register<sup>39</sup>, the register of liens, and the register of business entities (National Court Register)<sup>40</sup> is carried out remotely. From 2009, when Electronic Admonitory Proceedings (*Elektroniczne Postępowanie Upominawcze*, “EPU”)<sup>41</sup> appeared in the Polish Code of Civil Procedure, the process of computerising the judiciary undoubtedly gained greater momentum. The electronic record of proceedings began to exist in 2010 beside the traditional written record of proceedings<sup>42</sup>. Following the example of civil proceedings, similar changes appeared within the proceedings in matters of contraventions and in criminal proceedings. The next stage was to implement oral statements of rea-

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- 38 The IT system of the State Criminal Register cooperates with the Central Register of Vehicles and Drivers (Centralna Ewidencja Pojazdów i Kierowców) and with the IT system of the Central Board of the Prison Service at the Ministry of Justice. Since 2008, the State Criminal Register has cooperated with other criminal registers from some EU Member States through the sTESTA network.
  - 39 It is possible to consult the entirety of the land register (“księga wieczysta”) through that system, obtain a certified copy, and verify authenticity of a print-out. There is an additional functionality of access to electronic notices on entry and to information on the state of a case to make an entry to the land register through the trusted ePUAP user profile (which is one of the national methods of identification in Poland, equivalent to a qualified electronic signature).
  - 40 The currently available electronic services are: an Internet-based search engine for entities entered into the National Court Register; independent downloading of print-outs from that Register, which enjoy the legal status of a document issued by a court; making applications on-line to enter an entity into the National Court Register; making applications to enter a Polish private company limited by shares (a “sp. z o.o.”), a Polish registered partnership (a “sp.j.”), and a limited partnership (a “sp.k.”) to the Register (the so-called S-24 company module, which allows registration of those types of companies and partnerships through a ready-made template over 24 hours); ordering and receiving documents online from the corporate catalogue of documents.
  - 41 Introduced by the Act of 9 January 2009 on the amendment of the Act – Code of Civil Procedure (Journal of Laws of 2009, item 156.). Consists in a simplified procedure of litigating money claims by completing an online form by the claimant (including by the so-called mass claimant), and in paying a judicial fee over the Internet. The claimant receives an order for payment to his or her account in the IT system, while the defendant is served therewith by post. An order for payment contains an identification code which allows for verification that the payment order exists and what are its contents in the IT system. There is an option of electronic (i.e. remote) commencement of civil enforcement proceedings.
  - 42 Until 2010, there only was an option in judicial proceedings to take evidence remotely by way of videoconferencing.

sons for decisions into the proceedings, and then online hearings in 2015, as other European states did. According to Article 151§ 2 of the Polish Code of Civil Procedure<sup>43</sup>, it is possible to order the commencement of a public hearing via technical means that would allow to carry it out remotely. In that event, parties to the proceedings may take part in the hearing while being physically present at some other venue and take procedural acts from there. The course of procedural acts is transmitted in real-time to the place of stay of the parties and to the court holding proceedings. The venue at which the parties may take part in a public hearing should be located at the courthouse of a different court. A major improvement for the purposes of applying for that very manner of holding a public hearing is found in the option of filing an application therefor via the Information Portal. Feedback communication with a court takes place electronically, as well. It is worth noting that the application for an on-line hearing made via electronic means is a first-of-a-kind service in Poland which is provided completely through the Internet, and thus the first service of the so-called Electronic Internal Mail Department (*Elektroniczne Biuro Podawcze*)<sup>44</sup>. Everything in that regard depends on the technical capabilities present at a given court, in a given category of cases, or in the scope of a given procedural act. Such a capability was ensured for the application for an online hearing. However, such an application must be signed in accordance with Article 126§ 5 of the Polish Code of Civil Procedure, i.e. by a qualified electronic signature, by a trusted signature, or by a personal signature. The existing option to hold a hearing online with the participation of parties present in different courthouses was expanded in 2020. The state of the law

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43 Act of 17 November 1964 – Code of Civil Procedure (consolidated text: Journal of Laws of 2020, item 1575, as amended).

44 The concept of the Electronic Internal Mail Department should be understood here as a complete solution that enables both the filing of briefs in an electronic manner and the electronic service. The provision of Article 125§ 2<sup>1a</sup> of the Polish Code of Civil Procedure uses the phrase “selecting the option to file briefs (...) and subsequent filing of briefs” is permissible where it is possible due to technical reasons attributable to a given court. This should be understood in such a way that if the technical reasons permitted the handling of one type or category of cases, then only to that extent electronic communication at a given court would take place. Therefore, based on Article 125§ 2<sup>1a</sup> of the Code, it is possible to file a specific brief through a ICT system that serves judicial procedures, on assumption that the proceedings then continue “on paper”. Marcin Ułasz in Jacek Gołaczyński and Dariusz Szostek (eds) *Kodeks postępowania cywilnego. Komentarz do ustawy z 4.7.2019 r. o zmianie ustawy – Kodeks postępowania cywilnego oraz niektórych innych ustaw* (C. H. Beck 2019) 72.

was subject to change due to passing a governmental bill to amend certain statutes in the scope of protective acts related to the spread of the SARS-CoV-2 virus<sup>45</sup>, where the legislator decided to allow a broad participation in a hearing through a videoconference. According to Article 15zzs<sup>1</sup>, the participants in an online hearing need not be present at court and may participate in a hearing remotely, by using a personal computer or a mobile device. Connection takes place by using two applications, i.e. Avaya Scopia or Jitsi Meet (the court decides which one is to be used). The entirety of the hearing is held remotely, including the delivery of a judgment and the presentation of the oral grounds therefor, or the provision of an oral statement of reasons<sup>46</sup>.

The Information Portal was implemented into the court system together with the e-record of proceedings. It is a system allowing an authorised user to gain access to information on a given case, to court documents, to recordings of the electronic record<sup>47</sup>, and to the Portal of Judicial Decisions mentioned above. Finally, the date of 10 July 2015 is of note here, as on that day the provisions allowing comprehensive service of fully electronic, bilateral communication with a court in civil matters were passed. Thus, the legislator allowed wide use of electronic and documentary forms in the context of recording court documents in the course of civil proceedings. However, the IT system was not created, and the administration of justice was mainly based on “paper-based” service of process (with

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- 45 Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating COVID-19, other infectious diseases and crisis situations caused thereby (Journal of Laws of 2020, item 1842, as amended).
- 46 Should a hearing be recorded by a device recording sound, or images and sound, the Polish legislator introduced the possibility for the statement of reasons to be delivered after the delivery of the operative part of the judgment, and then recorded by that device, in civil proceedings and in proceedings in the matters of contraventions. Oral statement of reasons becomes a part of the electronic record of proceedings. Anna Zalesińska, ‘Electronic Court’ in Jacek Gołaczyński, Wolfgang Kilian and Tomasz Scheffler (eds) *Legal Innovation in Polish Law* (C. H. Beck 2019), 119.
- 47 E-services for citizens are provided through the Information Portal, i.e.: an application for automatic transcription solely by using automatic speech recognition (ASR), application to make an audio-video recording available, application to reserve a station to consult the electronic official record at the file-reading room, an application for an e-hearing (the first application within the framework of the so-called Electronic Internal Mail Department). There is going to be an application for the streaming of a hearing, to be made available in 2021.

minor exceptions described above) until 2020<sup>48</sup>. This is not to say that electronic service of process was not carried out. Public administration and the judiciary implemented that service in a limited<sup>49</sup> manner<sup>50</sup>, in differing ways and by using different IT systems. Even within the bounds of the widely understood public administration (tax offices, the Social Insurance Institution, etc) there were divergences, in particular during the first years of implementing electronic communication<sup>51</sup>. That situation changed greatly on 18 November 2020, when the Act on Electronic Service was passed. However, implementation of electronic service and the creation of a system handling them is planned to take years, for this is a major organisational undertaking. Completion thereof is planned for as late as 2029. Due to the circumstances related to the pandemic, the Polish legislator has decided in 2021 to temporarily allow the possibility of carrying out effective electronic delivery service via Case Information System (Portal Informacyjny)<sup>52</sup>. Where cross-border communication is

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48 Although the traditional postal receipt was superseded by an electronic receipt, the so-called Electronic Confirmation of Receipt.

49 Limited because only certain types and kinds of cases were capable of being managed remotely.

50 The duty to carry out electronic service on demand appeared in administrative procedure already in 2005. In civil proceedings, electronic service was performed only in select types and kinds of cases. By way of an example, one may point to the Electronic Admonitory Proceedings mentioned above.

51 The development of e-services has advanced greatly in recent years in Poland, and public bodies ensure the possibility of settling select cases over the Internet via those e-services for potential stakeholders.

52 Article 15zzs<sup>9</sup> of the Act of 2 March 2020 on special solutions related to the prevention, counteraction and combating COVID-19, other infectious diseases and crisis situations caused thereby (Journal of Laws of 2020, item 1842, as amended), which came into force on 3 July 2021.

concerned, the eCODEX<sup>53</sup> and eCODEX Plus project<sup>54</sup> wherein Poland participated becomes of special importance. The purpose of that project was to create legal and factual capabilities of electronic receipt of briefs within the framework of two cross-border judicial procedures – the European Order for Payment<sup>55</sup> and the European Small Claims Procedure<sup>56</sup>, by connecting the courts of Member States which participated in the project to the e-Justice portal ([e-justice.europa.eu](http://e-justice.europa.eu)) and by introducing appropriate legislative amendments to the provisions of civil procedure in force<sup>57</sup>. The

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- 53 The e-CODEX project (carried out from 2010 to 2016) greatly influenced the development of computerisation of judicial procedures in the European Union. The concept of the e-Justice portal ([e-justice.europa.eu](http://e-justice.europa.eu)) was drawn up within the framework of that project, to serve as a pan-European contact point in matters of the administration of justice. Furthermore, the project produced steering guidelines for subsequent work on filing and serving briefs and court letters via electronic means. The effects of that project were met with positive assessment from the European Commission and adapted in the work of the European legislator. Katarzyna Klimas and Damian Klimas, 'Electronic Communication in European Cross-birder Proceedings – Polish Perspective' in Jacek Gołaczyński, Wolfgang Kilian and Tomasz Scheffler (eds) *Legal Innovation in Polish Law* (C. H. Beck 2019)197; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Digitalisation of justice in the European Union A toolbox of opportunities, Brussels, 2.12.2020 COM(2020) 710 <[https://ec.europa.eu/info/sites/info/files/communication\\_digitalisation\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication_digitalisation_en.pdf)> accessed 12 January 2021.
- 54 National ICT systems were successfully connected to a central portal within the framework of the eCODEX Plus project (carried out from 2017 to 2019). Pilot actions pertained to two procedures, i.e. procedure for the European Order for Payment and the European Small Claims Procedure. The pilot procedure took place at the District Court for Wrocław – Fabryczna in Wrocław and at the Regional Court in Wrocław.
- 55 Regulation (EC) No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure, OJ L 399/1.
- 56 Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199/1.
- 57 The Polish legislator did not foresee the option of using contemporary technological solutions within the scope of provisions directly applicable to European cross-border procedures. However, legislative solutions foreseen by the European legislator allow for computerisation both the European Order for Payment procedure and the European Small Claims procedure. Using electronic communication between the courts of a given Member State hearing the case in one of the European cross-border procedures is made possible in particular by Article 26 of Regulation no. 1896/2006, which states that all procedural issues not specifically dealt with in that Regulation shall be governed by national law, and by Article 19 of Regulation no. 861/2007 which states in turn that subject to the provisions of that Regulation, the European Small Claims Procedure shall be governed by

project was a success, and the platform itself is going to be used to handle the next process, i.e. the transmission of applications and notices pursuant to Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters<sup>58</sup>.

Within the framework of the so-called back office, there are various IT systems supporting the work of officials at courts, including e.g. electronic clerical system for the courts, a HR/financial system based on the technology of SAP, or the electronic internal mail system. Using e-mail is the standard (the comprehensive implementation of Microsoft Outlook and a central AD domain within the Polish courts was completed in 2021). A videoconferencing system was a popular tool for internal meetings, even before the pandemic. However, solutions present within the Polish judiciary have an insular nature. There are many ICT systems, and not all of them are integrated. Duplicated data are stored on some of them. As it may be noticed, those systems apply to some types of cases, or only to some types of proceedings, or even to specific processes. A comprehensively implemented, homogenous ICT system serving the judiciary is absent in Poland. The potential of blockchain and AI is not realised in the Polish legal system, as of now. To some extent, certain mechanisms support the speech recognition process while transcribing the electronic records and handle the first stage of anonymising statements of reasons. However, automation of decision-making (including the cases of issuing an order for payment) is used only in the Electronic Admonitory Proceedings (and to a limited extent, for that matter) – that is, the draft of an order for

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the procedural law of the Member State in which the procedure is conducted. Thus, those provisions grant relative autonomy in the scope of computerisation of those procedures at the national level. Moreover, there are provisions under both Regulations that refer to using electronic communication in European cross-border procedures, while at the same time leaving the decision on the issue of using them to the respective Member States of the European Union.

58 OJ L 174/27. Requests and communications provided for under that Regulation are to be transmitted through a decentralised IT system comprising national IT systems connected by communications infrastructure enabling secure and reliable cross-border exchange of information between national IT systems. A prototype created within the framework of the eCODEX project is to be that system. Cf. Proposal for a regulation of the European Parliament and of the council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726 <[https://e.europa.eu/info/sites/info/files/law/contribute\\_to\\_law-making/documents/e-code\\_x-main-act-en.pdf](https://e.europa.eu/info/sites/info/files/law/contribute_to_law-making/documents/e-code_x-main-act-en.pdf)> accessed 12 January 2021.

payment is generated automatically on the basis of batch data from the claim. However, that draft requires acceptance by an adjudicator, which is carried out by affixing an electronic signature. Only then, such an order for payment is served on the defendant. In the upcoming years – apart from the uniformization of electronic service already being implemented by public bodies – the implementation of a new clerical system is planned. That system is going to supersede the various systems hitherto in operation and then provide a comprehensive back-office service both for a court and for processes wherein the so-called clients of the judiciary take part.



# Cyber Security, Cyber Hygiene or Cyber Fiction of our Time

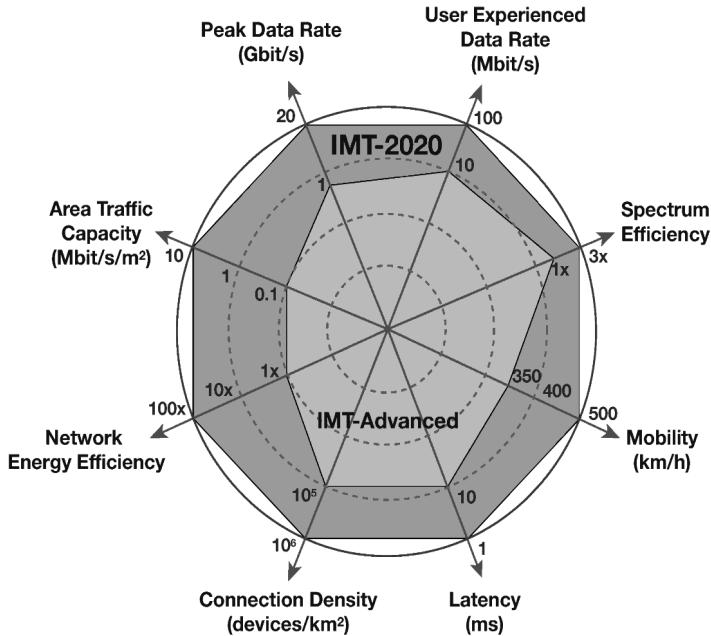
*Tomasz Chomicki*

## *1. Introduction*

The moment we start thinking about how the world will look like in five, maybe ten years, the image of "The Matrix" or other sci-fi movies comes to mind. Is it possible to predict business processes and technologies that will become our everyday life in a few years? The answer is not simple, but in the technical literature you can read about what functions the future 5G or maybe even 6G network will have. Many pseudo-experts define the new, fifth-generation network as one that will give us extremely high speeds. This is just one of many parameters that only gives us a slight understanding of the technology. Standardization bodies ITU, International Telecommunications Union and 3rd Generation Partnership Project (3GPP) have defined in formal documents, technical parameters of the fifth-generation network. The most important of these are, first of all, 1 million devices per 1 km<sup>2</sup>, minimum latency of up to 1 millisecond, sending speed to the edge of the network is 10Gbps, about 10 times longer battery life, operation of the network when devices move at 500 km/h, and great reliability described as six nines (or 99.9999). The technical document describing these assumptions is IMT-2020 (Figure 1).

What does this mean for the common man or the well-educated lawyer? The set of these enigmatic technical parameters shows that mobile communication technology is born, which means no less than "the new Internet". The Internet, to which, according to the theory, we will connect all devices. The Internet that will be a kind of oxygen of our modern life. Questions may arise: So do these services already exist? Do the technologies that realize the above described standard and advertisements of the operators tell us that we live in this technological mature world? Well, no. The development of this new technology is still ahead of us. Is it possible to stop or delay it? Probably not, because even the times of COVID-19 pandemic show how indispensable reliable communication is for today's functioning. The essence of the new tomorrow are autonomous cars, drones delivering packages, or Da'Vinci medical robots, whose operators-doctors perform complex medical procedures. This is still the future,

Figure 15: Specification of the technical standard described in the ETSI IMT-2020 documents



Source: IMT-2020 - Wikipedia, <<https://en.wikipedia.org/wiki/IMT-2020>> ‘accessed 29 March 2021’.

although not very distant; such projects can already be found on the map of international implementations.

A surgeon in China has already performed the world's first remote surgery using 5G technology, PC Mag reports, citing local news reports from China. The doctor from the southeastern province of Fujian used next-generation networks to control robotic arms at a location 30 miles away. The operation was made possible by the extremely low latency of 5G.<sup>1</sup>

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1 China Performs First 5G Remote Surgery, <[www.pcmag.com/news/china-performs-first-5g-remote-surgery](http://www.pcmag.com/news/china-performs-first-5g-remote-surgery)> accessed 29 March 2021.

## *2. Cybersecurity*

The great array of technological challenges is at the same time a rising tide of cyber threats. Analyses of the digital crimes occurring in our country made by cybersecurity companies indicate that the number and intensity of cyber attacks are invariably increasing. In 2019, DDoS attacks (those that overloaded websites) and ransomware attacks (software that encrypts for ransom) were the main problems in Polish companies. Organizations in Poland also noted data destruction, leakage or damage primarily due to malware infection. According to experts' analysis, the number of reported incidents after ransomware attacks increased by 20 % and the number of so-called botnets, which, among other things, spread other malware or sent spam, increased by 28 %. Analysts also observed an increase in the installation of special programs to secretly generate cryptocurrencies.<sup>2</sup> The number of tools that embed special scripts on websites and are used to steal financial data also increased by 200 %. In addition, the number of banking trojans that steal customers' payment data has increased in 2019.

We could also see interesting developments in 2020, when the COVID-19 pandemic took hold for good. Bitdefender's survey of IT staff published in July shows intimidating data - the number of IT security incidents has increased dramatically. The attacks that dominate have become whaling - a fishing attack on decision-making personnel (26 %) and ransomware (22 %). According to the survey described above, criminals were hitting financial institutions (43 %), healthcare (34 %) and the public sector with full force. However, the imagination of criminals knows no bounds.

From the information published on 10.2.2020 in the portal Niebezpiecznik, we can learn about an "interesting" and at the same time disturbing incident that could threaten the life and health of several thousand people, which was reported by a sheriff from Florida. "On Friday, someone broke into the water supply in Pinellas County and increased the concentration of sodium hydroxide a hundred times."<sup>3</sup>. Sodium hydroxide is used by Florida water utilities to control the acidity of water. The burglar managed to influence its concentration, which he altered to a value of 11,000 ppm, but luckily a waterworks employee noticed the change and

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2 Check Point Data, 'Raport Cyberbezpieczeństwa' (2020).

3 Piotr Konieczny, 'Haker zatrul wodę w wociągach, przez Internet' (Niebezpiecznik.pl, 10 February 2021) <<https://niebezpiecznik.pl/post/ktos-przez-internet-zatrul-wode-w-wodociagach//>> accessed 31 March 2021.

promptly restored the correct parameters. Authorities reassure that even if the employee had not manually restored the settings, other safety systems would have worked, including one that monitors the pH of the water. They also add that the water with the changed parameters would be delivered to the residents the next day at the earliest.<sup>4</sup>

What does all this mean? The answer is quite simple: there is no longer a space in which we can feel safe. Critical infrastructure protection, including industrial networks, is becoming an important part of our security and thus a new area for deeper analysis by legal teams.

With this in mind, on December 11, 2020, a political agreement was reached at the European level to establish a European Cyber Security Competence Centre and Network. The seat of the Centre became Bucharest. This is not the only solution - in other countries there is also a heated debate on the law related to the implementation of new regulations related to cyber security. On the eve, when we stand at the stage of implementing new technologies, it is worth to stop and think about what to improve to avoid these threats and what systemic changes to introduce to minimize the effects of attacks and threats. Naive people may say that the law and emerging regulations will protect us. However, experts make it clear - the person responsible for protecting our security is us. Here are some rules that you should always pay attention to:

- 1) download and use applications always from authorized sources (stores like Play or Apple Store);
- 2) making regular copies of data in an independent cloud infrastructure;
- 3) active remote deletion function on the device (e.g. phone, tablet);
- 4) use of anti-virus systems, or applications with ongoing code analysis type MTD;
- 5) limiting trust in unknown links and attachments sent via email;
- 6) securing devices with password or biometric systems;
- 7) using unique passwords for each online account;
- 8) use of authentication;
- 9) keeping system software up to date;
- 10) using VPN services on open Wi-Fi networks;
- 11) separating professional and private work environments (containerization);

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<sup>4</sup> Andy Greenberg, ‘A Hacker Tried to Poison a Florida City’s Water Supply, Officials Say’ (Wired.com, 2 August 2021) <[www.wired.com/story/oldsmar-florida-water-utility-hack/](http://www.wired.com/story/oldsmar-florida-water-utility-hack/)> accessed 29 March 2021.

- 12) verifying the sender (carefully checking the email address) whenever you receive information about an amazing bargain, promotion, or win; messages sometimes contain minor character details, i.e., substituting the letter L for a capital I;
- 13) Paying attention to text messages, as it is not uncommon to receive shipping manipulation or impersonation of a store or contractor;
- 14) avoid using seemingly "free" applications or services (because they are not always free).

Is it enough? Of course not, but it will significantly reduce potential problems. Lack of knowledge does not release us from the consequences, and lawyers from responsibility, e.g. disciplinary. We must learn to build knowledge about cyber dangers, although Poles have more and more knowledge and awareness of threats and consequences of identity theft.

According to the study, 53 % of respondents are concerned about the security of data, 20 % of them used or use the services that provide data protection online<sup>5</sup>. According to a report prepared by the Insurance Information Institute (iii.org), identity theft continues to challenge consumers as criminals develop new mechanisms to commit fraud.

According to the 2019 Identity Fraud Survey from Javelin Strategy & Research, the number of consumers who were victims of identity fraud dropped to 14.4 million in 2018, down from a record 16.7 million in 2017. However, identity fraud victims bore a greater financial burden in 2018: 3.3 million, nearly triple the number in 2016. What's more, fraud costs more than doubled between 2016 and 2018 to \$1.7 billion. Fraud losses on new accounts have also increased slightly, and criminals have begun to focus on a variety of financial accounts, such as loyalty and bonus programs and retirement accounts. In addition, criminals are becoming adept at thwarting authentication processes, particularly in seizing cell phone accounts. The number of these takeovers has nearly doubled to 680. The Consumer Sentinel Network, maintained by the Federal Trade Commission (FTC), tracks consumer fraud and identity theft complaints filed with federal, state and local law enforcement agencies and private organizations. Of the 3.2 million identity theft and fraud reports received in 2019. 1.7 million were fraud-related, about 900,000 were other consumer complaints, and about 651,000 were identity theft reports. Of the 1.7 million

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<sup>5</sup> According to research carried out by Credit Information Bureau – BIK, 'Cybersecurity of Poles 2020' (Biuro prasowe Grupy BIK, 26 January 2021) <<https://media.bik.pl/informacje-prasowe/637189/dobre-praktyki-ochrony-danych-osobowych>> accessed 31 March 2021.

fraud cases, 23 % of the reported money was lost. In 2019, consumers reported losing more than \$1.9 billion due to fraud complaints, an increase of \$293 million from 2018. Within the fraud category, impersonation fraud was the most frequently reported and ranked first among the top 10 fraud categories identified by the FTC. They resulted in losses of \$667 million.<sup>6</sup>

The question arises why as many as 20 % of the respondents admitted that they do not protect their phone with a password at all, and 25 % never change the password they have? Internet users confirmed that antivirus programs are most often installed on computers (87 %), while 63 % use them on phones and tablets. Therefore, despite the growing awareness of threats, it is still necessary to intensively educate customers about cyber threats. KasperskyLab notes a 242 percent year-over-year increase in brute force attacks against protocols that support remote access to devices. Because a mobile device is not just a device from which we make phone calls, we are also increasingly "emailing," "banking" and working remotely. We must, therefore, almost re-learn the principles of cyber security.

### *3. Cybers Hygiene – A Security Package*

The European Commission has unveiled a new cyber security package and a comprehensive set of rules for digital services operating in the EU. One of the postulates is the continuous deepening of knowledge from already well-established information websites like Niebezpiecznik, Zaufana Trzecia Strona, Rasmussen.edu, Itseccentral, Digitalguardian, Blog.feedspot or at technology seminars of various solution vendors. The governments of various countries are trying to talk a lot about it, organizing a wide range of courses and trainings and publishing more and more new information. It is worth realizing a great example shown by the Panoptikon Foundation. It shows what information can be obtained by connecting a smartphone to the network. As mentioned earlier, end devices, in order to ensure data security process, often connect to "cloud" services, creating copies of data, i.e. photos, recordings, contacts. It is worth taking care to secure this access with a strong password and carefully review the data storage policy and save very sensitive data on your own hardware.

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6 See: Insurance Information Institute, 'Facts + Statistics: Identity theft and cyber-crime' (iii.org) <www.iii.org/fact-statistic/facts-statistics-identity-theft-and-cybercrime> accessed 29 March 2021.

Another important piece of advice for users is to uninstall applications that are not being used, and to look carefully at access requests, e.g. if a flashlight application requests access to contacts it is a sign that the application is suspicious, and its developers may not necessarily have honest intentions. We know that the state institutions have the right to demand information about us from telecom operators, providing it to the appropriate services (e.g. phone records, location data). Operators, in accordance with generally applicable law, are obliged to keep such data for at least 12 months.

State authorities have also at their disposal solutions that enable partial or total surveillance. Recently there has been a lot of publicity about software from Israeli company NSO Group called Pegasus. The application allows to "infect" a device and in the next step to take full control over it, processing information, eavesdropping on messages, listening to conversations, collecting location data or listening to sounds coming from the environment without user's knowledge. According to research by Citizen Lab, the software has been purchased by at least 45 countries in the past two years, including Mexico, France, the United Kingdom and Switzerland, among others.<sup>7</sup>

#### *4. AI and ML vs Internet Security*

In the world of LegalTech, AI and ML have to be added to the world of cyber, as potentially risky situations can also occur with the tools they cover.

An interesting story involves Robert Julian-Borchak of Detroit, who was arrested on the basis of faulty facial recognition by a police algorithm and, according to the media, spent thirty hours in custody while completely innocent. When Williams was summoned by police, he was automatically screened by cameras, and the image-processing analytics that reside there concluded that he was the person seen in the 2018 robbery video.

This case is widely considered to be the first AI/ML error of its kind in history. This raises the question of whether algorithms can therefore be trusted and whether the technology is necessary to function. Data from

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<sup>7</sup> Bill Marczak and others, 'Hide and seek, Tracking NSO Group's Pegasus Spyware to Operations in 45 Countries' (citizenlab.ca, 18 September 2018) <<https://citizenlab.ca/2018/09/hide-and-seek-tracking-nso-groups-pegasus-spyware-to-operations-in-45-countries/>> accessed 29 March 2021.

the IoT report is presented below. According to research presented by Strategy Analytics Research services of 2019, the number of devices using the Internet will grow rapidly, and no longer only smartphones, tablets, TVs will be connected to the network, but autonomous vehicles, "smart" home devices, industrial IoT, etc. The scale of various vulnerabilities is constantly growing, so machine learning algorithms and artificial intelligence solutions will also have to be used to counter them.

As an interesting note, Researchers from Monash University and the Indian Institute of Technology Ropar have developed machine learning algorithms capable of detecting fake videos, for example, during video conferencing conducted by the ZOOM app. The researchers applied over-the-top analysis and search for differences between video and audio, breaking images into fragments and analyzing the unsynchronized differences, searching for details in unnatural facial movements, lips, or sound disturbances.<sup>8</sup>

According to the EC, the expenses related to the development of artificial intelligence in the public and private sector will amount to about 20 billion euros per year in the time forecast 2020-2030. An important indicator on which systems are to be built is trust, which will force a change in current regulations. It is proposed that in selected sectors, such as medicine or transport, digital systems created using artificial intelligence and machine learning algorithms should always be transparent, traceable and supervised by a human. Thus, the role of law and lawyers who will be able to work in interdisciplinary teams that understand the technology and use the tools is slowly becoming a requirement rather than a direction for a distant transformation.

## *5. The Forecast of the Future*

In the White Papers<sup>9</sup> prepared by Samsung, we can read that applications using wireless communication, are expanding from connecting people to

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8 See: Monash University, 'Deepfakes detect Zoom-bombing culprits' (monash.edu, 25 January 2021) <[www.monash.edu/it/about-us/news-and-events/latest/articles/2021/deepfakes-detect-zoom-bombing-culprits](http://www.monash.edu/it/about-us/news-and-events/latest/articles/2021/deepfakes-detect-zoom-bombing-culprits)> accessed 29 March 2021.

9 See: Samsung, 'Samsung's 6G White Paper Lays Out the Company's Vision for the Next Generation of Communications Technology' (Samsung Newsroom, 14 July 2020) <<https://news.samsung.com/global/samsungs-6g-white-paper-lays-out-the-companys-vision-for-the-next-generation-of-communications-technology>> accessed 29 March 2021.

connecting things. Wireless communication is becoming an important part of social infrastructure and people's daily lives. In addition, today's exponential growth of advanced technologies such as artificial intelligence (AI), robotics, and automation will cause an unprecedented paradigm shift in wireless communication. These circumstances lead to four major megatrends moving toward 6G: connected machines, the use of AI in wireless communications, the openness of mobile communications, and increased contribution to social goals. The number of connected devices is expected to reach 500 billion by 2030, about 59 times the projected world population by then (8.5 billion). Mobile devices will take many forms, such as augmented reality (AR) glasses, virtual reality (VR) headsets and hologram devices. Increasingly, machines will need to be connected via wireless communications. Examples of connected machines include vehicles, robots, drones, home appliances, displays, smart sensors installed in various pieces of infrastructure, construction machinery, and factory equipment. As the number of machines increases exponentially, data will become the dominant user of 6G connectivity.

Looking at the history of wireless communications, the technologies were developed with the premise of developing services targeted at people. That was and is their primary use. In 5G, machines and technology development have also been taken into account when defining requirements and technology development. It can be expected that new technologies, such as 6G, will need to be developed specifically to connect hundreds of billions of machines. To provide initial insight into the target performance required, the perceptual abilities of humans and machines were compared. For example, the ability of the human eye is limited to a maximum resolution of  $1/150^\circ$  and a viewing angle of  $200^\circ$  in azimuth and  $130^\circ$  in zenith. On the other hand, machine vision capabilities are highly developed and the elimination of such limitations occurs because it can use multiple cameras with different functions. Given the strong capabilities of machines, the performance requirements of a 6G system can be very high for relevant service scenarios that are still unknown today. In recent years, the development of AI has penetrated various fields such as finance, healthcare, manufacturing, industry, and wireless communication systems. The application of AI in wireless communications has the potential to increase efficiency improvements and reduce capital expenditures (CAPEX) and operating expenditures (OPEX).

The authors of the paper<sup>10</sup> show by example that AI can improve the efficiency of data relaying operations by taking into account the dynamic geographic deployment of networks and environments, and in a new way optimize network planning that includes the location of stations baseband (BS) and network termination. The advantages that will be achieved include reduced network energy consumption and prediction, detection and repair of network anomalies. In the case of 6G, the realization that AI technologies are available for practical applications can help develop a system that takes into account the possibility of embedding AI in the various entities that make up the wireless network and services. The vast amount of data associated with hundreds of billions of connected machines and people will need to be collected and used in 6G systems. Including AI early in the concept and technology development for 6G will therefore provide more opportunities to use AI to improve the overall network performance in terms of efficiency, cost, and ability to provide various services.

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10 *ibid.*

# Information Security in Legal Firms

*Robert Pajak*

## *1. Introduction*

Law firms and lawyers have been an interesting target for cybercriminals for many years. This is particularly because they possess a considerable amount of valuable information (e.g., know-how, contract details etc.). This does not only refer to their own data (including that of their employees), but above all that of their customers<sup>1</sup>. However, the possession of interesting data is not the only reason. In particular, law firms are also increasingly becoming the indirect target of attacks as (legal) service providers. In this way, by leveraging the trust in such entities, cybercriminals can more easily get into the targeted company/person or gain knowledge to act against them.

The consequences of this type of action are obviously devastating. Starting from loss of reputation, through liability related to violation of the law (personal data, sensitive data, various types of information protected by secrecy rules), up to the lawyer's disciplinary liability. It should also be mentioned that law firms work under a special ethical and legal regime (attorney-client privilege), which further increases the seriousness of the problem of security attacks and information security breaches.

The aim of this chapter is to provide an introduction to information security and protection and to show where to begin in order to build protective mechanisms and how to start implementing recommendations from the list of so-called best practices. This will enable conscious and consistent management of the protection of information processed in a law firm, including its employees and associates. Additionally, this chapter aims to familiarize reader with the vocabulary used in the information security and protection industry, which will consequently allow to understand where and how to deepen your knowledge on this topic.

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<sup>1</sup> Donie O'Sullivan C, 'Hacked Celebrity Law Firm Says It Has Not Worked With Trump' (CNN, 17 May 2020) <<https://edition.cnn.com/2020/05/17/politics/celebrity-law-firm-hacked-trump/index.html>> accessed 17 August 2021.

Information security and data protection is a highly interdisciplinary knowledge domain - covering whole range of topics - from physical protection, through highly specialized technical matters, to policies, procedures, regulations, guidelines, and plans. A comprehensive coverage of such a broad topic would require a separate publication, so in this chapter we only provide an introduction to the problem. However, taking the challenge holistically - thanks to the systematic approach aimed at reducing some of the more complex topics, adding references to detailed guidelines and the introduction of aspects related to the concept and language of risk - it is possible to bring the subject closer to the reader and achieve the goal of increasing security in law firms and introducing best practices into the daily routine of this important professional group. This will also naturally increase the chances of warding off threats or minimizing their effects. Finally, it can also provide an opportunity to prevent the phenomenon of resignation or to analyse the issue of delays and to try to understand the common, yet incorrect, opinion that security must be very expensive and only large companies can afford it.

## *2. The Concept of Information Security, Data Protection and Cyber security*

One of the most important steps in dealing with a new subject is to determine the meanings of the basic (key) terms and concepts that underlie it. In the case of information security and protection, however, it is difficult to find one coherent and exhaustive definition, especially one that would comprehensively convey the depth of the topic. A scholarly discourse would allow us to derive an understanding of the concept from matters of basic human needs ("overlaid" on modern information society) and would lead us to issues of etymology of the word itself. In this chapter, however, the focus is on the conceptualization and practical application. The challenge of finding the one unified definition is further complicated by semantic problems. It should be noted that a significant part of the terms in information security and data protection originate in English-speaking countries, where a distinction is made between the terms "security" and "safety"<sup>2</sup>, and they do not always find a proper translation in

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2 Ludovic Piètre-Cambacédès and Claude Chaudet , 'The SEMA Referential Framework: Avoiding Ambiguities In The Terms "Security" And "Safety"' (2010) 3 International Journal of Critical Infrastructure Protection.

other languages<sup>3</sup>. Trying to look for a definitional consensus that would take into account the proper adaptation to our needs in the pragmatic field, we will quickly come to define the measure of security by distinguishing a number of criteria. Since the 1970s and the first studies of data protection, coming from the military domain and industry best practices and standards, the so-called "CIA triad" has been considered the primary criteria for information security. This acronym comes from the first letters of three main parameters: confidentiality, integrity, and availability. Confidentiality is the most intuitive attribute of information - it assures us that only authorized people can see the information. Integrity, on the other hand, indicates an important feature of information that is the need to ensure data consistency in the sense of absence of unauthorized changes. Availability of information - similarly intuitive - tells us that a person can access the information whenever he or she needs it.

This minimum set of three criteria, described in detail in ISO 27001, has been expanded to include a number of other properties that define the crucial parameters of information security, especially in a communication context. While the above-mentioned three basic criteria suffice to define the problematic, it is worth looking at one additional attribute - accountability, an attribute of information that specifies that we can unambiguously attribute given actions to a specific user.

When thinking on how to protect a particular piece of information, we can consider the goals of securing it in the context of these criteria. It is worth remembering to look at the subject of information protection also beyond information systems - hence the reference in this chapter to more general concepts, i.e., information security and protection - rather than using the increasingly common concept of cybersecurity. In addition to linguistic purism, this is particularly important given the fact that there is still a significant amount of information that is not necessarily in digital form or exists in dual form. Similarly, the security of information in digital form may also require measures outside of information systems.

As an example, let's take a situation in which a law firm is attacked and, in addition to data on digital media, information is stolen, e.g., in the form of printouts - and the break-in itself occurs trivially by breaking a window and unauthorized access to the building. In this case, one can

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3 Spyridon Samonas and David Coss, 'The CIA Strikes Back: Redefining, Confidentiality, Integrity And Availability In Security' (2014) 10,3 Journal of Information System Security <<http://www.proso.com/dl/Samonas.pdf>> accessed 17 August 2021.

clearly see the need to go beyond issues related to the digital sphere in order to comprehensively protect information stored and processed in law firms.

### *3. Information Security Planning to Secure Law Firm*

#### *3.1 General Comments. Sources of Information Security Best Practices.*

Both the field of information security and protection, as well as adversarial hacking techniques are constantly evolving. Every day new methods of breaking control mechanisms appear, and media headlines describe subsequent incidents involving companies whose databases were hacked using these techniques. In this context, taking into account that focusing solely on the information security process is not the main goal of the business, which is after all focused on conducting and developing business in the legal area, the question of where to draw current sources of knowledge becomes justified. An equally important and serious problem is the phenomenon of outdated best practices in this area. The answer to these questions will be presented below, together with reference on particularly important and universally best practices.

As indicated above, one of the fundamental problems in information security and protection is the complexity of the subject matter. It makes sense, therefore, to refer to proven guidelines to make sure that none of the topics necessary for laying the foundations for security is overlooked. At present, however, there is a vast number of standards, norms, regulations, and guidelines available - dozens of different frameworks for security are readily identifiable. On top of that, some of them are less popular and recognizable only in selected geographic areas, and not necessarily tailored to smaller and medium-sized entities. Minding that (as an assumption) the subject of this discussion are typically relatively small organizational units (from individual practices to subject matter experts (SMEs)), and trying to reasonably minimize the complexity of the addressed topics (as reasonably structured a catalogue of guidelines as possible), we have to reduce such a large number of recommendations and indicate that the following standards, good practices and framework guidelines are worthy of particular attention: ISO 27001, NIST Cybersecurity Framework, CIS Controls/CIS Benchmarks and industry guidelines sensum largissimo.

### *3.2. ISO 27001*

ISO 27001 is a norm created by the International Standard Organization. Its purpose is to standardize an information security management system. The standard is recognized globally (with particular popularity in the geographical area of Europe) and is the basis for many other guidelines and regulations that take it as their baseline/fundamentals. ISO 27001 allows to obtain certification of compliance with its guidelines - you can formally confirm that you are complying with the recommendations set out in the standard. Such certification can be done periodically by an independent auditor. Within the framework of the standards described in the 27000 series, it is also worthwhile to get acquainted with the guidelines described in ISO 27002; this standard is under continuous development.

### *3.3. NIST Cybersecurity Framework (CSF)*

These are guidelines created by the US National Institute of Standards and Technology (NIST). They were constructed for the private sector to assess the risks it faces when processing data in cyberspace. The guidelines remain internationally recognized, with a particular popularity in the US. The NIST CSF is widely regarded as a "lighter" version of NIST 800-53, and these guidelines provide the basis for requirements to be met for companies working with U.S. government entities. The framework is being actively developed and incorporates the needs of self-diagnosis. An additional plus is that they address vendor (supplier) management as a critical component of ensuring information security and protection. These issues are becoming increasingly important due to the increased use of trust relationships with companies that perform subtasks for other entities.

### *3.4. CIS Controls/CIS Benchmarks*

The Center for Internet Security (CIS) is a non-profit organization that promotes open standards and guidelines related to information security. From the perspective of building security in a law firm, the most useful framework standards developed by CIS include CIS Controls - 20 guidelines that allow taking into account the most typical areas requiring security attention, and CIS Benchmark - a set of recommended settings and configurations for various systems and products. These tools will allow you

to verify the correctness of your assumptions and pay attention to most of the necessary elements important from the perspective of information protection.

### *3.5. Industry Guidelines*

#### *3.5.1. International Bar Association*

The legal community, in response to the increasing number of threats, has reacted by creating catalogues of best practices. One of the very popular one is that created by the International Bar Association (IBA), an organization of hundreds of thousands of legal practitioners and organizations in the field worldwide. In 2018, IBA, pointing out that law firms are a significant target for attack, particularly due to not making cybersecurity a priority, created a task force to build a catalogue of best practices to help law firms protect themselves from information security and protection breaches. The result was the Cybersecurity Guidelines<sup>4</sup> report, which addresses both technological and organizational challenges. Certainly, noteworthy is the attempt to divide and prioritize requirements according to the size of the law firm and the inclusion of individual legal practices.

#### *3.5.2. Council of Bars and Law Societies of Europe*

The Council of Bars and Law Societies of Europe<sup>5</sup> (CCBE), as the association representing affiliated lawyers from 45 countries in the wider Europe, issued its recommendations in 2016 related to protection against unlawful surveillance. These guidelines were created both to protect against threats from cybercriminals and directed at protection in relation to threats from poorly regulated processes at the national level. Despite the specific focus, the recommendations refer both to the basics of information security and protection, including the aforementioned ISO 27001. Noteworthy is the

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4 International Bar Association, 'LPRU Cybersecurity' (*Ibanet.org*, 2018) <<https://www.ibanet.org/LPRU/Cybersecurity>> accessed 17 August 2021

5 CCBE, 'CCBE GUIDANCE On Improving The IT Security Of Lawyers Against Unlawful Surveillance' (*ccbe.eu*, 2016) <[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/IT\\_LAW/ITL\\_Guides\\_recommendations/EN\\_ITL\\_2\\_0160520\\_CCBE\\_Guidance\\_on\\_Improving\\_the\\_IT\\_Security\\_of\\_Lawyers\\_Against\\_Unlawful\\_Surveillance.pdf](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/IT_LAW/ITL_Guides_recommendations/EN_ITL_2_0160520_CCBE_Guidance_on_Improving_the_IT_Security_of_Lawyers_Against_Unlawful_Surveillance.pdf)> accessed 17 August 2021

recognition and strong justification of the criterion of confidentiality as paramount to the profession of legal practice, also indicating as an imperative the acquisition of skills in information protection and security.

#### *4. Other Law Firm Information Security and Protection Challenges*

##### *4.1. Roles and Responsibilities*

One of the most frequently observed mistakes connected with information security and protection is appointing one (the only) person, often performing at the same time completely different primary duties, responsible for this area. Undoubtedly, it is worth indicating who bears responsibility for a given subject - nevertheless, ensuring security should be a duty of every employee and it is both a basic and a necessary condition. Responsibility for information protection and security should be introduced into employee and other contracts, including contracts with suppliers whose services the law firm uses. However, it is worth noting that the responsibilities should also be accompanied by appropriate knowledge gained during training and education. These trainings should be conducted periodically (a significant facilitation may be the use of regularly updated platforms where employees can improve their skills in avoiding and repelling attacks). Investment in security knowledge becomes particularly important if we consider that social engineering attacks are still among the most popular methods of breaking into companies.

When mentioning roles and responsibilities, it is important to ensure that each employee (similarly, trainee, etc.) has access only to the information necessary for his or her job. The need-to-know principle, sometimes also called the principle of necessary/justified knowledge, allows to minimize the effects of security breaches. Additionally, all tools used should be configured in a way that enables clear identification of the person responsible for each action (see: accountability).

##### *4.2. „Digital Hygiene”*

In the age of the information society and increasing digitization, to avoid cybercrime problems, every law firm partner, employee, and associate should train a set of habits to safely navigate and survive in the digital world. It is not uncommon for cybercriminals to forgo breaking through

more complex security measures, focusing instead on areas that are not challenging and where there is less risk of identification or failure. These habits are forming into a kind of catalogue of behaviours that we can refer to as digital hygiene. In particular, we should pay attention to behaviours such as:

- 1) Regularly updating the operating system and software, both on computers and mobile devices, as well as any other electronic/IoT devices (smart TVs, "smart speakers", lighting controls, "smart light bulbs", sensors, weather stations, electronic locks, etc. - such devices can also provide an "entry" point for cybercriminals).
- 2) Encrypt data on all media and devices wherever possible, using proven algorithms and strong passwords (preferably keys).
- 3) Use two-factor/multi-factor authentication wherever possible:
  - a) U2F tokens should be used where possible - these will also help in the context of preventing phishing - actions aimed at compromising security by impersonation methods,
  - b) where possible, use authentication applications such as Microsoft Authenticator (instead of SMS codes).
- 4) Use of different passwords for each service/web page.
- 5) Use of "password managers" - special programs that allow storing and generating unique passwords for each website used and can additionally ensure that the password is entered only on the correct page. Some of them also inform about improper practices related to the use of passwords and their compromise/leakage.
- 6) Preventing the use of personal electronic devices by other people/third parties.
- 7) Preventing other people/third parties from attaching USB-type media - in particular, care should be taken to prevent of allowing plugging charging cables (something what looks like an ordinary USB cable may in fact be a specialized device designed to break security and gain unauthorized access to information stored on the device).
- 8) Refusing to request to make 'courtesy calls' to other people using personal telephone or other communication devices.
- 9) Consideration of setting up a separate wireless network for the needs of the chancellery and a separate one for the needs of clients and visitors; prohibition of the use of free public wireless networks.
- 10) When using Wi-Fi (wireless fidelity) technology, the need to ensure that the network belongs to the true and honest service provided, particularly if a message is displayed requesting the user to enter a password.

- 11) Use of VPN (Virtual Private Network) solutions - especially when travelling.
- 12) To refrain from passing on important information and data, even to those closest to you, e.g., by telephone while travelling.
- 13) Use of privacy filters (also for mobile devices), especially in trains, planes and other means of transport that allow work.
- 14) Providing solutions for secure data disposal, both in traditional form (shredders with appropriate certificates) and digital (tools for secure data disposal, encryption).
- 15) The need to configure security mechanisms when working in a cloud environment (the responsibility for configuring security mechanisms is usually shared/transferred to the end user - the so-called shared responsibility security model).
- 16) Making back-up copies and regularly verifying data on it.
- 17) Encryption of backup copies using appropriate algorithms.
- 18) Use of reputable services such as "Have I Been Pwned" to monitor if those accounts and password from various services have not been compromised by attacks.
- 19) To regularly complete and update knowledge of information security (e.g., by reviewing industry portals).
- 20) Use only devices (mobile phones/tablets/mobile devices) that have current manufacturer support for security patch updates.
- 21) Using a separate profile on your phone (or other phone/mobile device) for your private matters.
- 22) Limiting trust towards people/third parties initiating contact (e.g., via telephone, Internet).
- 23) Verification of requests for electronic favours (e.g., return contact to a 'friend').
- 24) Limiting the natural desire to help other people (e.g., not allowing people you don't know enter into the building; the person may, for example, be faking an important phone call, have their hands "full", etc., in order to exploit the natural desire to help and get into the building without following security procedures/access badge).
- 25) Never open links with an offer that you have not previously ordered.
- 26) Turn off bluetooth (this recommendation may be difficult in an era of widespread device integration, e.g., car kits, smart watches, but it is worth remembering in special situations).
- 27) Using different browser to connect to the bank, law firm or websites where you have access to confidential data.
- 28) Prohibition on communicating login data, passwords and disallowing account sharing with anyone.

- 29) Verifying account numbers on invoices (they may be false) and requests to change contractor numbers etc.
- 30) Prohibiting leaving devices, media, documents, and other items containing data in a car or other risky location.

#### *4.3. Insider Threats*

Insider threats is also an important, but not easy and usually a rather sensitive topic. We are talking here about both current and former employees, trainees, persons, and companies cooperating with and having regular access to the office/data, etc. In the context of threats, we are talking about both intentional and unintentional actions caused by insiders. According to research<sup>6</sup>, more than half of organisations are confronted with this type of phenomena, and most are in no way prepared for it. The difficulty in dealing with this type of problem stems from several reasons - both the delicate nature of (inter)employee relations and legal constraints (verification of an employee's background, scope of control possibilities, etc.). The ease of access from the inside also encourages cybercriminals to use this method - after all, there's nothing easier than turning up for an internship or job interview and gaining virtually unlimited access to the inside of an organisation, if only for a moment.

In order to efficiently deal with insider threats, it is worth preparing a detailed security plan, taking into account such mechanisms as: limiting privileges in the access to information to a necessary minimum (taking into account the above-described principle of indispensable knowledge), full accountability of actions while processing information, auditing and monitoring systems taking into account the detection of unusual events. Additionally, awareness-raising activities and open communication in the above-mentioned scope should be conducted. Particularly sensitive data should also be marked, and attention should be paid to their flow within the company (and external systems, e.g., cloud systems used by it). These topics are important not only because of cybercrime, but also because of the potential for conflicts of interest.s

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<sup>6</sup> Crowd Research Partners and Cybersecurity Insiders, 'Insider Threat Report 2018' (Crowd Research Partners, 2018) <<https://www.veriato.com/resources/whitepapers/insider-threat-report-2018>> accessed 17 August 2021

#### *4.4. Multi-layer Security*

In the process of building security, it is also worth mentioning a principle which definitely works well in the practice of a lawyer, especially when we regularly see security mechanisms being broken and newer and newer attack techniques. We are talking about building multi-layered security mechanisms - even if we already have one layer of protection for a given system/information, it is also worth building and including all other available mechanisms. Such an approach allows you to protect yourself from an attack when a single protection mechanism is breached. It also gives a chance to avoid unauthorised access to the information through an additional control mechanism that may not have a publicly available "weaknesses" at the time.

#### *4.5. Outsourcing*

Considering the complexity of the subject of information protection and the rapid development of this area and juxtaposing this with the above-described fact of business priorities, it is worth considering whether all identified risks and designed security mechanisms can be implemented and supervised in-house. Many even large enterprises do not necessarily have (want to have) the necessary staff to create and maintain security measures - outsourcing may be a strategy in such a case. It should be remembered, however, that not every type of mechanism can be implemented externally (just as not every risk can or should be transferred outside the organisation). The unquestionable advantage of outsourcing part of the security elements is the automatic scaling along with the growth of demand/development of the organisation, as well as greater daily and knowledge coverage in the case of specialised entities. Often this type of investment allows us to see how regularly security attacks are attempted.

### *5. Summary. Security Is a Process.*

Summing up the considerations related to information security in a law office, it is important to mention that security is by no means a fixed state once and for all - we can only talk about managing it as a process and it should be regularly evaluated, monitored, and developed. Also, a proper understanding of audits and reviews will help us avoid erroneous

*Robert Pajak*

loss of vigilance - a security assessment only gives us a kind of "snapshot" for a given moment in time, and by no means a guarantee of security until the next audit. The current approach to security compliance increasingly points to the sensibility of developing continuous monitoring of the required security parameters, often combined with mechanisms for implementing changes, software, etc., rather than conducting only periodic audits.

**PART TWO**  
**Use of Information Technology Tools in the**  
**Administration of Justice of Selected Countries**



# Brazil

*Thiago Santos Rocha*

## *1. Introduction*

A constitutionally adequate analysis of the development and use of new technologies in the legal field is not limited to the verification of the results achieved, which should always be in line with the objectives established by art. 3 of the Brazilian Constitution of 1988 (CB/88, from its acronym in Portuguese), which point to the construction of a social State. It should also observe the respect for all the principles and rules that make up and structure the democratic State of law, among which are the fundamental rights and guarantees, norms of first magnitude.

According to the norm that is extracted from the statement of the caput and subsection XLI of art. 5 of CB/88, all are equal before the law, without distinction of any nature, and the law must punish any discrimination that violates fundamental rights and liberties. Furthermore, subsection X of the same article, also with fundamental rights status, establishes that people's privacy, private life, honor, and image are inviolable. Constitutional Amendment No. 45/2004 introduced into the list of fundamental rights set forth in the aforementioned art. 5 the right to speedy proceedings which, under the terms of subsection LXXXVIII, assures everyone, in the judicial and administrative spheres, that the proceedings will last a reasonable length of time and that means will be provided to guarantee the speed of the proceedings.

In a society that maximizes connections between people, the number of disputes that will require the intervention of lawyers and the Judiciary to solve them is also increasing. In this context, the tools made available by information technology cannot be ignored in order to speed up and make the resolution of disputes more efficient. However, procedural expeditiousness cannot be achieved at any cost, being limited to the necessary respect for all elements of the fundamental rights system, such as the right to equal treatment and the right to privacy.

In addition to this, some figures of the Brazilian reality need to be considered. At the end of 2019 there were 77.1 million lawsuits in progress in

the Brazilian Judiciary<sup>1</sup>. During that year, 35.3 million cases were closed, which means that each of the Brazilian judges decided an average of 2107 cases in that period, that is, approximately 8.4 cases sentenced by each judge every working day<sup>2</sup>. During the same year, the Judiciary's spending on information technology (IT) was approximately 480 million Euros<sup>3</sup>. According to data from 2018, the courts of the Judiciary had approximately 6,000 IT professionals, a third of whom were software developers<sup>4</sup>.

It is under this perspective that the present work proposes to expose, without claiming to be exhaustive, the main normative instruments concerning the current stage of use and regulation of legaltech tools in Brazil, in order to allow some critical considerations for the future. To this end, the study made use of research in normative texts from official databases, analysis of reports with quantitative and qualitative data on the theme, as well as analysis of juridical bibliography.

## *2. Legaltech in Brazil*

Technological innovation has shown itself capable of producing standardized solutions in the delivery of services in various areas of legal activity, allowing the overload of administrative tasks to be eliminated and freeing up human capital to provide better quality service to the end user.

Thus, in addition to the activities directly developed by public services, one can notice the emergence of legaltechs in the private sector, i.e., companies especially dedicated to offering innovative products or services through the use of technological resources for the legal area. A good indicator of this is the fact that the Brazilian Association of Lawtechs and Legaltechs (AB2L), a private entity created in 2017 with the aim of, among others, contributing to the development of a technology and innovation environment in legal practice, has already 388 member companies.

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1 Conselho Nacional de Justiça, 'Justiça Em Números 2020' (Conselho Nacional de Justiça 2020) 93 <<https://www.cnj.jus.br/wp-content/uploads/2020/08/WEB-V3-Justica-em-Numeros-2020-atualizado-em-25-08-2020.pdf>> accessed 9 February 2021.

2 *ibid* 105.

3 2.18 billion Brazilian Reais. *ibid* 77.

4 Conselho Nacional de Justiça, 'Inteligência Artificial No Poder Judiciário Brasileiro' (Conselho Nacional de Justiça 2019) 37 <[https://www.cnj.jus.br/wp-content/uploads/2020/05/Inteligencia\\_artificial\\_no\\_poder\\_judiciario\\_brasileiro\\_2019-11-22.pdf](https://www.cnj.jus.br/wp-content/uploads/2020/05/Inteligencia_artificial_no_poder_judiciario_brasileiro_2019-11-22.pdf)> accessed 7 February 2021.

As reported by AB2L, its associates are organized into 13 service categories: a) analytics and jurimetrics - platforms for data analysis and compilation and jurimetrics; b) automation and document management - software for the automation of legal documents and management of the life cycle of contracts and processes; c) compliance - companies that offer the set of disciplines to enforce the legal norms and policies established for the institution's activities; d) legal content, education and consulting - portals of information, legislation, news and other consulting companies with services ranging from information security to tax advice; e) extraction and monitoring of public data - monitoring and management of public information such as publications, court proceedings, legislation and notary documents; f) management of offices and legal departments - information management solutions for offices and legal departments g) Artificial Intelligence (AI) in the public sector - AI solutions for courts and public authorities; h) networks of professionals - networks connecting legal professionals, enabling people and companies to find lawyers throughout Brazil; i) Regtech - technological solutions to solve problems generated by regulatory requirements; j) online conflict resolution - companies dedicated to online conflict resolution by alternative means to the judicial process such as mediation, arbitration and negotiation of agreements k) Taxtech - platforms that offer technology and solutions for all your tax challenges; l) Civic Tech - technology to improve the relationship between people and institutions, giving more voice to participate in decisions or improve service delivery; and m) Real Estate Tech - application of information technology through platforms focused on the real estate and notary market<sup>5</sup>.

### *3. Blockchain and DLT in Government Systems*

In September 2020, based on Judgment 1,613/2020 of its plenary session, the Federal Audit Court (TCU), a body that assists the National Congress in exercising the constitutional function of external control of the Federal Government, published a guide for public administration in order to understand what are the blockchain technologies and Distributed Ledger

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5 AB2L, 'Radar de Lawtechs e Legaltechs' ([ab2l.org.br/radar-lawtechs/](https://ab2l.org.br/radar-lawtechs/)) <<https://ab2l.org.br/radar-lawtechs/>> accessed 10 February 2021.

Technology (DLT), as well as analyze the potential and uncertainties of these technologies for digital government services<sup>6</sup>.

Always keeping in mind the goal of avoiding waste of public resources, to help deciding whether or not a blockchain/DLT solution is applicable to an institution's use case, this guide presents a needs assessment model, which consists of direct questions about the characteristics of the organization's business process<sup>7</sup>.

Also according to the TCU guide, the benefits of blockchain/DLT technology for the public sector are the government's ability to deliver services with greater efficiency and security, enhanced automation, transparency and auditability, thus benefiting society. The guide also sets out the main critical factors in implementing a project, and a risk matrix, including suggestions for controls to mitigate them. Moreover, among the various areas in which this technology can be applied to expand and improve government services are the tax process, the universalization of health services, the creation of self-sovereign digital identities, the management of agreements, the digital inclusion of the unbanked, the monitoring of financial transfers, the disintermediation of notary services, the implementation of a more robust electoral process and the prevention of fraud and money laundering<sup>8</sup>.

Appendix I of that guide provides information on 15 cases of application of blockchain/DLT by Brazilian public entities, in projects that are in various stages of development and use. By way of example, mention should be made of the "Brazilian Powers System", which consists of a blockchain network created in partnership by Banco do Brasil and Petrobras, with the aim of digitizing the powers registration process, replacing the manual paper-based processes that define, for example, who has powers to operate an institution's accounts. The system is being accelerated into production and, among the cases listed in Appendix I, is the only one involving a branch of the Judiciary, the Superior Electoral Court, which, in the system, has the prerogative of granting powers to newly elected mayors<sup>9</sup>.

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6 Tribunal de Contas da União, 'Levantamento Da Tecnologia Blockchain' (TCU 2020) <<https://portal.tcu.gov.br/levantamento-da-tecnologia-blockchain.htm>> accessed 9 February 2021.

7 ibid 22–23.

8 ibid.

9 Tribunal de Contas da União, 'Apêndice 1 -Aplicações Blockchain No Setor Públ-co Do Brasil', (TCU 2020) <<https://portal.tcu.gov.br/levantamento-da-tecnologia-bl ockchain.htm>> accessed 9 February 2021.

#### *4. Online Court Proceedings*

The computerization experience of the Brazilian courts can be traced back to Law No. 11,419/2006, which amended the Code of Civil Procedure (CPC) and introduced other normative measures for the computerization of the judicial process, regulating the use of electronic means in the processing of judicial proceedings, communication of acts and transmission of procedural documents. As of this law, it became acceptable to send petitions, appeals and the practice of procedural acts in general by electronic means, upon the use of an electronic signature and prior registration with the Judiciary, as regulated by the respective bodies (art. 2). The electronic signature is admitted both by means of a digital signature based on a digital certificate issued by an accredited Certification Authority, and by means of user registration with the Judiciary, as regulated by the respective bodies (art. 1, § 2).

It is important to note that, since 2020, the use of electronic signatures in interactions with public entities is regulated by Law No. 14,063, a result of the conversion of Provisional Measure No. 983/2020. However, this law does not apply to judicial proceedings, as expressly stated in subsection I of the sole paragraph of its article 2, so that the digital signature in such proceedings is regulated by the provisions of Law No. 11.419/2006.

It should be noted that the electronic signature is not to be confused with the digitized signature, which is usually done by means of a scanning process. Unlike the former, which guarantees the authenticity of the act, the latter, as already decided by the Federal Supreme Court (STF), is a mere electronic stamp without any regulation and whose originality cannot be asserted without the aid of technical expertise<sup>10</sup>.

With regard to the communication of procedural acts, Law No. 11.419/2006 allowed the courts to create its electronic Justice Daily (DJe), available on the internet, for publication of their own judicial and administrative acts and those of their subordinate bodies, as well as communications in general (art. 4, caput). The site and the content of such publications must be digitally signed based on a certificate issued by a Certification Authority (art. 4º, § 1º), and the electronic publication replaces any other means and official publication, for any legal effects, except in cases that, by law, require personal summons or examination (art. 4º, § 2º). If users are registered in the system, the subpoenas, except in a few exceptional cases, will be served electronically, dispensing with publication in the official or-

10 STF. First Panel. AI 564.765-RJ, DJ 17/3/2006.

gan, including electronically (art. 5). In addition to providing that in the electronic process all citations, summonses and notifications will be made by electronic means (art. 9, caput), it established that the citations, summonses, notifications and remittances that allow access to the full text of the corresponding process will be considered personal view of the interested party for all legal purposes (art. 9, caput and § 1º).

Regarding the electronic process, Law No. 11,419/2006 authorized the Judiciary to develop electronic systems for processing lawsuits by means of totally or partially digital records, preferably using the world computer network and access through internal and external networks, with all acts signed electronically (art. 8, caput and sole paragraph).

Thus, once the system for the electronic process was created, the distribution of the initial petition and the filing of the defense, appeals and petitions in general, all in digital format, may now be made directly by the public and private lawyers, without the need for the intervention of the registry or the court clerk's office, a situation in which the filing is done automatically, providing an electronic receipt of protocol (art. 10). However, it is the Judiciary's duty to keep scanning equipment and access to the worldwide computer network available to interested parties for distribution of pleadings (art. 10, § 3º).

Regarding the conservation of the records of the electronic process, the law provides that it may be done totally or partially by electronic means and, in the latter case, the records must be protected by means of access security systems and stored in a medium that ensures the preservation and integrity of the data, being dispensed the formation of supplementary records (art. 12, § 1º). The law also provides that the systems must use, preferably, open-source programs, accessible uninterruptedly through the internet, prioritizing their standardization, and will seek to identify the occurrence of prevention, *lis pendens* and *res judicata* (art. 14).

Since both individuals and legal entities can be parties, as a general rule, the plaintiff must, as soon as it files the initial petition, inform the number in the registry of individuals or legal entities, as the case may be, with the Federal Revenue Service (art. 15).

With the publication of the new CPC (Law No. 13.105/2015), the practices introduced by Law No. 11.419/2006 were incorporated into it and, to a large extent, improved. Its art. 194, for example, states that the procedural automation systems shall respect the publicity of the acts, the access and participation of the parties and their attorneys, including in hearings and trial sessions, subject to the guarantees of availability, independence of the computing platform, accessibility and interoperability of the systems,

services, data and information that the Judiciary administers in the exercise of its functions.

When dealing with the registration of electronic procedural acts, article 195 states that it must be done in open standards, which will meet the requirements of authenticity, integrity, temporality, non-repudiation, preservation, and, in cases of judicial secrecy, confidentiality, observing the nationally unified public key infrastructure, under the terms of the law.

Art. 196 on the other hand, attributes to the National Council of Justice (CNJ)<sup>11</sup>, and, suppletively, to the courts, the competence to regulate the practice and official communication of procedural acts by electronic means and to watch over the compatibility of the systems, disciplining the progressive incorporation of new technological advances.

It is important to note that the new CPC also dealt with the duty of the Judiciary to ensure to people with disabilities accessibility to its websites, to the electronic means of practice of judicial acts, electronic communication of procedural acts and electronic signature (art. 199). In this same sense, Resolution No. 185/2013, as amended by Resolution No. 245/2016, both of the CNJ, establishes that the Judiciary shall provide in-person technical assistance not only to people with disabilities, but also to those over sixty years of age (art. 18, § 2º).

Also according to the new CPC, the use of electronic documents in conventional proceedings, that is, in proceedings in printed matter, will depend on its conversion to printed form and verification of its authenticity (art. 439), being the judge's duty to assess the probative value of the electronic document not converted, ensuring to the parties access to its content (art. 440). Even in conventional processes, electronic documents produced and preserved in accordance with specific legislation are admitted (art. 441). Moreover, the signature of the judges, in any of their acts in the process and in all levels of jurisdiction, will be done electronically (art. 205, § 2º).

In 2013, through Resolution No. 185, considering the need to regulate the implementation of the use of electronic tools for the judicial process, in order to confer uniformity to the practices of the various bodies of the Judiciary, the CNJ instituted and established the parameters for the

<sup>11</sup> The CNJ is the body of the Brazilian Judiciary in charge of developing judicial policies that promote the effectiveness and unity of the Judiciary, oriented to the values of justice and social peace, created by Constitutional Amendment No. 45 of 2004, that introduced article 103-B in CB/88, and installed on June 14, 2005.

implementation and operation of the Electronic Judicial Process System (PJe), an information processing system and practice of procedural acts.

According to art. 2 of Resolution No. 185/2013, the PJe is responsible for the control of the proceedings, the standardization of all data and information comprised by the judicial process, the production, registration and publicity of procedural acts, and the provision of essential data for the management of the information required by the various supervisory bodies, control and use of the judicial system.

In turn, article 4 of Resolution No. 185/2013 deals with important elements for the verification of authenticity of electronic documents, by determining that the procedural acts will be registered, visualized, processed and controlled exclusively in electronic means and will be digitally signed, containing elements that allow the identification of the user responsible for its practice. According to paragraph 1 of the same article, the reproduction of a document from the digital records must contain elements that allow verification of its authenticity in an electronic address made available for this purpose on the websites of the CNJ and of each of the PJe's user courts. Furthermore, the user is responsible for the accuracy of the information provided during the registration process, as well as for the safe-keeping, confidentiality, and use of the digital signature, and, in any case, no allegation of improper use can be made (§ 2º).

PJe allows digital signatures of individuals and legal entities with the use of A1 and A3 digital certificates, in accordance with ICP-Brasil regulations (art. 4, § 3º of Resolution No. 185/2013, as amended by Resolution 281/2019). Moreover, the signature and the registration of the procedural act may be split, in order to allow the signature of digital documents to use secure authentication standards and the registration of the procedural act to be promoted by an A1 certificate, institutional, in accordance with the ICP-BR standard. In such cases, the secure authentication model will use a two-factor authentication standard, by means of a disposable password (token), with prior registration (pairing) of the user's mobile device in the PJe system (art. 4-A, caput and § 1º, of Resolution No. 185/2013, as amended by Resolution No. 281/2019).

As measures to ensure access to the system, the PJe websites of the Councils and the Courts should only be accessible through a secure HTTPS connection (art. 6, § 2º, of Resolution No. 185/2013, as amended by Resolution No. 281/2019). In the same sense, for the respondents of a judicial proceeding, access codes to the proceeding must be generated, with limited validity period, allowing them to access the entire content of the electronic records, in order to enable the exercise of the adversary and full defense (art. 6, § 3º, of Resolution No. 185/2013).

It is up to the user to acquire, by himself or by the institution to which he is linked, the digital certificate, ICP-Brasil standard, issued by an accredited Certificate Authority, and the respective portable cryptographic device (art. 9, § 2º, III, of Resolution No. 185/2013).

### *5. Artificial Intelligence in the Justice System*

In February 2019, through Ordinance No. 25, the CNJ established the Innovation Laboratory for Electronic Judicial Process (Inova PJe), with the goal of creating a primarily virtual environment for PJe, which acquires the characteristic of a microservices platform with extensive use of Application Programming Interfaces (APIs).

The central idea of the implementation of Inova PJe is the development of research in AI that allows solutions to give more speed and effectiveness to the judicial process. The environment created by this laboratory permits collaboration between several courts, building an ecosystem of AI services, aimed at optimizing the work in the PJe system and saving human and financial resources, in addition to contributing to the procedural speed. Among the premises of Inova PJe is that the AI models used in decision making or production of artifacts should be auditable, through a process defined by the CNJ, to analyze the results based on ethical and legal criteria<sup>12</sup>.

In this environment, the Sinapses Project is made available to the PJe. Sinapses is a technological solution originally conceived by the Court of Justice of the State of Rondônia which, acting as an AI model factory, allows the research and production of intelligent services to assist in the construction of modules for the PJe and in its improvement.

In Sinapses, to train the model, the document base is fed by the client systems with new examples based on use. If a divergence is observed between the suggestion offered by the AI and the user's choice, the document object of the divergence is stored in a "reinforcement" area, recording the deadlock so that it can be resolved by a third party (human). Once it is defined who was right, the new example becomes part of the new training base<sup>13</sup>.

According to the 2019 report, the CNJ describes 14 use cases of Sinapses, among which are, for example: a) large mass triage, which classifies

12 Conselho Nacional de Justiça (n 4) 16–18.

13 *ibid* 28.

cases so that they can be grouped into previously defined classes; b) intelligent procedural movement, which performs predictions about decisions, suggesting to the user the best option applicable to the case; c) prevention analysis, which searches the procedural bases and identifies possible cases of similarity of procedural elements that may impact the competence to judge the cause; and d) Victor, the artificial intelligence platform of the STF<sup>14</sup>.

Taking into account the absence of specific rules in Brazil regarding governance and ethical parameters for the development and use of AI, as well as the need to respect fundamental rights by courts in the development and implementation of tools that use AI, the CNJ published Resolution No. 332 in August 2020. This resolution is influenced by the "White Paper on Artificial Intelligence: a European approach to excellence and trust", published by the European Commission in February 2020, and expressly considers the "European Ethical Charter on the use of AI in judicial systems and their environment".

Resolution No. 332/2020 applies not only to new projects, but also to those that at the date of its publication were already being developed or implemented in the courts, except for those acts that had already taken full effect (art. 30), and the courts must immediately notify the CNJ as soon as research, development or implementation of AI models begins. However, in the case of the use of AI for facial recognition techniques, these may only be initiated after authorization from the CNJ for implementation (art. 22).

To make clear the scope of its application, the Resolution considers as an AI model the set of data and computational algorithms, conceived from mathematical models, whose purpose is to offer intelligent results, associated or comparable to certain aspects of thought, knowledge or human activity (art. 3, II).

Such Resolution demonstrates the concern with the respect for the principle of isonomy, determining that the use of AI models should seek to ensure legal certainty and collaborate so that the Judiciary respects the equal treatment of absolutely equal cases (art. 5). Thus, although the suggestions of AI tools are not binding, the judicial decisions supported by them must preserve equality, non-discrimination, plurality, and solidarity, assisting in the fair trial, with the creation of conditions that aim to eliminate or minimize oppression, the marginalization of human beings, and errors of judgment resulting from prejudice (art. 7). To this end, before being put into

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14 *ibid* 29–36.

production, the AI model must be approved in order to identify whether its development was influenced by prejudices or generalizations, resulting in discriminatory biases in its operation (art. 7, § 1) and, if any discriminatory bias of any nature or incompatibility with the principles provided in the Resolution is identified, corrective measures must be adopted (art. 7, § 2). If it is impossible to eliminate the discriminatory bias of the Artificial Intelligence model, it must be discontinued (art. 7, § 3).

As a measure to prevent the development of discriminatory biases, the Resolution determines that the composition of teams for research, development, and implementation of computer solutions that use AI will be guided, at all stages of the process, by the search for diversity in its broadest spectrum, including gender, race, ethnicity, color, sexual orientation, people with disabilities, generation, and other individual characteristics (art. 20).

Another element present in Resolution No. 332/2020 is transparency, which supposes the provision of a satisfactory and auditable explanation by a human authority regarding any proposed decision presented by the AI model, especially when it is of a judicial nature (art. 8, VI). Therefore, the bodies of the Judiciary involved in an AI project must inform the CNJ of the research, development, implementation or use of AI, as well as the respective objectives and the results intended to be achieved, in addition to promoting efforts to act in a community model. The deposit of the model in Sinapses is mandatory, and parallel development is forbidden when the initiative has objectives and results achieved that are identical to an existing AI model or an ongoing project (art. 10).

Furthermore, computer systems that use AI models as an auxiliary tool for the preparation of judicial decisions will observe, as a preponderant criterion for defining the technique used, the explanation of the steps that led to the result, in addition to allowing the supervision of the competent judge (art. 19). The intelligent system must ensure the autonomy of the internal users, using models that enable the review of the decision proposal and the data used for its elaboration, without any kind of binding to the solution presented by the AI (art. 17, II).

The use of AI models in criminal matters is something especially sensitive, so that art. 23 of Resolution No. 332/2020 determines that it should not be encouraged, especially in relation to the suggestion of predictive decision models, except when it comes to the use of computer solutions intended to automate and provide subsidies for the calculation of sentences, prescription, verification of recidivism, mappings, classifications and sorting of records for collection management purposes. Especially in what concerns the verification of criminal recidivism, AI models should not

indicate a conclusion more prejudicial to the defendant than the one the judge would reach without its use.

In line with Resolution No. 332, in December 2020, the CNJ published Ordinance No. 271, which regulates the use of AI in the Judiciary. In addition to reaffirming and addressing some operational aspects of the aforementioned Resolution, the Ordinance establishes measures such as determining that Sinapses will be the common platform on which the AI initiatives of the Judiciary will be centralized (art. 4).

It is noteworthy that the Ordinance No. 271 also provides that the development and registration of models in the platform will be preceded by the installation of the extractor module to ensure that the data on which they are based are included in the central repository, including the cover of the judicial process (metadata), its procedural movements, and the documents duly converted to plain text format (art. 11). The AI models used to assist the Judiciary in the presentation of analyses, suggestions or content must adopt measures that enable the tracking and auditing of the predictions made in the flow of their application (art. 12) and return to the API registered in the platform the information of any disagreement as to the use of the predictions, so as to ensure the auditing and improvement of the artificial intelligence models (art. 13).

Beyond the normative framework, it is interesting to consider the data of reality. In 2019, the CNJ conducted a detailed study on the use of AI in the Brazilian Judiciary, in which it emphasizes that what is expected of AI in such scope is that it can contribute to the resolution of the huge number of cases pending solution, as well as give greater speed to their processing<sup>15</sup>.

As CNJ data indicates, only 10 % of all new cases initiated during 2019 were by physical means. That is, 90 % of the proceedings initiated in 2019 were digital, which is equivalent to 23 million new electronic cases. It should be noted that not all are through the PJe, since Resolution No. 185/2013 allows the use of other systems, provided they are integrated with the National Interoperability Model (MNI). In the 11 years of the historical series analyzed by CNJ, 131.5 million new cases were filed in electronic format<sup>16</sup>.

Of the 90 courts that, along with the CNJ, make up the Brazilian judicial structure, formed based on article 92 of the CB/88, 11 have already achieved 100 % of digital proceedings. Moreover, in a specific survey con-

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15 *ibid* 10.

16 Conselho Nacional de Justiça (n 1) 112.

ducted in May 2020 with 62 courts, it was found that only 13 of them have less than 90 % of their collections digitized<sup>17</sup>.

More recently, the Center for Innovation, Administration and Research in the Judiciary of the Getúlio Vargas Foundation conducted, from February to August 2020, the first phase of a survey that aims to identify, understand, systematize, develop and improve technological solutions, with an emphasis on AI, aimed at improving the justice system. After researching a sample of 59 courts and the CNJ, a report published in December presents the data collected from each court, indicating the name of the system, its origin, current situation, functionalities and the problems it proposes to solve, as well as the results achieved<sup>18</sup>.

Besides the CNJ's Project Sinapses, the research indicated that there were 64 other artificial intelligence projects within the Judiciary, either already implemented, in the pilot project phase or under development. Of these projects, 47 were developed by the courts' internal staff, 13 in partnership with private companies, 3 through partnerships with universities, and one by other bodies<sup>19</sup>.

According to this research, the AI projects in Brazilian courts involve functionalities such as verification of the legal hypotheses of dismissal, suggestion of draft, grouping by similarity, realization of the judgment of admissibility of appeals, classification of cases by subject, treatment of mass claims, online attachment, extraction of data from judgments, facial recognition, chatbot, calculation of probability of reversal of decisions, classification of petitions, indication of statute of limitations, standardization of documents, transcription of hearings, automated distribution and classification of sentences<sup>20</sup>.

## *6. Plans for the Future*

In the scope of the agencies and entities of the federal public administration, Decree No. 10,332/2020 establishes the Digital Government Strategy for the period 2020 to 2022, in which the goal of implementing AI resour-

17 *ibid* 113.

18 Luis Felipe Salomão (ed) *Tecnologia Aplicada à Gestão Dos Conflitos No Âmbito Do Poder Judiciário Brasileiro* (FGV Conhecimento 2020) <<https://ciapj.fgv.br/publicacoes>> accessed 5 February 2021.

19 *ibid* 26 and 69.

20 *ibid* 69.

ces in at least twelve federal public services by 2022 stands out (initiative 8.2.).

Regarding the Judiciary, one cannot talk about the plans for the near future without referring to the National Strategy for Information Technology and Communication of the Judiciary (ENTIC-JUD) for the period 2021 to 2026, established in January 2021 by Resolution No. 370 of the CNJ, which is the main instrument for promoting agile governance and digital transformation of the Judiciary through innovative digital services and solutions that drive the technological evolution of the Judiciary. The ENTIC-JUD aims to reach at least 75 % of the Judiciary bodies with a satisfactory maturity level in the Information Technology and Communication Governance index (iGovTIC-JUD) by December 2026 (art. 2, II). To achieve the objectives of the Strategy, each body must prepare a Digital Transformation Plan that will contain, at a minimum, digital transformation of services, integration of digital channels, interoperability of systems and monitoring strategy (art. 15).

Still in the scope of the Judiciary, it must be taken into account Resolution No. 363, of January 2021, in which the CNJ establishes measures to be adopted by the courts for the process of adaptation to the General Law of Personal Data Protection (Law No. 13.709/2018).

With regard to private legaltech companies, there is great expectation with the approval of the Legal Framework for Startups. The topic is the subject of the Draft of Complementary Law No. 146/2019, already approved in the Chamber of Deputies in December 2020 and pending approval in the Federal Senate, which provides for startups and presents measures to encourage the creation of these companies and establishes incentives for investments by improving the business environment in the country.

About the initiatives that may impact the regulation of blockchain, it is worth mentioning the Draft Law No. 2876/2020, which is currently in progress in the Federal Senate and proposes to alter the Public Registries Law in order to establish that all registrations made by Real Estate Records and Registry of Deeds and Documents are also inserted in the National Electronic System of "Blockchain" to be made available by the CNJ. Draft Law n. 2303/2015, which is currently pending in the Chamber of Deputies, provides for the inclusion of virtual currencies and airline mileage programs in the definition of "payment arrangements" under the supervision of the Central Bank. Also worthy of mention is Draft Law n. 5051 of 2019, currently in progress in the Federal Senate, which, in very general terms, proposes to establish the principles for the use of AI in Brazil.

## 7. Final Considerations

Legaltech solutions can serve, in many cases, as a means to ensure fundamental rights in the Brazilian legal system, especially the right to speedy proceedings. However, although they are quite useful in the execution of administrative activities, such tools cannot be treated as a panacea for all the ills that afflict legal activities.

As Lênio Streck rightly points out, even when trying to rule out the problem that discretionary powers represent for legal activities, especially those related to judicial ones, elements of discretionary powers may remain in the definition of the data that feeds the robot algorithms, when differentiating what is and what is not relevant. Thus, it cannot be said that there is a true solution when the proposal presented shares the bases of the problem it intends to solve. Furthermore, considering that legal activities are interpretative, the Law cannot be seen as a mere matter of fact. Otherwise, under the argument of the standardization of decisions, the reproduction of standards previously adopted by courts would lead to a new form of legal realism<sup>21</sup>.

Moreover, even if the data used to inform the algorithmic decision is reliable, the operation of machine learning can generate discriminatory situations, harmful to the right to equality, which can result in many pernicious consequences until it is noticed that there is a flaw or bias. Thus, as a transparency measure, the algorithms used in public decisions need to be audited. In addition, a policy of accountability of algorithms needs to be taken seriously so that personal responsibility for the decisions they make can be established<sup>22</sup>.

Furthermore, the fundamental right to privacy presupposes the appropriate management of personal data by the public and private entities that hold them, making it necessary to prevent incidents such as the one that recently occurred at the Supreme Court of Justice, when the Court's activities were paralyzed after its servers were hijacked by ransomware, the

<sup>21</sup> Lenio Luiz Streck, ‘Um robô pode julgar? Quem programa o robô?’ (Consultor Jurídico, 3 September 2020) <<https://www.conjur.com.br/2020-set-03/senso-incom-um-robo-julgar-quem-programa-robo>> accessed 10 February 2021.

<sup>22</sup> Isabela Ferrari and Daniel Becker, ‘Algoritmo e Preconceito’ (JOTA Info, 12 December 2017) <<http://www.jota.info/opiniao-e-analise/artigos/algoritmo-e-preconceito-12122017>> accessed 10 February 2021.

worst cyber-attack ever against the information technology network of a Brazilian public institution<sup>23</sup>.

According to the foregoing, one cannot deny the normative advance concerning legaltech activities in Brazil, especially those within the justice system. However, there are still several points that require a normative framework at the legislative level, in order to give greater protection to the system of fundamental rights and bring legal security to all those involved in legaltech activities. The technological sciences are very dynamic, and the legal sciences must be prepared for this.

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23 According to an official announcement from the Presidency of the STJ: Ministro Humberto Martins Presidente de STJ/CJF, ‘Comunicado da Presidencia do STJ’ (STJ, 18 November 2020) <<https://www.stj.jus.br/sites/portalp/Paginas/Comunica%C3%A7ao/Noticias/18112020-Comunicado-da-Presidencia-do-STJ.aspx>> accessed on February 10, 2021.

## China

*Maddalena Castellani*

### *1. LegalTech used in the country: courts, law firms, arbitration*

Due to the constant and inevitable increase in litigation in China, arising from the massive and generalized use of the internet, the Chinese government has decided to establish, for the first time on August 18, 2017, the world's first Court specializing in handling internet-related cases in the city of Hangzhou, Zhejiang Province, the central hub of e-commerce.

Initially this was a pilot project which, as we shall see, given its great success, has been replicated in various cities, thus becoming a true model of a court that uses new technologies.

The Hangzhou Internet Court (the "Court") trials internet related disputes on the Online Dispute Platform ([www.netcourt.gov.cn](http://www.netcourt.gov.cn)<sup>1</sup>).

The Court implements all procedures via the internet on the Platform<sup>2</sup>.

The procedures to be followed by the Court are detailed in the Trial Rules of the Hangzhou Internet Court Dispute Platform.

The main issues of the Court were:

- 1) The Court has exclusive jurisdiction for the following cases (first instance):
  1. Disputes regarding contracts of online shopping, services, microfinance loans etc.;
  2. Disputes relating to the ownership and infringement of online copyright;
  3. Disputes relating to infringing other person's personal rights via internet;
  4. Disputes relating to product liability infringement of products bought online;
  5. Disputes regarding domain names;
  6. Administrative disputes raised because of administration measures on the internet;

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1 <<https://www.netcourt.gov.cn/?lang=En>> accessed 21 August 2021.

2 <<http://english.court.gov.cn/>> accessed 21 August 2021.

7. Other internet related civil or administrative cases designated by the higher courts.
- 2) Online trial  
All trial procedures were conducted by the Platform, including filing for litigation, the trial hearing, the delivery of the sentence and also the executing judgements.
- 3) registration for the verification  
Parties involved in the dispute have to be registered with the Platform and be verified via online real name verification, face recognition or off-line verification.
- 4) Pre-mediation process  
Before the case has been taken to court, a mediation process will be undertaken. The mediation period lasts for 15 days and can be extended. During this period, a mediator will help both parties to mediate the dispute.
- 5) Judges can use artificial intelligence technology to draft judgements.  
The first case filed with the Court was an online copyright infringement case in which both parties agreed to mediate in the 20 minutes' video hearing.

From 2017, to April 15, 2018, the Hangzhou Internet Court accepted a total of 7,372 cases involving six types of network-related cases and concluded 4,532 cases. The online filing rate was as high as 96 %, and the related party cases were 100 % online. The online trial took an average of 25 minutes and the online trial averaged 46 days<sup>3</sup>.

At the end of 2018, the Hangzhou Netcourt accepted a total of 12,074 cases involving network cases and concluded 10,391 cases. All of the cases of related parties were heard online. The trials took an average of 28 minutes and the average procedure lasted 38 days.

Some authors noted that in the process of construction and development of Hangzhou NetCourt, notwithstanding the results of the practice were very fruitful, in the same time there were some weakness.<sup>4</sup>

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3 Paolo Beconcini, 'More "NetCourts" Opening in China' (Squire Patton Boggs, 14 November 2018) <<https://www.iptechblog.com/2018/11/more-netcourts-opening-in-china/>> accessed 21 August 2021

4 Hanying Zhu, "'Zhejiang Experience": Problems and Countermeasures in the Construction of Internet Courts' (Atlantis Press, September 2019) <<https://www.atlantis-press.com/proceedings/jahp-19/125917489>> accessed 21 August 2021.

For example:

- a) The Innovation of the Litigation System Under the Online Trial Mode was not Compatible with the Rules of the Litigation Law. The rules for the regulation of the process and specific links of the traditional offline mode couldn't be fully applied to the online trial mode of the Internet court, and conflicts arose in the specific application process. The application of the online trial mode under these conflicts has raised the issue of the rationality of electronic delivery, the application of electronic evidence, the rationality of the proceedings in the second instance, and the negative impact on the litigants' right to appeal. Although the Hangzhou Internet Court has tentatively proposed a solution, the basic and principled standards involved in some issues, needed to be improved from the perspective of system design and legislative level. As will be seen, with the enactment of the founding legislation of the Beijing and Guangzhou NetCourts, the legislative system has managed to address the shortcomings described above.
- b) There was found to be a security risk to the data and the entire online process. The authors found that Hangzhou courts would need to improve their technical level and overall strength in order to secure the entire online process... First, it was found that it was necessary to strengthen the judges' and staff's sense of security responsibility to ensure that relevant confidential information does not leak out, and that the legitimate rights and interests of litigants are not harmed. Second, it was noted that it would be appropriate and necessary to cooperate with first-class domestic and foreign technology companies to improve litigation platforms and the technical system of online processes. The authors believe that "The security, stability and reliability of all aspects of the online litigation process should be ensured. Further improve digital encryption technology to ensure the authenticity and integrity of electronic documents and files." The third suggestion of the authors was to "keep up with the direction of big data development and ensure the stability and convenience of information interaction of storage data. With the help of the big data platform, the exchange and sharing of data information will be strengthened to ensure the authenticity of data sources." Therefore, the authors hoped that "Through the above points, it is necessary to improve the construction of technology platforms and avoid the risks brought by the application of Internet technologies."

As will be seen later, China Legal system was able to solve in a short time the technological imperfections of Hangzhou Internet Court, and so, given

the fast technological progress, on July 6, 2018, the Central Committee for Deepening Reform in China, reviewed and approved the “Proposal for the Establishment of the Beijing Internet Court and the Guangzhou Internet Court” (later referred to “law”), which has been the second and third internet courts<sup>5</sup>.

As indicated in the law establishing the Internet Courts of Beijing and Guangzhou, the purpose of the NetCourts is to adjudicate cases related to the Internet. NetCourts are grassroots courts, and cannot have jurisdiction over disputes of a high value, those involving foreign elements such as a foreign plaintiff or defendant, or those in the exclusive jurisdiction of other courts (e.g. trademark and patent disputes). Appeals against a NetCourts’ judgments must be filed with the territorially competent Intermediate Court or an IP court.

#### *Beijing Internet Court<sup>6</sup>*

The Beijing Internet Court was specially established with 8 internal departments, including the Case-filing Division (litigation service center), the 1st Comprehensive Division, the 2nd Comprehensive Division, the 3rd Comprehensive Division, the Enforcement Department, the Political Department (Party Affairs Committee), the Trial Management Office (Research Office), and the General Office (Judicial Police Brigade).

#### *The trial staff<sup>7</sup>*

The Beijing Internet Court, at the date of the information I got (end of 2019), has 35 post judges, 105 judge assistants and court clerks, 19 judicial administrators and 24 judicial police officers. The average age of the post judges is 40. 75.7 % of them hold a master's degree or above. They have been engaged in the trial work for more than 10 years averagely.

**Jurisdiction:** The Beijing Internet Court has jurisdiction over eleven types of specific Internet-related first-instance cases that should be accepted by the primary-level people's courts within the jurisdiction of Beijing.

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<sup>5</sup> Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Cases by Internet Courts promulgation date 2018-09-06 effective date 2018-09-07 \_ document number: Fa Shi (2018) No. 16.

<sup>6</sup> <<https://english.bjinternetcourt.gov.cn/index.html>> accessed 21 August 2021

<sup>7</sup> <<https://english.bjinternetcourt.gov.cn/judges.html>> accessed 21 August 2021

The NetCourts in Beijing, according to article 2 of the "law" has ruled that:

"The following types of first-instance cases should be accepted by grassroots people's courts, within the jurisdiction of the city where an internet court is located, will fall under the jurisdiction of the internet court in Beijing, Guangzhou and Hangzhou respectively:

1. Disputes arising out of signing or performing online shopping contracts on e-commerce platforms;
2. Disputes over online service contracts which were signed and performed on the internet;
3. Disputes over finance-lending contracts or small-amount lending contracts, which were signed and performed on the internet;
4. Disputes over the ownership of the copyright or neighboring rights of work initially published on the internet;
5. Disputes arising out of the online infringement of the copyright or neighboring rights of work published or disseminated online;
6. Disputes over the ownership, infringement, or contracts of internet domain names;
7. Disputes arising out of the online infringement of others' civil rights, such as personal and property rights.
8. Disputes over product liability as a result of the infringement of others' personal or property rights caused by defects of products bought on e-commerce platforms;
9. Internet-related public interest lawsuits brought by prosecutor's organs;
10. Administrative disputes arising out of administrative behaviors of administrative organs in respect of the administration of internet information services, internet commodity trading and the management of relevant services; and
11. Other internet-related civil and administrative cases that fall under the jurisdiction of internet courts, as designated by superior people's courts.".

It should be noted that, with respect to the jurisdiction of the Hangzhou court, the "law" has expanded the areas of competence of the NetCourt.

Although trademark, design and patent disputes are not within the jurisdiction of NetCourts, other relevant IP rights can be litigated before these new judicial bodies. Most important among these are copyright and domain name disputes.

NetCourts' procedures are less formal than alternative procedures and do not require physical attendance. For example, filing, evidence submis-

sion, payment, and service of documents are all processed online. Court hearing and mediation are organized online as well, and the parties do not need to travel to the court to attend. Court hearings will be held via video conferencing technology on any available media utilized and approved by the court.

Aside from eliminating traveling and paper submissions, NetCourts are also supposed to operate efficiently. For this reason, hearings are scheduled for no longer than 20 minutes. Another important aspect is the preservation of evidence and filing authenticity. NetCourts will use and allow "blockchain" to synchronize evidence with a notary public and the other government bodies as well as commercial websites, so the parties cannot tamper with it.

The problems noted by some authors and indicated in footnote n. 4, have been solved through, for example, the harmonization of the regulation of online courts with "traditional courts" (the law), the use of a blockchain platform for the exchange and preservation of evidence, and the use of big data and artificial intelligence.

But not only.

A further interesting element that should be mentioned is the establishment of a new mediation platform with the characteristic of Beijing Internet Court.

The online "e-mediation platform" created by the Court, has realized real-time access to the "integrated dispute mediation-ruling" platform as well as the case filing and trial system of Beijing Court so that the case files and materials can be transferred online, the service of result is available online, the mediation result is confirmed online and the mediation files are generated online, just to name a few. The data concerning a case in the whole process is transferred online. With the aid of the online mediation platform, the mediator is able to conduct the mediation "screen to screen" with the litigants anytime and anywhere via mobile phone or computer throughout the entire mediation course, making it unnecessary for the litigants to communicate "face to face" with the mediators in the court.

From September 9, 2018 to August 31, 2019, a total of 29,728 mediation cases were conducted and 100% of them were handled online; 23,262 mediation cases were concluded and 5,572 of them were successfully settled, with a success rate of 23.9 %.

This new mediation system was called "*Fengqiao Experience*".

*2. Blockchain and DLT in government systems. Whether there are judicial systems or other registers using blockchain. Legal provisions linking a blockchain entry to a legal presumption.*

Taking a brief step back, it is necessary to point out that the positive push for the use of blockchain, has also been sealed by rulings from the Hangzhou court itself<sup>8</sup>. For example on 2018 – 06 -28, the Court has established that "*we should maintain an open and neutral stance on using blockchain to analyze individual cases. We cannot exclude it just because it is a complex technology. Neither can we lower the standard just because it is tamper-proof and traceable*"<sup>9</sup>.

This particular case involved a copyright infringement claim (images and text) filed by a Chinese media company called The Claimant, known as Huatai Yimei, against a Shenzhen-based technology company Daotong.

According to the complaint, the defendant had reprinted Huatai Yimei's work on its website without permission. During the hearing, the plaintiff presented the court with screenshots of the allegedly infringing websites and source codes uploaded to a blockchain provider, called Baoquan ([www.baoquan.com](http://www.baoquan.com)).

These items were used as evidence to convince the Court that the defendant was liable for copyright infringement.

Therefore, the Court argued that it was not possible to exclude the blockchain from the evidence just because it was a "complex technology," and ultimately based its decision on that element.

Specifically, the Court held that the evidence storage platform was legal, neutral, and qualified as such. The technology used to collect the evidence was said to be reliable and the electronic data complete, as the Court was satisfied that it had not been modified.<sup>10</sup>

Considering the above, now the "law" has formulated standards for electronic evidence and normalized the evidence determination process for the whole chain.

<sup>8</sup> <<https://www.netcourt.gov.cn/?lang=En>> accessed 21 August 2021

<sup>9</sup> Maddalena Castellani, Paola Pomi, Cesare Triberti and Alessandro Turato (eds) *Blockchain: Guida pratica tecnico giuridica all'uso* (Goware 2019)

<sup>10</sup> <[https://go.dennemeyer.com/hubfs/blog/pdf/Blockchain%2020180726/20180726\\_BlogPost\\_Chinese%20Court%20is%20first%20to%20accept%20Blockchain\\_Judgment\\_EN\\_Translation.pdf](https://go.dennemeyer.com/hubfs/blog/pdf/Blockchain%2020180726/20180726_BlogPost_Chinese%20Court%20is%20first%20to%20accept%20Blockchain_Judgment_EN_Translation.pdf)> accessed 21 August 2021

Firstly<sup>11</sup>, the court has established a blockchain platform of credible electronic evidence to address the pain spot of preserving electronic evidence. A scientific blockchain ensure that the judicial blockchain has a high starting point. The judicial blockchain "Balance Chain" has been established under the leadership of the Beijing Internet Court in cooperation with the National Information Security Development Research Center, Baidu, Trust do Technology and other leading blockchain institutions in China. The Court keeps strict control of the blockchain and strengthens the systematic management of the blockchain. The *Detailed Regulations on Joining in Balance Chain and Related Management*, the *Testing Practices for Joining in Balance Chain* and other regulations were formulated to normalize the qualification requirements for joining in the "Balance Chain", the rules for preserving electronic data, the management mechanism of the platforms joining in, the use of electronic data, the supervision, review and exit of the institutions on the chain, and to ensure the security of the data linked to the "Balance Chain" and the effective protection of the privacy of the parties involved in various cases. The in-depth use of the blockchain helps improve the actual effectiveness of the blockchain. The application of the "Balance Chain" solved such issues as the information security of electronic data, joint verification and authentication, realized the "whole-process recording, all-chain creditability, and all-node witness" of electronic data, and enabled the "one-stop" solving of the preservation, obtainment and determination of electronic evidence. It has greatly enhanced the creditability and probative force of electronic evidence, significantly improved the efficiency of online trials, greatly reduced the parties' cost in safeguarding their rights, and boosted the development of the credit system. So far, the „Balance Chain” has completed the connection to 18 cross-chain nodes and the data joint with 25 application nodes of 9 categories, such as copyright and Internet finance; 6.96 million items of electronic data have been input into the chain; the number of cross-chain data items of preserved evidence has exceeded ten million.

**Secondly, the Court has formulated the norms for the whole-process examination of electronic evidence and eliminated the barriers hindering the verification of electronic evidence.** Regarding such issues as the generation, storage and submission of electronic evidence, our court has formulated the norms for the whole-process examination of electronic evidence. We will examine the qualifications of the third-party evidence-

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11 <<https://english.bjinternetcourt.gov.cn/onlinelawsuitguide.html>> accessed 21 August 2021;

preserving platforms to help verify the effectiveness of electronic evidence. Before the test, measures are taken to make sure the computer (server) is clean and the time is correct so as to rule out the possibilities that such factors as the operator's improper intervention and false environment may lead to false evidence and to ensure the creditability of the approaches taken for the generation and storage of electronic evidence. In the case where the adprints.cn sued the eastday.com for infringing its copyright, our court determined that the plaintiff's evidence of timestamp was not credible as the plaintiff missed the critical step of examining the authenticity of the Internet connection when preserving the evidence. The handling of this case is a vigorous exploration for the improvement of the rules for verifying the evidence of timestamp. The blockchain ecology is expanded to promote the establishment of the blockchain standards and to generalize the use of blockchain in evidence preservation. During the trials, the court verified 1,301 items of cross-chain evidence involving 303 cases. Among them, 14 cases were closed by judgment, and no party involved raised any objection to the authenticity of the evidence.

Thirdly, Court has refined the rules for evidence determination and overcome the difficulties in electronic evidence determination. In combination with the characteristics of the new types of evidence collection in the Internet era, the Court normalized the standards for determining the authenticity, relevance and validity of the evidence stored by such new technical means as electronic notarization, blockchain, credible timestamp, and cloud evidence. According to the actual characteristics of electronic evidence, some standards are formulated for the online verification of the originals of such electronic evidence as pictures, videos, and audios. In combination with the storage subject, the storage and publicity methods, the period of electronic data and other aspects of the Internet-related cases, the court formulated the guidelines and interpretation about the burden of proof for the electronic evidence of the same-type cases to help find out the facts of each case. According to the types, characteristics and distribution of the cases handled by the Internet court, assisting experts and technical investigators are brought in to provide professional opinions for judges' reference regarding specialized and technical issues<sup>12</sup>.

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12 Art. 10 of the “law” states: “Where litigants and other individuals involved in litigation adopt technical approaches to electronically process such prosecution materials as their identifications, duplicates of business licenses, the power of attorney and identifications of legal representatives, and such evidential materials as written evidence, expert opinions and written records for inspections, and then submit the electronic copies, the internet court will deem that such electronic copies meet the requirements on originals,

Art. 11 of the „law” (3rd part) states that: „Where the truthfulness of electronic data submitted by litigants can be proved through technical approaches for collecting, securing and preventing the falsification of evidence, such as the electronic signatures, trusted time stamps, hash verification, and block chain, or be verified on the electronic evidence collection and storage platform, the internet court shall accept and confirm such electronic data”.

It was therefore legislated that the Court, without having to carry out further tests, in the event that a party deposits documents that are digitally signed, that have time stamp or, for example, that are stored in a blockchain, will accept these documents as compliant and usable in the process.

4. *Online court proceedings. Are it acceptable, in what way, the way of communication, what information systems are used. How is the judgment issued. Is the connection from the court or can it be made using a private computer?*

All documents and evidence must be placed on the platform.

No other deposit forms are accepted.

Noting that, in most lawsuits, at least one of the parties involved is a big digital platform, the Legislator, on the subject of identifying the parties involved, has established in Article 6 that:

*"Where litigants and other individuals involved in litigation use a litigation platform to carry out litigation-related activities, their identities shall be authenticated through comparison with identifications and licenses, biometric features recognition, or the authentication on the national unified identity authentication platform, or by other online means, and they shall obtain an exclusive account to log into the litigation platform.*

*Any activities carried out by using an exclusive account to log into the litigation platform will be considered as those carried out by the authenticated individual in person, unless such activities are attributed to the system's malfunctions caused by technical problems with the litigation platform, or the authenticated individual is able to prove that his or her litigation platform account is illegally used by others".*

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*after they have been examined and confirmed. Where the opposing litigant raises an objection regarding the truthfulness of such materials with reasonable causes, the internet court shall require the litigant to provide the originals".*

It is evident, therefore, that all the personal and contact information that a subject enters - by authenticating himself to a portal (for example for the online purchase of products or services) - are considered as a valid starting point for the recognition of the subject involved in the litigation.

Article 8 of the "Law" provides that the Internet Court, after accepting a lawsuit, may use the contact information provided by the plaintiff, such as the mobile number, fax, e-mail, or instant message account, to notify the defendant and the third party to participate in the case and authenticate their identity on the litigation platform.

Still on the subject of service of documents and communications between the parties and the Court, Article 15 provides that with the consent of the parties, the court may communicate with the parties by the use of: the litigation platform, short messages, fax, e-mails, the instant message account, or by other electronic means<sup>13</sup>.

If a litigant has not given explicit consent to electronic service, it will be deemed as consenting to electronic service when it has been agreed that relevant documents will be served electronically in a lawsuit for any arising dispute, or electronic service is confirmed by issuing the return receipt or conducting the corresponding activities for litigation purposes, and it does not give its explicit disapproval of electronic service.

Article 16 states that: *"For electronic service purposes, the internet court shall confirm the specific means of electronic service and the address with each litigant, and inform them of the applicable scope of electronic service, effects, how to change their address for service, and other matters in respect of the service that should be notified.*

*Where the receiver fails to provide an effective address for electronic service, the internet court may prefer an electronic address frequently used by the receiver, such as mobile number, email address and instant message account, if it is confirmed that such address has been in active use by the receiver in the last three months".*

<sup>13</sup> WeChat and Alipay have often been described as "super apps" because everything is integrated into one service. Instead of having to have one app for banking and another to request a cab service, many of these functions are built directly into WeChat so that the app becomes a one-stop shop for users.

If the account is linked to the bank account the app allows you to pay for anything. It is the most widely used payment tool in China.

Mini-programs have become more important than the app itself, as WeChat pushes harder to become a kind of one-stop shop.

Therefore, WeChat and Alipay offer much more than just messaging, allowing its users to do almost anything from payments to the ability to book flights and hotels.

Therefore, as we understand it, if a party fails to provide a correct and effective electronic address for the purpose of receiving service, the court may use other media that the party habitually uses (including instant messaging apps).

In any case, it is foreseen (art. 17) that where an internet court serves documents to the electronic address that is voluntarily provided by the receiver or has been confirmed with the receiver, the documents will be deemed as successfully served once they reach the receiver's certain system.

The Court does not verify of its own motion that the notice was actually received if:

- 1) the receiver party has confirmed receipt of the notice;
- 2) the receiver party performs activities related and consequential to the subject matter of the notification;

Finally there is a presumption of reception for the Court (art. 17 – 2.2): Where the receiver's medium system gives feedback that the receiver has read the message, or there is other evidence proving that the documents have been well received by the receiver, it shall be presumed that the documents have been successfully served, unless the receiver is able to prove that the medium system is at fault, the service address is not owned or used by himself or herself, the message was not read by him or her in person, or there exists another circumstance in which he or she has not received the documents served<sup>14</sup>.

With regard to notifications of judgments issued by the judge, article 15 statutes that: „*The internet court may serve judgment documents electronically after it has informed litigants of their rights and obligations and obtained their consent to electronic service. Where a litigant raises a request that it needs the paper judgment documents, the internet court shall provide the paper judgment documents*”.

Finally, it should be noted that among the applications of NetCourt, the so-called “Mobile Micro Court”.

The “Mobile Micro Court” provides five litigation services including “intelligent litigation, filing cases at hand, online mediation, video trial and online evidence uploading.”

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14 Instant messaging technology.

This App, which is built using instant messaging technology<sup>15</sup>, enables online filing, trial, evidence presentation and verification, and service on the mobile side.

The instant messaging technology allows the parties and judges to send, in real time, location and multiple types of message to each other, including text, emojis, pictures, voice recordings, and files. Moreover, it can send SMS notifications to the parties upon completion of submission of their evidence, and also notifications when they come online.

At present, Beijing Internet Court is carrying out system upgrade and adaptation work for high-quality online video trials in a 5G network<sup>16</sup>.

So, for example, only by using the app embedded in WeChat, the parties can realize online filing, case inquiry, online service, online mediation, online trial and other more than 20 functions, so as to enjoy the indiscriminate one-stop smart litigation self-services on the electronic litigation platform anytime and anywhere. As of August 8, visits to the Mobile Micro Court have exceeded 19,000, with an average of 224 per day. Most of the users are under 40 years old and come from 20 provinces or municipalities.

##### *5. AI in the justice system. How is it used. Is it permissible to make automatic decisions. China's Netcourt use AI in the justice system.*

The main application in AI is the automatic generation of usable documents to aid the work of judges.

15 Instant messaging identifies online users and allow them to communicate with each other effectively and diversely by using extensible messaging and presence protocol (XMPP), Flash SMS based on unstructured supplementary service data (USSD) and other technologies. At Beijing Internet Court, the instant messaging technology supports real-time communication across various platforms, significantly facilitates communication between judges and the parties, and accelerates the service of information by the court.

16 There is another interesting application of the Instant Messaging technology: the *Pop-up notification service platform*. This platform, built with Flash SMS software, can automatically display a notification served by the court at the top of the mobile phone screen when the screen is locked. The user must read the notification and click "Confirm" before continuing to use his/her phone. The pop-up notifications sent to the mobile phone of a party, regardless of whether the phone is being used or in standby mode, will not be blocked by common security anti-virus software or security settings on the phone. This ensures that notifications are served effectively. The receipt of a notification serves as one of the proofs of successful service of that notification.

It is necessary to underline again that all subsequent information relating to the new technologies was found from official documents present on the Netcourt's and the Supreme Court's websites<sup>17</sup>.

The typical technical application of the new tech are:

- 1) Legal knowledge Graph (AI – deep learning)
- 2) Blockchain
- 3) Instant messaging
- 4) Facial recognition
- 5) Image Recognition
- 6) Speech recognition
- 7) Cloud video

I've already talked about blockchain and Instant messaging so, now, the work will be focused in IA and in particular on the application and – said benefits – of the use of Legal knowledge Graph, Facial recognition and Image recognition.

The massive use of IA in the NetCourt's ecosystem is called Legal knowledge Graph that is described „The legal knowledge graph technology is designed for two-way deconstruction of the structure of legal provisions and documents, creating the basic logic of legal knowledge graph and document generation. The contents of electronic legal archives are processed to extract elements that are used to build the conceptual knowledge graph of semantic elements for generation of a legal document. The element information nodes are configured on a document generation template based on the case information obtained by intelligent evidence review. Then the natural language processing (NLP) technology is used to automatically synthesize the corresponding language text, from which a legal document can be generated automatically.

- 1) **The legal knowledge graph technology** supports online automatic generation of documents. This allows judges of Beijing Internet Court to write standard legal documents more efficiently and accurately”.

The principal application are:

- Automatic generation of documents for judges.
- The legal documents for judges can be generated automatically by using a combination of legal knowledge graph, NPL technology, and document assembly building technology. The generation of rules and template libraries helps standardize documents on the

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17 <<https://english.bjinternetcourt.gov.cn/>> accessed 21 August 2021.

Internet-based litigation platform, and a standard document can be more authoritative. The structured contents and provisions of legal documents are generated quickly, enabling legal documents to be prepared efficiently.

- Automatic generation of documents for the parties. The facts of a case can be organized with the help of big data and artificial intelligence analysis, legal knowledge graph and cognition engine technology. These technologies also can support automatic generation of an appeal petition, a letter of confirmation of the address of a defendant to be served, a defendant's answer, a jurisdiction objection application, and a counterclaim.

From the analysis of the official documents, it is very clear that the system believes that deep learning has enormous advantages for judges, litigants and lawyers. In fact, in the subcharter of the appendix to the White Paper on technological applications in the judicial system it is asserted that there are many benefits of the Automatic Generation of the legal documents, most of all, it is stated that system sets judges free from repetitive work and allows them to devote more energy to case research. In addition, the system helps minimize the possibility of judging identical or similar cases differently and further alleviate the shortage of court officials.

*"As of August 8, 2019, the electronic litigation platform of Beijing Internet Court's has provided a total of 117.729 legal documents by using the automatic document generation service, which considerably accelerated case handling".*

2) Another application of the IA tech is the facial recognition system<sup>18</sup>.

In the Internet-based litigation platform of Beijing Internet Court, facial recognition technology enables online registration. Besides, facial recognition technology supports the digital management of personnel access control of Beijing Internet Court by intelligent access control and passive unconscious face-swiping attendance checking.

The main applications of this technology are:

- a. **Identity authentication.** "Identity authentication based on facial recognition technology is applied in many scenarios such

<sup>18</sup> Facial recognition technology is a kind of biometric technology which detects and tracks the face in an image or video stream and then performs identification based on the facial feature information.

as platform registration, online court hearing, online mediation and security protection, effectively reducing the time spent in identity verification. In the registration process on the PC-end electronic litigation platform, users need to authenticate their real names and pass facial recognition to avoid registration with false account information. When litigants handle related litigation through the mobile client, the Mobile Micro Court App provides convenient authentication for litigants, agents and other litigation participants. The authentication can be completed in various forms such as face matching and liveness detection. The whole process takes less than 20 seconds, providing considerable simplicity and ease for mobile phone users.

- b. **Intelligent access control for the office building of Beijing Internet Court, and passive unconscious face-swiping attendance recording.** It also real-time collects data such as face images and feature attributes and record particulars of visits. Once an illegal entry is found, an alarm will be sent promptly. With passive unconscious face-swiping attendance recording, police officers do not have to stop at the attendance machine. The system automatically captures the facial information when police officers walk into or out of a door, and quickly performs identification and matching in millisecond level to complete attendance recording, thus remarkably improving work efficiency.

In the opinion of the editors of the "White paper" there are many benefits that derive from the use of facial recognition. For example this technology can eliminate the formalities of document examination and registration, as well as repeated input of information. The facial recognition system can remotely confirm the identity information of litigants. This allows litigants to participate in the court trial without appearing before the court, making litigation procedures convenient. „As of August 8, 2019, the facial recognition system of Beijing Internet Court had provided remote identity authentication for various platforms for more than 200.000 times”.

3) The particular applications of the **Image Recognition technology**<sup>19</sup> are:

- Image recognition, which can automatically identify litigation materials and documents, is applied to electronic case files and archives. With the help of the technology, the electronic litigation platform automatically identifies and categorizes the materials submitted by litigants and the documents prepared by judges in the process of handling a case. After the case is closed, the court clerk can archive electronic case files with one click, and replace paper files with electronic files for appeal transfer.
- It is used to help judges read files. To enable judges to quickly search for and locate files in a large volume of files, intelligent file reading supports functions of full-text search, page number locating and catalog locating. After judges enter keywords in the search box, such as litigation status, name of the litigant or name of evidence, etc., the system will perform automatic retrieval. The contents of case files are directly displayed in the area of search results on the reading interface. The page number can be input in the page number locating box, and the system automatically locates the page number in the image. The catalog of electronic case files clearly displays material names and their page numbers. By clicking on the material in the catalog tree, the system will automatically locate the material.

There is another application of the IA technologies that I did not find in the technical appendix to White paper for the new technologies in the Netcourts, but in another document called "20190820-B-0003-0904-F-trials-whitepaper<sup>20</sup>" according to which the Netcourt of Beijing would have developed the first virtual AI judge and put it in use. According to this stringent subtitle entitled: "*Digging into the depth of litigation services and constantly upgrading the smart litigation services*" the Netcourt: "*Based on the extraction of more than 120 common questions and the answers of more than*

19 (n 17): "Image recognition is the technology that combines image angle recognition, text line detection, text line recognition, and detection of single-character coordinates to identify targets and objects in different modes in an image.

On the Internet-based litigation platform of Beijing Internet Court, image recognition supports online identification and extraction of the content of electronic files and assists judges in reading and writing documents daily. The technology enables judges to handle cases efficiently.

20 ibid.

*20,000 words, the virtual judge identifies the key words of the questions asked by the parties involved in various cases and gives the corresponding answers. It provides an engaging experience for the parties, manifests the friendliness and liveliness of online services, makes intelligent dispute guidance more humane, and allows users to feel judicial friendliness the moment they access the website. As of August 31, 2019, the AI virtual judge had given a total of 662 responses to parties”.*

Unfortunately, it is not possible to have more information about this new AI development. It would almost seem to be a public service that dispenses pro veritate opinions to individuals who would like to file a lawsuit or be sued in court.

This is one of the cases for which a greater effort of cooperation will be necessary to understand the innovative scope of the technology used by the Netcourts.

## France

*Iga Kurowska*

Alongside other European countries, France has been trying to embrace the opportunities offered by LegalTech tools since the second decade of the XXI century. Although none of the technologies has proved disruptive for the legal sector, certain disruptive technologies have been successfully integrated into their daily work by French legal practitioners, such as blockchain, big data analytics, or Artificial Intelligence (AI).

### *1. A progressive but satisfactory Legaltech adoption by French law firms*

When it comes to the use of Legaltech tools by the law firms, most of them, no matter the size, have been proficient in the use of the tools from the Legaltech 1.0 category, including basic office-related software for document creation and management, e-billing tools, video-, and tele-communicators, or legal search engines (rendered possible through legal open data project<sup>1</sup>). Also, an important number of law firms have been using electronic signature, as well as communicators created especially for law firms, which presumably guarantee a higher level of security and confidentiality of information exchange.

Certain lawyers have also been implementing in their practices a big part of Legaltech 2.0 solutions, such as Document automation Software, Document Management Software, Customer Management Software, Software for Online Annual General Meetings of companies, or even AI-based document review tools, gradually tested in big international law firms. It can be generally stated that the interest in digitalization and advancement of the tools' adoption is greatly dependent on the lawyer's personal interest in the matter. Legal technology and legal innovation have been promoted by both private and public sectors for several years already through conferences, forums, master classes, and workshops of public access. Therefore, more tech-savvy individuals have had both time and opportunity to famil-

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<sup>1</sup> The loi pour une République numérique (Digital Republic bill), that entered into force on October 7, 2016 was an important step in opening public data in France.

iarize themselves with a vast offer, also of a national origin, and implement selected solutions in their workplace.

French Legaltech ecosystem has also come up with a number of more advanced solutions, such as blockchain registry for Intellectual Property (“IP”) rights, for company registries, or Artificial Intelligence (“AI”) for advanced legal expert systems (also commonly called “chatbots”). However, their use is still very seldom, and their utility is underrated.

## *2. An ambitious but underperformed digital transformation of the French justice system*

Digitalization of procedural civil law has been gradually established in France for the last twenty years. The scope of that transformation includes, among others, recognition of digital evidence and electronic signature in 2000<sup>2</sup>, a possibility of electronic exchange of procedural pieces between the parties in a judicial dispute in 2005<sup>3</sup>, the publication of judgments in a digital form in 2012<sup>4</sup>, electronic identification through eIDAS regulation in 2014; all of the above being a process of paving the road towards the establishment of a fluent and fully dematerialized legal framework for e-delivery of legal documents in France.

Although courts and public administration have been undergoing a digital transformation for many years now<sup>5</sup>, the Covid-19 crisis has demonstrated significant insufficiencies. Although some procedures have been fully dematerialized, such as the ones regarding the IP rights<sup>6</sup>, or pecuniarily-small civil claims<sup>7</sup>, and communication is for most cases possible through email, or specially dedicated for that purpose platforms, a require-

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2 Law no. 2000-230 of March 13, 2000 has introduced to the French Civil code digital proof. Articles 1 and 2 of the Decree no. 2001-272 of March 30, 2001 has specified the requirements for the electronic signature.

3 Decree no 2005-1678 of December 28, 2005.

4 Decree no 2012-1515 of December 28, 2012.

5 Many important initiatives improving efficiency and access to justice have been put in place starting from 2017, such as “Le portail du justiciable” with legal procedural rights written in plain language, downable forms serving as claims for civil procedures, as well as, from January 4, 2021, a possibility to make these claims, together with attachments, directly through the platform.

6 Both registration and amendments can be done fully online, through INPI website: <<https://www.inpi.fr/fr>> accessed 31 March 2021.

7 Since the reform of 23 march, 2019, civil claims below 5000 euros can be done in a fully dematerialized manner.

ment of an original document in paper form is still a common reality for litigation. Nonetheless, and surprisingly<sup>8</sup>, curiosity and openness towards more high-tech solutions can be noticed among jurisdictions all over the country, which are testing AI-powered solutions<sup>9</sup>, and by the government, which have recently introduced a project for the creation of an algorithmic estimation of corporal damages in civil litigation<sup>10</sup>.

The recent Covid-19 pandemic has also been a chance to implement fully virtual court hearings. Starting on April 2, 2020<sup>11</sup>, and concerning a limited number of matters, parties, judges, clerks, and attorneys were provided with a platform to participate in hearings in respect of security and procedural requirements. Also, due to a pandemic, new platforms enabling judicial claims, such as opening a liquidation process<sup>12</sup>, or claims for judicial resolution of employee-employer conflicts<sup>13</sup>, have gained utility.

### *3. E-delivery*

Since 2005, “The electronic communication”<sup>14</sup> is a separate part of the French Civil Procedure Code applicable to procedures before most jurisdictions and instances, with that mode being explicitly permitted both

8 Also due to the fact that France was the first country in the world to prohibit in 2017 judicial analytics, which was a controversial decision commented all over the world. See more: Artificial Lawyer, ‘France’s Controversial Judge Data Ban – The Reaction’ (Artificial Lawyer, 5 June 2019) <<https://www.artificiallawyer.com/2019/06/05/frances-controversial-judge-data-ban-the-reaction/>> accessed 31 March 2021.

9 The first agreement of collaboration between Predictice, a predictive justice startup, and Lille Bar Association have been signed in 2017. More: Louis Larret-Chahine, ‘Lille, premier barreau à tester la justice prédictive?’ (Predictice Blog, 1 August 2017) <<https://blog.predictice.com/lille-est-le-premier-barreau-%C3%A0-tester-la-justice-pr%C3%A9dictive>> accessed 31 March 2021.

10 Decree no 2020-356 of March 27, 2020 creating an automated personal data processing algorithm ,DataJust’.

11 Enabled by a series of *Ordonnances of March 25, 2020*, amending the rules of judicial procedures. More: <<https://www.gouvernement.fr/conseil-des-ministres/2020-03-25/faire-face-a-l-epidemie-de-covid-19>> accessed 31 March 2021.

12 <<https://www.tribunaldigital.fr>> accessed 31 March 2021.

13 <<https://www.saisirprudhommes.com>> accessed 31 March 2021.

14 La communication par voie électronique – Livre I<sup>er</sup> of French Civil Procedure Code, art. 748-1 to 748-7. Notification du droit commun et les notifications spéciales : titre XXI of Livre 1<sup>er</sup> of French Civil Procedure Code.

for ordinary and special notifications, judicial procedures with mandatory representation, as well as in front of the French Court of Appeal and the highest Court of Cassation<sup>15</sup>. The articles have been amended on multiple occasions, completed by several purely technical orders, with a real revolution being made in 2015 by simplifying the formal requirements and focusing on two problematic matters: security and cost-sharing. After years of “reality checks,” richer in the knowledge of numerous particularities related to modernizing the legal justice system, today’s regime, as described recently by the French legislator<sup>16</sup>, is a mix of proper for paperless and traditional civil procedure rules, the latter applying also to conventional ways of service of documents in France.

Nevertheless, despite numerous efforts of progressive construction through extensive legislation, both practitioners and academia agree that the digitalization plane has been missing a pilot, and the recent crisis of Covid-19 has confirmed it. The actors of the French legal system point out the inconsistencies and contrarieties, impeding a proper functioning of the justice system and creating legal insecurities, not to mention a missed chance to embrace the opportunities arising from legal technology.

The e-delivery of judicial decisions has been first allowed in 2008 and concerned exclusively the decisions given by the Cour de Cassation. The procedure has been extended to other jurisdictions in 2012, which allowed for a codification of e-delivery in the French Civil Procedure Code. In order for it to be served in conditions deemed equivalent to its paper version, the document needs to be elaborated by bailiff through specialized software, sealed, e-signed, and made available to the recipient in a secure way – through a virtual private network (“RPSH”) accessible exclusively after a correct encrypted identification through a platform “e-huissier”. The recipient is informed of the e-delivery by means of an email or through a text message (SMS) that is sent through a specially elaborated for this purposes platform and requires identification through a login and password. Both forms require a notice of receipt sent automatically by the system when the recipient logs into the platform.

However, for the e-delivery to be sufficient, the recipient needs to give prior consent to the method of e-delivery. It is a complex three-stage proce-

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15 As for the Court of Appeal: Article 930-1 of French Civil Procedure Code, which has been modified by a recent *Arrêté* of May 20, 2020 in order to clarify the rules applicable to that electronic communication. As for Court of Cassation: order of June 17, 2008.

16 Law n° 2019-222 of March 23, 2019, of planning for 2018-2022 and the justice reform.

dure including a provision by a person of detailed information, including the email address of their choice and emission of a dematerialized confirmation of the consent. The subscription to e-delivery is thus voluntary. In the future, the prior consent requirement can be erased by creating personal judicial email addresses attributed to all legal persons. Since 2015, an e-delivery, with a more restricted material scope as limited to convocations and excluding judgments, can also be made to moral persons. In any case, for both natural and moral persons, a fault of such prior consent could be considered by a court as a substantial formality and thus sanctioned by the nullity of service of the judicial document within the court proceedings.

According to the article 662-1 al. 3 of the French Civil Procedure Code, a properly established e-delivery is equivalent to its highest form of service of judicial documents in France – personal service - if the notice of receipt is received by the bailiff on the day that the act had been sent. The date and time of sending (as opposed to receiving) of the document to its addressee are the ones that make run the procedural terms. On the contrary, if the person's prior consent to e-delivery is listed in the system, nevertheless, the notice of receipt has been received after the day of its issue or the message has never been read, the e-delivery is equivalent to a “service done at home”. Alike in a traditional material service, paperless delivery needs to respect the time constraints, that is, be delivered between 6 PM-9 PM on workdays. In case of a plurality of recipients, under the condition of all of the concerned having priorly consented to the e-delivery mechanism, a single bailiff is authorized to serve the parties, no matter of their geographical resort; and thus, creating a derogation from a general competence rule<sup>17</sup> applicable to serving judicial documents. A similar exception of territorial principles of e-delivery applies if a third party is to intervene in the trial. Meanwhile, an interesting, simple but progressive initiative emerged from a student-founded legaltech: an online intermediary platform for traditional service<sup>18</sup>. It allows for finding and contacting the competent bailiff, managing the case through a SaaS tool, and receiving SMS updates on its progress

When it comes to e-delivery to French attorneys-at-law, which is covered by a different procedural legal framework than the one described above, an e-delivery has been rendered possible slowly but progressively,

<sup>17</sup> L. 111-1 du Code des procédures civiles d'exécution. Such exception has been allowed by articles 5-1 and 5-2 of Decree no 56-222 of February 29, 1956, created by a Decree no 2012-366 of March 15, 2012.

<sup>18</sup> <<https://isignif.fr>> accessed 31 March 2021.

starting from 2008 for proceedings before the Cour de Cassation<sup>19</sup> and through an application known as “Comavo”. Today, the e-delivery and exchange of other judicial documents is done through RPVA (Réseau Privé Virtuel Avocats). Subsequently, a necessary legal arsenal has been put in place in order to allow for a dematerialized exchange of documents between lawyers at different levels of the procedure and before different jurisdictions. However, although the whole judiciary chain is theoretically possible to be performed online, imperfections, as mentioned above, and gaps still exist. For instance, although a court decision can be signed and delivered online, the enforceable copy of the court’s decision – an essential element for the execution of the judgment – has not yet received the technical specifications allowing for its practical execution by the French Courts.

Besides administrative procedures that have not been covered by that brief resume of the French legal framework, e-delivery is also possible in criminal matters if such choice is made by the bailiff and, if not expressly excluded by the Ministry of Justice in the name of the traditional serving method. Therefore, so far, both for civil and criminal procedures, electronic delivery stays optional. In practice, however, it is still far from being a preferred option of both judiciaries and legal persons, if not a marginal one, a conclusion drawn from its invisible presence in the day-to-day litigation reality.

#### *4. Plans for the future*

On the European scene, France is considered a relatively developed and dynamic Legaltech market. Indeed, it is still not comparable to the one of the United States or the United Kingdom, but for the last consecutive years, it has had a growing number of investments, private actors, and public engagement. Its expansion is expected to continue during the upcoming years, with more strategic acquisitions and maturing startups. The Covid-19 pandemic has definitely contributed to the review of many initiatives, led by and for the private and public sector, as well as to a significant shift of approach of all legal professionals – from dreaming of ambitious futuristic applications to more pragmatic, modest but realistic projects, with possible immediate implementation.

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19 Order of June 17, 2008.

# Germany

*Wilfried Bernhardt*

## *1. LegalTech used in Germany: courts, law firms, arbitration*

The term "Legal Tech" is defined in different ways. In Germany, legal tech is sometimes reduced to the legal advice provided by lawyers using innovative technologies.<sup>1</sup> However, the following explanations are based on an expanded concept of legal tech. In this respect, legal tech refers to the use of innovative technologies, including artificial intelligence and blockchain/DLT, to support the legal professions and the judiciary<sup>2</sup>.

Promoting the use of artificial intelligence is also the key focus of the German government's policy. The national AI strategy<sup>3</sup> of the German government on how the use of AI and its implications (legal, ethical etc) does not specifically discuss implications related to the use of AI in the justice field, but it is part of the horizontal framework and is therefore of high relevance for the further use of innovative technologies also in the justice system. The strategy sets three main goals:- a.) Making Germany and Europe a leading center for AI and thus helping safeguard Germany's competitiveness in the future (e.g. by developing existing Centres of Excellence for AI at supra-regional level, establishing additional Centres of Excellence for AI, and developing them into a national network of at least 12 centres and application hubs), b.) Integrating AI in society in ethical, legal, cultural and institutional terms in the context of a broad societal dialogue and active political measures (e.g. by elaborating guidelines for developing and using AI systems in a way that is compatible with data protection rules), c.) Foster responsible development and use of AI to

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1 Christina-Maria Leeb, *Digitalisierung, Legal Technology und Innovation* (Duncker & Humblot, 2019) 59.

2 Isabelle Désirée Biallaß in Stephan Oryand Stephan Weth (eds) *Elektronischer Rechtsverkehr* (1st edition, juris Allianz, 2020); Jens Wagner, Legaltech und Legal Robots. Der Wandel im Rechtswesen durch neue Technologien und Künstliche Intelligenz, (Springer 2020).

3 Die Bundesregierung, 'Künstliche Intelligenz (KI) ist ein Schlüssel zur Welt von morgen.' (Die Bundesregierung), <[www.ki-strategie-deutschland.de](http://www.ki-strategie-deutschland.de)> accessed 26 February 2021.

serve the good of society (e.g. by setting up a German observatory for AI). Therefore, high priority is also given to the future use of AI in the judiciary and among the judiciary's communication partners.

There are several possible uses of modern technologies for the judiciary and lawyers:

### *1.1. Courts*

In the **judiciary**, specialized programs offer templates for the different jurisdictions. These range from simple court orders (such as for scheduling a hearing, inviting witnesses) to text modules for judicial decisions on the case itself. The electronic text modules were mostly created by external developers, but also offer the option of adapting input masks or text modules to individual requirements or supplementing them with free text. Due to the constitutional principle of judicial independence, the judge is free to develop further templates himself for his own work, provided that he has the underlying knowledge in this respect.

Electronic programs (such as Judica in the North Rhine-Westphalian judiciary or in the states of the forumSTAR network) and calculation programs also support judges in the application of certain legal norms. For example, judges who must decide on family court disputes have access to complex calculation programs (e.g., for calculating alimony or pension equalization). Special programs are also available for other legal calculations - for example, in the context of legal aid proceedings or in the calculation of attorney's fees and court costs. Programs can also be used to determine the local jurisdiction of a court<sup>4</sup>. The support provided by information technology extends to suggestions for substantive legal decisions. However, it is legally doubtful to what extent the judge may have automatic decision proposals submitted to him by an automatic system. If, because of high work pressure, a judge feels compelled to accept proposed decisions without closer consideration, this could be seen as an attack on judicial independence. Further (constitutional) concerns arise from the fact that proposed decisions are not transparent for the judge due to complex programs. However, transparency is not only important for the

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4 Abschlussbericht der Länderarbeitgruppe 'Legal Tech: Herausforderungen für die Justiz' (Schleswig-Holstein, 2019), <[https://www.schleswig-holstein.de/DE/Landesregierung/II/Minister/Justizministerkonferenz/Downloads/190605\\_beschluesse/TOPI\\_11\\_Abschlussbericht.pdf;jsessionid=403E9295A2AF9CB0FBA9909024CD2AFA.delivery2-replication?\\_\\_blob=publicationFile&v=1](https://www.schleswig-holstein.de/DE/Landesregierung/II/Minister/Justizministerkonferenz/Downloads/190605_beschluesse/TOPI_11_Abschlussbericht.pdf;jsessionid=403E9295A2AF9CB0FBA9909024CD2AFA.delivery2-replication?__blob=publicationFile&v=1)> accessed 26 February 2021.

judge himself, but also for the parties to the proceedings: they, too, must be able to understand judicial decisions. Therefore, it is also important that the judge can justify his decisions and does not just have to refer to suggestions made by a non-transparent AI-supported program.

Less legally problematic is the use of automatically operating programs in the service offices of the courts. Automation also helps judicial officers, especially in the processing of register matters. Registers (such as the commercial register, the register of cooperatives and partners, the insolvency register, the land register, the criminal register) are the responsibility of the judiciary in Germany. Other registers (such as the register of wills and the central register of precautionary measures) are the responsibility of the Federal Chamber of Notaries, but notaries are also integrated into the German judicial system. Entries, changes and deletions in the registers rely heavily on IT automation, although judicial officers are still involved in decisions. Since 2007, communication with most registry courts has been shifted to the so-called "electronic court and administrative mailbox -EGVP-", an encrypted platform with an integrated signature function.

## 1.2. *Law firms*

The lawyer can enter individualized texts into dynamic document templates, sometimes assigning individual facts to predefined categories or entering answers in selection boxes. In this way, the lawyer can create independent contract texts or lawyer's briefs. In doing so, he can access databases in which he will find pre-formulated and adaptable texts for various case scenarios. Programming skills are not required, but knowledge of how to use the document generator is.

Expert systems (Legal Process Automation) help lawyers to run through recurring legal review steps in a semi-automated manner for the purpose of advising clients, starting with simple deadline and fee calculations, and extending to more intensive subsumption of frequent case constellations under the appropriate legal norms. In addition, lawyers provide corresponding systems on online platforms on which clients must answer predefined questions themselves and the answers result in an automatic legal evaluation for which a fee is charged.

Furthermore, the number of legal tech platforms operated by companies is growing in Germany, which citizens can use to have legal rights checked in various standard situations without having any legal knowledge

of their own.<sup>5</sup> For example, there are online platforms for calculating possible compensation in the event of flight cancellations or delays, the permissible amount of an apartment rent, the amount of social welfare claims, the legality of terminations of employment contracts or the calculation of claims for damages in traffic accidents. Simple legal questions are thus answered quickly and reliably according to a standardized model without the need for court proceedings, or if court proceedings are still required, these proceedings are prepared.

There are no specific regulations on legal tech applications in Germany. However, the German Legal Services Act (Rechtsdienstleistungsgesetz) only permits individual legal advice if it is provided by licensed lawyers.

The question of the admissibility of legal tech platforms therefore depends on whether the platforms have the character of legal advice within the meaning of § 2 (1) of the Legal Services Act.<sup>6</sup> The Federal Court of Justice recently ruled that a platform which could be used to calculate the permissible amount of apartment rents did not constitute an impermissible legal service because the legal platform merely enabled an initial - rough and preliminary - assessment of claims.<sup>7</sup>

In some cases, contract texts can be drawn up at [www.smartlaw.de](http://www.smartlaw.de).

A working group of the German Bar Association (DAV) is conducting an in-depth dialogue with its members, 63,000 lawyers, to analyze the current use and potential use of AI, but also with AI providers. Options are changes in BRAO (act on the legal profession) and RDG (legal services act).

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<sup>5</sup> See Wagner (n 2) 2; Isabelle Biallaß in: Ory/Weth, jurisPK-ERV Band 1, 1st. edition., chapter 8, as of 28.08.2020, para. 10. Examples: <[www.flightright.de](http://www.flightright.de)> accessed 26 February 2021; <[www.fairplane.de](http://www.fairplane.de)> accessed 26 February 2021; <[www.helpcheck.de](http://www.helpcheck.de)> accessed 26 February 2021; <[www.geblitzt.de](http://www.geblitzt.de)>; accessed 26 February 2021; <[www.hartz4widerspruch.de](http://www.hartz4widerspruch.de)> accessed 26 February 2021; <[www.myright.de](http://www.myright.de)> accessed 26 February 2021; <[www.wenigermiete.de](http://www.wenigermiete.de)> accessed 26 February 2021.

<sup>6</sup> Examples: [www.flightright.de](http://www.flightright.de), [www.fairplane.de](http://www.fairplane.de), [www.helpcheck.de](http://www.helpcheck.de), [www.geblitzt.de](http://www.geblitzt.de), [www.hartz4widerspruch.de](http://www.hartz4widerspruch.de), [www.myRight.de](http://www.myRight.de); [www.wenigermiete.de](http://www.wenigermiete.de). „Legal service is any activity in concrete third-party matters as soon as it requires a legal examination of the individual case“. However, § 10 para. 1 RDG allows certain institutions to provide legal services if they act on the basis of special expertise and are, for example, registered as debt collection service providers with the competent authority.

<sup>7</sup> Judgement of the Federal Supreme Court (BGH) from 27 November 2019, VIII ZR 285/18, NJW 2020, 208.

### 1.3. Arbitration

Non-governmental dispute resolution platforms (online dispute resolution) have existed for a long time, mostly offered by companies active in the field of online commerce.<sup>8</sup> Most of these are American companies, but they also offer their services in Germany. Blockchain arbitration, for example via Kleros<sup>9</sup>, is also used in Germany. There has been no specific development in Germany in this regard.

### 2. Blockchain and DLT in government systems. Whether there are judicial systems or other registers using blockchain. Legal provisions linking a blockchain entry to a legal presumption.

Currently, no blockchain and DLT are used in the jurisdiction of the judiciary in Germany. However, there are projects in which the use of blockchain and DLT is being examined for the benefit of judicial applications and for which pilot applications already exist:

A project aimed at assessing whether supplementary integrity assurance can be provided for the land register database by means of blockchain technology.<sup>10</sup>

In another cooperation project of the Federal Chamber of Notaries with the Bavarian State Ministry of Justice and as a technical partner the Fraunhofer FIT in the judiciary were examined potentials of blockchain regarding an **electronic validity register**.<sup>11</sup> The project aimed to examine the possibilities to establish a public electronic register confirming the validity status of documents (valid/revoked) based on blockchain technology. Two examples/uses cases to be examined in detail are the certificate of inheritance and the notarized certificate of authority. This has resulted in

<sup>8</sup> Wagner (n 2) 37, refers to the examples of eBay and PayPal.

<sup>9</sup> ibid. 34.

<sup>10</sup> European Commission, ‘Study on the use of innovative technologies in the justice field – Final Report’ (2020) 120, <<https://op.europa.eu/en/publication-detail/-/publication/4fb8e194-f634-11ea-991b-01aa75ed71a1/language-en>> accessed 25 February 2021.

<sup>11</sup> <[https://www.edvgt.de/wp-content/uploads/2020/10/Protokoll\\_EDVGT\\_2020\\_Blockchain-not-Vollmacht.pdf](https://www.edvgt.de/wp-content/uploads/2020/10/Protokoll_EDVGT_2020_Blockchain-not-Vollmacht.pdf)> accessed 26 February 2021; see also the presentation of the Federal Chamber of Notaries at <[https://www.egovernment-wettbewerb.de/praesentationen/2020/Blockchain\\_fuer\\_notarielle\\_Vollmachten\\_und\\_Erbscheine.pdf](https://www.egovernment-wettbewerb.de/praesentationen/2020/Blockchain_fuer_notarielle_Vollmachten_und_Erbscheine.pdf)> accessed 26 February 2021.

an operational prototype of a central register based on blockchain, which enables the simple verification of the validity of documents (for example, via smartphone), such as the registration of a notarized power of attorney in the register from scan to upload, the verification of the validity of powers of attorney from the user's perspective, and the administration of a power of attorney. Now the legal basis for its use in real operations is to be created, which does not yet exist in Germany.

According to the German Bar Association the use of blockchain/DLT technology stands in conflict with some legal topics. For instance, the protection of minors under §§ 107, 108 German Civil Code (BGB) would have to be extended. And the correction, deletion (including the right to forget) and blocking of personal data (Art. 15, 16 and 17 GDPR) is not technically possible because all transactions are interlinked.<sup>12</sup> However, there are also technical and legal proposals to solve this problem.<sup>13</sup>

3. *Electronic communication with the court. Legal basis, method of communication, transmission of documents.*

- a. The procedural codes prescribe **certain formal contents for the communication of litigants** with the judiciary, in particular for pleadings by attorneys initiating proceedings. Section 130(1) of the Code of Civil Procedure (ZPO), for example, requires the specification of the digital post office box to which the court may transmit information. § 2 Electronic Legal Transactions Ordinance (ERVV) also stipulates that the electronic document must be transmitted to the court in printable, copyable and, as far as technically possible, searchable form in PDF file format. Furthermore, the electronic document shall be accompanied by a structured machine-readable record in XML file format corresponding to the definition or schema files specified in § 5. The XML structuring of lawyers' briefs ("Xjustice") has already been possible for 16 years -

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12 The Report of the European Commission: European Commision, 'Study on the use of innovative technologies in the justice field. Final report" (Publication Office European Union 2020) "Study on the use of innovative technologies in the justice field", (Brussels, September 2020) 167.

13 Dariusz Szostek, Blockchain and the Law (1 ed., Nomos 2019) 108; Anne-Sophie Morand 'So kollidiert die DSGVO mit der Blockchain' (Netzwoche, 1 September 2020) <<https://www.netzwoche.ch/news/2020-09-01/so-kollidiert-die-dsgvo-mit-de-r-blockchain/0lt0>> accessed 25 February 2021.

albeit on a voluntary basis. ("Xjustice"<sup>14</sup>) has already been possible for 16 years - albeit on a voluntary basis. For electronic communication, the procedural codes prescribe a so-called writ-replacing form<sup>15</sup>. Here, potential plaintiffs can choose between various written form substitution options. One option is to provide the electronic with a qualified electronic signature in accordance with the eIDAS Regulation<sup>16</sup> of the person responsible and send it to the electronic mailroom of the court. There, the qualified electronic signature is validated and a note to that effect is included in the court file.

- b. Another option is to provide the document with a simple signature and submit it to the court via a **secure transmission channel**. The law specifies secure transmission channels in detail: using the mailbox and dispatch service of a so-called **De-Mail account**, which can be set up by any citizen with a mail address valid for life, provided that the sender is confirmed as a legal user by the De-Mail provider with an electronic signature when sending the De-Mail message. Authorized attorneys, notaries, and public authorities can also communicate with the courts via **special electronic mailboxes** without having to affix a qualified electronic signature to the documents sent. These special mailboxes have been established legally based (for attorneys by the German Federal Bar). The electronic mailboxes are intended to enable secure electronic communication with the judiciary that cannot be viewed from the outside; this is then also considered a "secure transmission channel". However, lawyers can also use the special electronic mailbox among themselves. Since January 1, 2018, Section 31a (6) of the Federal Lawyers' Act (Bundesrechtsanwaltsordnung) has imposed a so-called passive use obligation on lawyers: they must have the technical equipment required for P.O. boxes ready and take note of deliveries and accesses of communications via the P.O. box. By January 2022

<sup>14</sup> XJustiz (XML Schemata for the Judiciary) forms the basis for the exchange of procedural data in judicial proceedings and is laid down in organizational-technical guidelines that were already released for use throughout Germany in 2005. It consists of a basic module with generally required data (e.g., court name, file number) as well as specialized modules with subject-specific data (e.g., criminal proceedings, dunning procedures, registers).

<sup>15</sup> § 130a Code of Civil Procedure, § 46c Labour Court Act, § 55a Code of Administrative Court, § 52a Code of Fiscal Court, § 65a Code of Social Court, § 32a Code of Criminal Procedure.

<sup>16</sup> (n 996).

- at the latest, attorneys, notaries and public authorities are required to communicate exclusively electronically with the courts.<sup>17</sup>
- c. In addition, the Federal Ministry of Justice and Consumer Protection may, by statutory order, introduce electronic forms and require that all or part of the information contained in the forms be transmitted in structured machine-readable form.<sup>18</sup> The forms shall be made available for use on a communication platform on the Internet to be specified in the statutory order. The forms may be completed electronically and sent to the courts electronically. In doing so, the use of the electronic ID of the identity card or the electronic residence permit for foreigners shall be attached for the identification of the form user. Transmission of an electronic form by the user to the court together with identification by an ID is also considered to replace the written form, so there is no need to additionally affix a qualified electronic signature. The transmission of documents from the courts back to the user is in principle carried out by the same electronic means as for filing. However, so far only lawyers, notaries and public authorities can be addressed electronically by the courts via special electronic mailboxes. It is planned<sup>19</sup> to set up a special electronic mailbox for citizens, companies, and other professional groups on a statutory basis, which can then be used both for submitting official documents to the courts and for court documents to citizens and organizations without having to affix a qualified electronic signature. Finally, it is also planned to use digital user accounts, which are currently being set up for citizens and companies as part of the administrative portal network of the federal and state governments in Germany, for document transmission to the

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17 § 130d Code of Civil Procedure (ZPO), § 46d Labour Court Act (Arbeitsgerichtsgesetz), § 55d Administrative Procedure Code (Verwaltungsgerichtsordnung), § 52d Fiscal Court Act (Finanzgerichtsordnung), § 65d Social Court Act (Sozialgerichtsordnung), § 32d Criminal Procedure Code (Strafprozessordnung).

18 § 130d Code of Civil Procedure (ZPO), § 46d Labour Court Act (Arbeitsgerichtsgesetz), § 55d Administrative Procedure Code (Verwaltungsgerichtsordnung), § 52d Fiscal Court Act (Finanzgerichtsordnung), § 65d Social Court Act (Sozialgerichtsordnung), § 32d Criminal Procedure Code (Strafprozessordnung).).

19 Government Draft of an Act on the Expansion of Electronic Legal Communication with the Courts dated 10 February 2021 (Regierungsentwurf eines Gesetzes zum Ausbau des elektronischen Rechtsverkehrs mit den Gerichten und zur Änderung weiterer prozessrechtlicher Vorschriften vom 10 Februar 2021), <[https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE\\_Ausbau-ERV\\_V.pdf;jsessionid=B31215410FC393DA7D68555E8429DE1F.2\\_cid289?\\_\\_blob=publicationFile&cv=2](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Ausbau-ERV_V.pdf;jsessionid=B31215410FC393DA7D68555E8429DE1F.2_cid289?__blob=publicationFile&cv=2)> accessed 25 February 2021.

courts as well as for electronic returns from the courts to citizens and companies. To log in to the user account, the citizen must identify himself electronically with the ID; for companies, the use of the electronic tax ID is planned.

4. *Online court proceedings. Are they acceptable, in what way, the way of communication, what information systems are used? How is the judgment issued? Is the connection from the court or can it be made using a private computer?*

In Germany, there are no fully **virtualized online trials** yet. However, the lockdown phase of the COVID-19 pandemic and the requirement to reduce physical contact with people have intensified efforts to use videoconferencing systems for judicial proceedings as well. As early as 2002, § 128a of the German Code of Civil Procedure (ZPO)<sup>20</sup> has allowed parties to proceedings to participate from a location other than the courtroom and to take evidence with distant witnesses or experts. The decision to enable video transmission is at the discretion of the court, so the parties to the proceedings cannot force such a way of conducting the proceedings. The discretionary decision on the use of video conferencing systems takes into account, in particular, the motives expressed by the applicant for the video conference (for example, medical reasons, but also financial or time-related interests) as well as, from the court's point of view, wishes for acceleration and concentration. Under German procedural law, however, the judge cannot conduct the hearing from his home study but must be present in the courtroom during the videoconference hearing. The constitutional principle of publicity of the court hearing is thereby established by transmitting the procedural actions via videoconference to the courtroom at the place of the hearing. Video conferencing leads to a host of legal, organizational, and technical issues. For example, it must also be clarified whether data protection regulations allow cloud solutions or require on-premises solutions.

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<sup>20</sup> This provision shall apply by way of reference norms in the other procedural codes (pursuant to § 46 (2) of the Labour Court Act (Arbeitsgerichtsgesetz - ArbGG), § 4 of the Insolvency Code (Insolvenzordnung - InsO) and § 15 of the Voluntary Jurisdiction Act (Gesetz über Angelegenheiten der Freiwilligen Gerichtsbarkeit - FGG) as well as in § 110a of the Social Court Act (Sozialgerichtsgesetz) and § 102a of the Administrative Court Code (Verwaltungsgerichtsordnung).

During the critical pandemic phase 2020 , there was a legal option in Germany from May 29 2020 to 2021 in labor court<sup>21</sup> and social court<sup>22</sup> proceedings, to allow a volunteer judge "in the event of an epidemic situation of national significance" to participate in oral proceedings in the courtroom from another location by video conference if it is unreasonable for him or her to appear in person at the courtroom due to the epidemic situation Video participation by the volunteer judge was also possible for the deliberation, voting and pronouncement of the decision, provided that the confidentiality of the deliberation was ensured.

It is conceivable that the online participation of judges in oral proceedings, which is legally only temporarily made possible by the law, could also be provided for permanently and also in proceedings of other jurisdictions outside of epidemic situations of national scope, and possibly also in certain situations to grant judges the possibility, e.g., of conducting a virtual court hearing from their home office. However, the question of how the public is to be involved would then have to be clarified. There are scientific studies on this subject that advocate the possibility of Internet transmission - but with strict adherence to data protection principles and IT security requirements.<sup>23</sup>

So far, the law has not explicitly specified which video systems are to be used and how private systems can be integrated. However, judicial responsibility for compliance with data protection principles and IT security means that judges cannot use their private devices. However, the litigants who are allowed to participate in the court proceedings via videoconference are not provided with court-owned hardware. Judicial decisions are not yet delivered via videoconference. However, decisions can be made electronically and delivered to the litigants electronically.

The courts in Germany are currently being equipped with the electronic court file. From Jan. 1, 2026, the file must be introduced in all courts.<sup>24</sup>

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21 via the outlined § 46 para. 2 Labor Court Act (AGG) in conjunction with § 128a of the Code of Civil Procedure (ZPO).

22 § 110a Social Court Act (SGG).

23 Anne Paschke, *Digitale Gerichtsöffentlichkeit* (Duncker & Humblot, 2018) 412.

24 Gesetz zur Einführung der elektronischen Akte in der Justiz und zur weiteren Förderung des elektronischen Rechtsverkehrs dated 5. 7. 2017, Bundesgesetzblatt I 2017, 2208.

*5. AI in the justice system and automatic decisions.*

- a. Artificial intelligence has been used only to a limited extent in the German **justice system**. Electronic file systems partially support the recognition of metadata of documents received by the court, such as document type, sender or creation date in documents (so-called metadata extraction) and considerably simplify the work processes in the judiciary, because documents can thus be automatically assigned to judges and existing files. However, this is not yet being used across the board. AI helps in the processing of mass proceedings by enabling trained systems to systematize and structure extensive documents, thereby making them easier to access for human processors.<sup>25</sup>
- b. Tools based on artificial intelligence are already being used to some extent **in criminal investigations**, for example to identify child pornography images among other pornographic or non-pornographic pictures or to identify hate crime on social media<sup>26</sup> (see below).
- c. There is a largely automated procedure in German procedural law, the **order for payment procedure**, which involves the assertion of mostly uncontested monetary claims. There are standardized forms for use in simplified proceedings - i.e., applications for an order for payment (Mahnbescheid) or order for enforcement (Vollstreckungsbescheid) in money claims. These forms must be used. If an application is not filed on the appropriate form within the deadline, it will be rejected as inadmissible. The applicant has various options for conducting the order for payment procedure electronically. He or she can use the eID function of his or her ID card for authentication and identification and enter the data directly into the prescribed masks, which are then formally checked by software, thus largely ruling out incorrect entry. The notice is sent either by affixing a qualified electronic signature or (if a lawyer is acting) without a signature via a special electronic mailbox that is electronically linked to the court. The order for payment is issued automatically. The payment order court only checks the information for completeness, but not for accuracy, which makes electronic processing relatively easy. Although the judicial officer officially bears responsibility for the procedure, in fact the judicial officer relies on the result of the automatic check. If an objection is filed after the automatic

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25 <[https://www.edvgt.de/wp-content/uploads/2019/10/Protokoll-EDVGT\\_Algorithmen-Justiz.pdf](https://www.edvgt.de/wp-content/uploads/2019/10/Protokoll-EDVGT_Algorithmen-Justiz.pdf)> accessed 25 February 2021.

26 (n 12) 121.

issuance and service of the order for payment, the order for payment procedure is deemed to be terminated. To pursue the claim further, contentious proceedings must be opened before the civil court, but these are not handled automatically; instead, they are handled before a (human) judge.

- d. The **European order for payment procedure**, which is similar to the domestic order for payment procedure and can be used in Germany across borders in relation to some EU member states, is also based on forms that can be filled out electronically and translated into all official EU languages and on digital transmission. Here, too, the procedures largely manage without human intervention. The same applies to the small claims' procedure. For fully automated processing without human involvement, a new process standard would have to be created - as is already provided for in the Administrative Procedure Act<sup>27</sup> for the issuance of automatic administrative acts.
- e. Partially automated processes are based on so-called **Model Declaratory Proceedings**. According to § 606 (1) of the German Code of Civil Procedure (ZPO), qualified consumer association can use the action to request a determination of the existence or non-existence of factual and legal prerequisites for the existence or non-existence of claims or legal relationships between consumers and an entrepreneur. When the action is admitted, individual consumers can join the lawsuit by entering their name and address in a register of actions, which is set up by the Federal Office of Justice in accordance with § 609 (1) of the German Code of Civil Procedure (ZPO). The entry is made exclusively electronically without incurring any financial expense. Only the participating consumers benefit from the effect of the action while being bound by the resulting model declaratory judgment.

## *6. The plans for the future.*

The proposals developed by the working group "Modernization of Civil Procedure", consisting of the presidents of the Higher Regional Courts, the Court of Appeal, the Bavarian Supreme Regional Court and the Federal Court of Justice, go beyond the current legal possibilities.<sup>28</sup>

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<sup>27</sup> § 35a Administrative Procedure Act (VwVfG).

<sup>28</sup> Thomas Dickert, 'Modernisierung des Zivilprozesses Diskussionspapier' (justiz.bayern.de) <<https://www.justiz.bayern.de/media/images/behoerden-und-gerichte/ob>

- a. According to this, (in general) the possibility of a "**virtual trial**" by video conference is to be created, in which the court does not have to be present in the courtroom either. The public is to be included by the fact that the hearing is transmitted simultaneously in picture and sound to a room designated by the court. So the proposal is not aimed at the court itself working in the home office and process being completely virtualized  
Other proposals involve new techniques, such as using voice recognition to create the record of proceedings, reviewing the record on a monitor in the courtroom, and then filing the record electronically.
- b. The **active obligation** to use electronic communication channels is to be **extended** to publicly appointed experts, publicly appointed interpreters, tax consultants, auditors, insolvency administrators, professional advisors as of 01.01.2026.
- c. The **fax** is to be abolished in the future for judicial communication and replaced by purely electronic legal communication.
- d. A legally regulated electronic "**message room**" for judicial communication is to ensure faster and more up-to-date communication between the court and the parties to the proceedings but is initially to be used for the informal exchange of electronic messages with lawyers and other parties to the proceedings, e.g., for making and rescheduling hearing dates or exchanging settlement proposals. In the future, it will be expanded to include the reliable and rapid exchange of electronic documents between parties and the court.
- e. An **accelerated, complete online procedure** with electronic communication by means of an intelligent input and query system for amounts in dispute up to €5,000 is to be introduced and centralized at certain courts. This type of procedure is primarily intended for mass dispute proceedings between plaintiff consumers on the one hand and defendant companies on the other. Short deadlines and the limitation of oral hearings to exceptional cases, if necessary, video with evidence or telephone conferences, are intended to speed up the process.
- f. The **structuring of the documents of the parties to the proceedings with the help of XML files** shall be expanded: In civil proceedings, the subject matter of the dispute is to be represented by a common "basic document", the design and technology of which are defined by standards and which is binding in the legal proceedings, in which the

complete party submissions in factual and legal terms, are presented side by side in the sense of a table of relations. Supplements of the process parties are inserted adjusting place. At the end of the hearing, this document should then be binding for the judge to record the facts of the case.

- g. The **procedure for determining court costs and attorneys' fees** shall be fully automated, incorporating elements of artificial intelligence, and a legal basis for this shall be created in the procedural laws.
- h. The Commission of the federal Ministry of justice and the representatives of the federal states for information technology in the judiciary (workgroup use of cognitive systems in the judiciary) has established a project for the use of artificial intelligence in the creation of the electronic, fully searchable land register.<sup>29</sup> This project aims to automate the analysis of existing PDF files with **land register information**. Afterwards the tool will fragment the file and assign the values to a database field in order to be able to store the contents in a structured manner in a database. In terms of technology, the solution is based on expert systems and rule-based systems. The PROSAR-AIDA tool can help where classification and data extraction is needed from unstructured and semi-structured documents, especially when the inherent logic of the documents is extremely complex.
- i. Furthermore the Commission for information technology in the judiciary in a project (January 2020 to October 2021) will examine and identify the specific demands and requirements needed for the **anonymization/pseudonymization of court decisions**. The aims are to be able to produce a corpus of anonymized/pseudonymized court decisions, in which the information and details requiring anonymization will be marked and annotated. Sometimes a pseudonymization is preferable, because an anonymization complicates the readability and the capture of the meaning of a document.<sup>30</sup> The solution will be based on expert and rule-based systems and natural language processing.
- j. The number of cross-border legal proceedings is growing. Therefore, the need for automatic translations is also increasing. Therefore, a project of the Commission for information technology in the judiciary is examining the possibility of a **Legal Translation Machine Service**. This project will provide a secure machine translation service so as to improve the process efficiency and acquire insights from available data,

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29 (n 12) 190.

30 Wagner (n 2) 25.

reporting and visualization (e.g. dashboards). In terms of technology, the solution is based on machine learning and expert systems and rule-based system technology.<sup>31</sup>

- k. There is great potential for the use of artificial intelligence in the criminal investigation process, in which the police and prosecutors work together. The Central Cybercrime Department of North-Rhine-Westphalia started a research project to fight child pornography with methods of AI<sup>32</sup>. The main objective is to identify child pornography images among other pornographic or non-pornographic pictures. A manual examination would take a very long time. With the help of AI (machine learning) it is possible to reduce the time needed and to increase efficiency.
- l. Also the Germany Central Cybercrime Department of North-Rhine-Westphalia together with university experts started another project in 2013 to identify hate crime on social media. The AI tool will include a scoring system **for hate crime identification**. The project rates online postings and the probability that they will be qualified as illegal offences. In terms of technology, the solution is based on machine learning.
- m. Also the Germany Central Cybercrime Department of North-Rhine-Westphalia deals with the **future criminal court room for Criminal Proceedings**<sup>33</sup>. To save time and expenses, the project aims to create modern court rooms which allow videotaping and speech-to-text recognition. All participants will receive a transcription and the audio file embedded. 3D-projection of crime scenes is under consideration.<sup>34</sup>
- n. In another project of Central Cybercrime Department of North-Rhine-Westphalia possibilities of a **hybrid cloud for document and electronic evidence** are examined.<sup>35</sup> Regarding overall project results according to the current state of research, in the first stage the AI fulfils the demand placed on it for the ability to differentiate and recognize deconstructed image content in a hybrid cloud scenario. The hybrid

31 (n 12) 121.

32 Start was in April 2019.

33 (n 12) 45.

34 Redaktion beck-aktuell 'EDV-Gerichtstag sieht Fortentwicklung der Justiz-IT als wesentliche Zukunftsfrage' (beck-aktuell Heute im recht, 20 September 2019). <<https://rsw.beck.de/aktuell/daily/meldung/detail/edv-gerichtstag-sieht-fortentwicklung-der-justiz-it-als-wesentliche-zukunftsfrage>> accessed 26 February2020.

35 (n 12) 146.

cloud concept in this case could be reused in document and electronic evidence (emails) investigation.

- o. Finally, there are also various fields of application for AI-based **interactive chatbots** in the judiciary. For example, citizens can use a developed chatbot "Justitia" to file criminal charges at a low threshold, for example on the topic of hate and incitement on the Internet, by requesting the necessary information from the person filing the complaint, retrieving related data from social platforms, and taking screenshots to preserve evidence for checking the initial suspicion.<sup>36</sup> However, chatbots are also to be used in the civil justice system and can be combined with robotic process automation. To this end, an application for applying for a certificate of inheritance was presented at the German IT Court Day 2020.<sup>37</sup>

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36 (n 34).

37 See presentation at <<https://www.edvgt.de/wp-content/uploads/2020/11/2020010-EDVGT-Praes.pdf>> accessed 26 February 2021.

# Hungary

*Zsolt Ződi*

## *1. The Use of Legal Technology in Hungary – General Picture*

### *1.1. Introduction*

The digitization of the justice sector started in Hungary in the early 2000s and was rather uneven. Some organizations, such as prosecutors, notaries, or some registration court proceedings, used state-of-the-art technology relatively early on, while litigation courts were lagging behind for quite some time. This lag amongst the attorneys is still existing.

The main reason for the court's lag was that in 1998 an organizational structure was established in which the third branch was completely separated from the rest of the central administration and government. This was favourable in terms of judicial independence, but not in other respects. The lobbying and fundraising power of the courts has diminished in the absence of government representation, and the closed organization has not perceived the technical challenges intensively enough, so it has not been able to keep up with them.

The main reason for the lag of advocacy was the extremely fragmented structure that still exists today. More specifically, the reason is that more than 98 % of law firms has fewer than 9 employees, and 80 % of the total attorney population works in such offices.<sup>1</sup> The number of cases in these offices is not large enough and the complexity of the division of labour is not worth it to automate the office. Moreover because of the average small size, and lack of complexity is not economical for manufacturers to develop software for such small practices. The digitization of the legal sector has therefore taken place almost exclusively as a result of legal rules imposing duties to the state and the third branch.

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<sup>1</sup> Péter Homoki: Overview on the average state of the art of IT capabilities of small law firms in the European Union. Presentation within the framework of AI4Lawyers Project (Council of Bars and Law Societies of Europe, 2021, under publication) 6., 8. I am grateful for Péter Homoki, to hand me his presentation in a draft form.

In the following, I present the legal technological status of the three major judicial sub-sectors separately.

### *1.2. Technology at the Courts*

Until 2011, the Hungarian court system was characterized by island-like developments. However, digitization has already started in four areas. 1. JIIS (Judicial Integrated Information System- BIIR in Hungarian) was introduced in the beginning of the 2000s. This system performed basic administrative tasks (registration of documents – without digital document management functions, and production of basic statistics). 2. Hungarian courts have been using electronic legal databases since the late 1990s because relatively advanced market solutions were available. 3. The use of traditional office software (word processors) gained momentum when, in 2005, the Hungarian Freedom of Information Act made it mandatory to publish judgments in large numbers. 4. A registration-type court procedure, the company procedure, was started to be digitized very early, so this procedure became almost completely electronic from the end of the 2000s. (see section 3.4.1)

2011 was an important year in court informatics. This is when the new judicial organization was created, in which the administrative tasks were taken over by a separate organization, with a president dedicated to digitization. It was then that four developments were launched that still characterizes court informatics today. 1. Development began, and from 2018 onwards, the so-called E-trial system has been introduced. E-trial is an integrated case management solution that enables simultaneous electronic communication and in-house court case management. (see point 3.)<sup>2</sup> 2. The court's own video conferencing system, the VIA VIDEO system, has been put in place.<sup>3</sup> 3. As a significant part of the Hungarian judiciary still dictates the text of judgments and other documents, the court has purchased a speech-to-text system (dictation software) that facilitates the

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2 “E-per 2018” on the website of National Office for the Judiciary. (“E-trial” 2018 in Hungarian) <<https://birosag.hu/elektronikus-kapcsolattartas/e-2018>> accessed 1 March 2021, and a shorter English version: “Digital Courts” <<https://birosag.hu/en/digital-court>> accessed 1 March 2021.

3 “VIA VIDEO projekt” (in Hungarian) <<https://birosag.hu/video-projekt>> accessed 1 March 2021.

digitization of documents.<sup>4</sup> 4. The information surfaces of the court have also been renewed, so new search software helps the clients to find out about the publicly available app. 170,000 judgments.<sup>5</sup> In addition to the four major directions, minor improvements have been launched, such as simple document assembly solutions in certain fields. I will talk about the details of the current court system in point 3., and about the future plans in point 6.

### *1.3. Technology at the Public Prosecutors' Organisation*

Although the office of the public prosecution does not publish information on the IT systems of the organisation, what can be known from the limited resources is that the IT equipment of the prosecution is generally better than that of the courts. This is partly due to the fact that the prosecution is part of the law enforcement system, and here at the turn of the millennium serious developments took place, e.g. it was then that the “RoboCop” system was introduced<sup>6</sup> in the police and then in the prosecutor's office a software to analyse the information stored in it. As it is visible from the parliamentary budget protocols, the prosecutor's office started the Introduction of an Integrated Records and Document Management System (I IDR), which will replace records management stored in individual island-like systems. The same material notes that the increase in electronic records and data exchange as a result of the pandemic has highlighted the difficulty of data exchange between organizations.<sup>7</sup> In point 6, I will talk briefly about this trend.

4 “A beszédfelismerő és -leíró szoftverek” (“Speech recognition and speech-to-text software” – in Hungarian) <<https://birosag.hu/beszedfelismero-es-leiro-szofveterek>> accessed 1 March 2021.

5 “Bírósági Határozatok Gyűjteménye” – in Hungarian – “Collection of Judicial Decisions” - <<https://birosag.hu/birosagi-hatarozatok-gyujtemenye>> accessed 1 March 2021.

6 See 18/2011. (IX. 23.) ORFK utasítás a Robotzsaru integrált ügyviteli, ügyfeldolgozó és elektronikus iratkezelő rendszerről (in Hungarian – No. 18/2011 directive of the National Captaincy of the Police [NCOP] on the „Robocop” integrated case- and document management system) <<https://net.jogtar.hu/getpdf?docid=A11U0018.0RF&targetdate=&printTitle=18/2011.+%28IX.+23.%29+ORFK+utas%C3%ADt%C3%A1s&getdoc=1>> accessed 1 March 2021.

7 Parliamentary protocol on the explanation of the 2020 budget. Public prosecution section. <<https://www.parlament.hu/irom41/10710/adatok/fejezetek/08.pdf>> accessed 1 March 2021.

#### *1.4. Technology at Law Firms*

As I mentioned above, the legal profession is extremely fragmented and the gap between large offices and lots of small ones is huge. While large international law firms use relatively sophisticated case and document management software and many already experiment with artificial intelligence (natural language processing) based solutions, for 98 % of law firms the digitization is limited to standard office software and free software used due to state-imposed procedures. I will talk about these in point 3.

#### *2. Blockchain within the Government*

Neither the public administration, nor the judiciary use blockchain (distributed ledger) technology for registration purposes, and cryptocurrencies are in the grey zone in terms of legality too. Although they are not banned, the Hungarian National Bank has drawn attention to the dangers posed by cryptocurrencies and ICOs several times, most recently in 2020<sup>8</sup>.

#### *3. Electronic Communication on the Courts*

##### *3.1. A Short History of Electronic Litigation in Hungary*

Electronic communication gradually appeared in the Hungarian court system. The “E-trial” became effective from 1 January 2013, although it was originally optional only in cases falling within the jurisdiction of the county courts. From 1 July 2015, it has been possible to file an application and other pleadings, as well as their annexes, electronically in all courts and at any stage of civil proceedings. Although the mandatory use has been *de iure* introduced already by the old civil procedure code in the 2009, *de facto* the use of the electronic procedure started after more prolongations only in 2016 with the entering into force of the new code on Civil Procedure.( Act CXXX of 2016. )<sup>9</sup>

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8 Magyar Nemzeti Bank, 'Kriptovaluta, nyereségrészesedési jog: fokozott befektetői kockázatok' (mnb.hu, 14 February 2020) <[https://www.mnb.hu/sajtoszoba/sajtok\\_zlemenek/2020-evi-sajtokzlemenek/kriptovaluta-nyeresegreszesedesi-jog-fokozott-befektetoi-kockazatok](https://www.mnb.hu/sajtoszoba/sajtok_zlemenek/2020-evi-sajtokzlemenek/kriptovaluta-nyeresegreszesedesi-jog-fokozott-befektetoi-kockazatok)> accessed 1 March 2021.

9 PéterSzalai , 'Elektronikus kommunikáció a polgári perben' in Gergely G. Karácsony (ed) *Az elektronikus eljárások joga* (Gondolat, 2018)

### 3.2. Legal Basis

In Hungarian law, electronic communication and administration are a regulated process on two levels. The general basis of the procedure is the law covering all proceedings (ie not only court, but proceedings within all public administration) by Act CCXXII of 2015. on *General Rules for Electronic Administration and Trust Services*.

Section 8 (1) of the law states in general that "The client - (...) - is entitled to perform his / her administrative acts electronically and to make his / her statements electronically before the body providing electronic administration." Accordingly, it makes the electronic process essentially entirely mandatory (Section 9 (1)) saying that electronic administration is the responsibility of all public bodies and legal representatives (lawyers).

On the second level of regulation there are specific laws regulating specific procedures. One of this is the already mentioned Act CXXX of 2016 on Civil Procedure. The law refers to electronic procedure in several places, but Part Ten deals with the use of electronic technologies and devices. The essence of the provisions is that lawyers are obliged to follow the electronic path and can only communicate on paper in exceptional cases.

Another main procedural act is Act XC of 2017 on Criminal Procedure, which regulates the electronic procedure in criminal matters. Chapter XXVII of the Act Its settles the issue, similarly to the Civil Procedure Act: lawyers are required to communicate electronically with all organization involved to the procedure, including with the courts.

### 3.3. Details of the electronic communication with courts<sup>10</sup>

In this subsection, I deal with the court (electronic trial - E-trial) system in more detail, I only touch on the other two, less important electronic procedures.

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<[http://real.mtak.hu/80535/1/e-elj%C3%A1r%C3%A1s-jog\\_Tank%C3%B6nyv\\_LO.pdf](http://real.mtak.hu/80535/1/e-elj%C3%A1r%C3%A1s-jog_Tank%C3%B6nyv_LO.pdf)> accessed 1 March 2021.

10 The most comprehensive practical guide of the procedure: Péter Homoki: „Tájékoztató az elektronikus ügyintézésről az ügyvédi tevékenységet végzők számára” (in Hungarian: “Guide to Electronic Case Management for Attorneys”) <[http://www.homoki.net/images/180901\\_Tajekoztato\\_eugyintezes\\_2018\\_tc.pdf](http://www.homoki.net/images/180901_Tajekoztato_eugyintezes_2018_tc.pdf)> accessed 1 March 2021.

The system of judicial electronic communication consists of two subsystems. 1. A central government system and a 2. court system. The two subsystems are further broken down into sub-subsystems.

Ad 1. The central system performs authentication, hosting, and has a form-filling module. Customers download and use the General Form Filling Software<sup>11</sup> and the official forms on their own machines.

All other documents (attachments, documents not submitted in printed form) must be converted to .pdf. The documents containing the forms and attachments must then be packed together and signed. This must then be electronically signed and uploaded as a package to the customer gateway, which the customer gateway forwards to the court subsystem. Compliance with the document is guaranteed by the electronic signature.

It should be noted here that instead of the electronic signature, the Document Verification Based on Central Identification function performed by the Central Identification Agent can also be used.

Ad 2. The package is then forwarded to the court subsystem, which then distributes it to the relevant court. This subsystem performs the registration, and it also has certain workflow management and document management functions like search and metadata handling.

### *3.4. Special Electronic Procedures that are Highly Automatised*

#### *3.4.1. Company Registration Procedure.<sup>12</sup>*

The company procedure (registration of companies in the business register - and change of its data) is one of the oldest electronic procedures in Hungary. This is an advantage, but also a disadvantage. Since it was first developed, it still represents a completely unique solution.

In Hungary, the business register is maintained by a special court. The procedure in this court is one of the oldest electronic procedures and in some parts fully electronic, fully automated. Its specialty is that it differs

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11 Description of the software in Hungarian: „Tudnivalók a nyomtatványkitöltő programokhoz” (in Hungarian – „User Guide to the form filling software”) <[https://www.nav.gov.hu/nav.gov.hu/nav/letoltesek/tudnivalok\\_nyomtatvanykitolto\\_programokhoz.html](https://www.nav.gov.hu/nav.gov.hu/nav/letoltesek/tudnivalok_nyomtatvanykitolto_programokhoz.html)> accessed 1 March 2021.

12 Guide of the Company Service of the Government (Cégszolgálat) – “Elektronikus cégeljárás” (in Hungarian – “Electronic Company Registration Procedure”) <<https://ceginformacioosszolgalat.kormany.hu/elektronikus-cegeljaras>> accessed 1 March 2021.

from the e-litigation procedure described above, because it is not done through the central address (client gateway or enterprise gateway), but via normal e-mail. While the process for e-litigation looks like this

Filling out forms> attaching attachments> logging in and identifying in the central system> pre-checking data in the central system> uploading documents to the central system

Until then, the order in the company procedure is as follows

Filling out forms> attaching attachments> packing and signing documents on your own machine> sending the signed file package to the central system, or a dedicated email address > the system checks the data.

### 3.4.2. Order for Payment Procedure.<sup>13</sup>

An order for payment procedure is a pre-litigation non-litigation procedure in which the applicant requests the issuance of an order stating the reasons and, unless the debtor objects, it becomes an enforceable instrument and, if it does, it becomes a lawsuit. The specialty of the procedure is that it is performed by a system operated by the Chamber of Notaries and is only suitable for the enforcement of small monetary claims (less than HUF 3 million).

The payment order procedure is a kind of hybrid system, because the application must be uploaded to the system of the Chamber of Notaries, not by e-mail, but not to the central system operated by the central IT company (NISZ Nemzeti Infokommunikációs Szolgáltató Zrt. – National Infocommunication Corporation<sup>14</sup>), but it must be uploaded to a system operated by the Chamber of Notaries.

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13 See the dedicated website of the service on the website of the National Chamber of the Hungarian Public Notaries (in Hungarian) <<https://fmh.mokk.hu/#x>> accessed 1 March 2021.

14 <<https://www.nisz.hu/>> accessed 1 March 2021.

The three electronic procedures above can be described in the table below:

	E-trial	Company registration procedure	Order for payment procedure
<b>Method of requesting data: via form / document / mixed (form + attachment option)</b>	Mixed	Mixed	Form
<b>Filling out forms: online or offline</b>	Offline	Offline	Online
<b>Authentication of parties: with electronic signature / otherwise / both possible</b>	Both	Only electronic signature	Both
<b>Submission of documents: uploaded by e-mail / system</b>	By system	By email	By system
<b>Once uploaded, there is a central submission or to the organization's own hosting</b>	Central	Central	Own

It can be seen from the table that the picture is rather mixed regarding the three electronic procedures and well reflects the divergence of the procedures developed independently at different times, which poses a big challenge for lawyers, and especially for small law firms.

#### 4. Online Procedures

We need to divide the subject of online hearings into two, on the one hand, hearings that are held entirely online, and on the other hand, hearings where certain procedural acts are conducted online. (Hybrid systems.) The latter has been used since the enactment of the VIA VIDEO<sup>15</sup> a video system set up in 2018, which allows certain procedural acts, mainly witnesses, to be heard and recorded. In recent years, Hungarian courts have started to use the system, though not en masse. (200 times in 2019, which is minimal, compared to the some hundred thousand hearings per year.)

Completely online hearings cannot be held in Hungary under the current rules of procedure. However, as a temporary rule in the wake of a

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15 see point 1.2.

pandemic emergency, 74/2020. (III. 31.) Regulation of the Government made it possible to hold e-hearings in both civil and criminal cases. In practice, this has only been applied in civil cases by courts again in very small numbers using Skype for Business. In addition, in civil proceedings, the law allowed proceedings to continue without trial.

There are no more advanced online procedures (such as online dispute resolution systems) in Hungary.

### *5. Use of Artificial Intelligence, and Automated Decision-making*

There is currently no artificial intelligence-based (if we consider machine learning as a distinguishing feature of AI) application in the justice sector. There are currently no fully automated decisions in the justice sector, such as only available in some areas of public administration in Hungary. In the company registration procedure there is a theoretical possibility to make automated (3.4.1) registration, but this has not been used in the past few years.

### *6. Future Plans*

As I indicated earlier, the Prosecutor's Office is currently working on a project to standardize records management. IT developments in the courts are currently underway with much less force than in recent years, with no major development projects on the horizon. There will be developments because of the pandemic on the video systems, and on the extension of the scope of the document assembly system. Although no plans have been made public yet, the development of the current company process, which was developed in the late 1990s and then in its late form in the late 2000s, has been in the air for years. Most law firms have so far been only sufferers and not controllers of digitization, a trend that is likely to continue in the future, as well as the huge IT development gap between large and many small law firms.



# Italy

Pierpaolo Marano, Mario Zanin, Enrico Maria Scavone

## 1. Introduction

Legal Tech<sup>1</sup> is or at least is becoming a structural aspect in the conduct of legal affairs, in particular regarding dispute resolutions in Italy.

Governmental and regulatory initiatives aimed at better defining the legislative framework of Legal Tech have emerged. Moreover, promotional initiatives supported by public and private subjects have been launched. Also, several use cases have been experimented with and developed in legal practice.

This chapter, therefore, explores the state-of-the-art of the Italian legal framework concerning Legal Tech issues, having regard to blockchain and dispute resolution systems<sup>2</sup>.

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1 Legal Technology or "LegalTech" is a term that broadly refers to the adoption of innovative technology and software to streamline and enhance legal services; other synonyms which are used interchangeably are "law tech", "LegalIT", "legal informatics", Marcelo Corrales, Mark Fenwick and Helena Haapio, 'Digital Technologies, Legal Design and the Future of the Legal Profession' in MarceloCorrales, Mark Fenwick and Helena Haapio (eds) *Legal Tech, Smart Contracts and Blockchain* (Springer, 2019) 1.

2 In this context, Legal Tech refers to platforms, IT services, and software that make law firms and lawyers more efficient in performing their activities and can be defined as the integration of information technology services and software in a legal context, as well as the development of legal platforms and their applications, Mark Fenwick, Wulf A. Kaal and Erik P. M. Vermeulen, 'Legal Education in a Digital Age. Why Coding Matters for the Lawyer of the Future' in Marcelo Corrales Compagnucci, Nikolaus Forgó, Toshiyuki Kono, Shinto Teramoto and Erik P. M. Vermeulen (eds) *Legal Tech and the New Sharing Economy* (Springer, 2020) 110. LegalTech, therefore, comprises information technology services applied to court proceedings and disputes resolution mechanisms, which represent crucial aspects of the legal context and the provision of legal services, since "*judgement is the fundamental act of law as well as the fundamental act of thought*", Francesco Carnelutti, *La prova civile. Parte generale. Il concetto giuridico della prova* ( Giuffrè, 1992) 9. In other words, the advent of digital justice, which offers online resolution of disputes and conflicts, is to be considered Legal Tech, Giuseppe Zaccaria 'Figure del giudicare:

The structure of the chapter is as follows. Paragraph 1 focuses on blockchain and distributed ledgers technologies. Paragraphs 2 focuses on digital tools applied to court proceedings in civil law matters, and paragraph 3 highlights novelties emerging in this concern due to the COVID-19 pandemic. Paragraph 4 concerns alternative dispute resolution mechanisms in financial sectors and applying technology within this field. At least, Paragraph 5 presents concluding remarks.

## 2. *Blockchain and distributed ledger technologies (DLTs)*

Blockchain technology fall within the more general concept of distributed ledger technologies ('DLTs')<sup>3</sup>, even though both terms are often used interchangeably. The Italian legislator introduced a legal definition of DLTs and smart contracts, and institutional actors' initiatives were launched to define the relative legislative framework and promote their uses. In the meantime, several projects were developed in legal practice to exploit the benefits of DLTs. Each of these issues will be explicitly examined in the present Paragraph, starting from the definition of DLTs adopted by the Italian legislator.

### 2.1. *Legal definition of DLTs and smart contract*

'DLTs' and smart contracts are defined under Italian law<sup>4</sup>.

In particular, DLTs means IT technologies and protocols using a ledger that is shared, distributed, replicable, simultaneously accessible and structurally decentralised on a cryptographic basis to allow the recording, validation, updating and storage of both not encrypted and encrypted data, which may be verified by each participant and which may not be altered and modified. A smart contract is defined as a computer program that

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calcolabilità, precedenti, decisione robotica' in *Rivista di diritto ir. civile.*, (Cedam, 2020) 2, 277.

3 Gregorio Gitti and Marisaria Maugeri, 'Blockchain-Based Financial Services and Virtual Currencies in Italy' in EuCML, 2020, 43; for further information, see Technical Committees ISO TC 307 available at <<https://www.iso.org/committee/6266604.html>> accessed 24 February 2021.

4 See Art. 8-ter of Decree-Law no. 135 of 14 December 2018, as converted with amendments by Law no. 12 of 11 February 2019.

operates on DLTs and whose execution automatically binds two or more parts based on predefined effects from the same.

Both definitions have been criticised as they violate the principle of technological neutrality. Also, the definition of a smart contract binds the fulfilment of the written form requirement to the parties' identification. Identification that occurs according to a process that will have to be regulated by the Agency for Digital Italy (AgID)<sup>5</sup>.

Storing information with DLTs produces the legal effects of electronic time stamps under Art. 41 of EU Regulation no. 910/2014 of the European Parliament and the Council on electronic identification and trust services for electronic transactions in the internal market ('eIDAS Regulation')<sup>6</sup>. Similarly, it is provided that smart contracts meet the requirement of written form following computer identification of the parties involved through a process with the requirements set by the AgID<sup>7</sup>.

Unfortunately, AgID has not yet adopted the provided guidelines. Notwithstanding this, the storing of information with DLTs creates the same legal effects of electronic time stamps, with the consequence that such storing can be meant as creating data in electronic form, which binds

<sup>5</sup> Giusella Finocchiaro, 'Intelligenza artificiale e responsabilità' (2020) 2 Contr. impr. 713; see also Giusella Finocchiaro, 'Intelligenza artificiale e protezione dei dati personali' (2019) Giurprudenza Italiana.1670-1677, which affirms that *"Instead the Italian definition attempts to describe blockchain technology and smart contract applications, at their current state, crystallising them. In addition to this, it carries out a further operation that is useless and, indeed, harmful. It attributes to smart contracts, after having uselessly defined, according to that process contrary to the principle of technological neutrality that was explained earlier, the written form, only if the parties are identified according to a process that will be regulated by AgID. Now, the identification of the parties, according to general principles, is not a requirement of the contract. Besides that, the written form of computer document is a matter already extensively regulated by the Digital Administration Code, which certainly does not require further clarification".*

<sup>6</sup> See Art. 8-ter, par. 3, Decree-Law no. 135/2018. The following par. 4 provides that *"within 90 days from the entry into force of the law, the Digital Italy Agency sets the technical standards that technologies based on distributed ledgers must possess in order to produce the effects referred to in paragraph 3"*.

<sup>7</sup> The Agency for Digital Italy ('AgID') is an Italian public agency established by Decree-Law no. 83 of 22 June 2012, converted with amendments by Law no. 134 of 7 August 2012. AgID performs tasks to pursue the highest level of technological innovation in public administration's organisation and development. Among its tasks, AgID accredits or authorises subjects (public or private) that carry out certain digital field activities (such as electronic storage, digital certificates, time stamps, certified electronic e-mail, PagoPA system of payments to public administrations).

other data in the electronic form to a particular time, establishing evidence that the latter data existed at that time<sup>8</sup>.

The eIDAS Regulation provides two different time stamping mechanisms, i.e. "qualified electronic time stamp" and simple electronic time stamp. The "qualified" time stamp shall enjoy the presumption of the (i) accuracy of the date and the time it indicates and (ii) the integrity of the data to which the date and time are bound. A simple electronic time stamp does not enjoy the same legal presumption but shall not be denied legal effect and admissibility as evidence in legal proceedings solely because it is in an electronic form or because it does not meet the qualified electronic time requirements stamp<sup>9</sup>.

The AgID's guidelines should help set out and clarify the requirements to assess when and whether DLTs storing of information is considered a time stamping mechanism or a qualified time stamping mechanism, with the consequences deriving from there. Until adopting such guidelines, it is left to the judiciary to consider on the specific circumstances of the case at hand what kind of legal effect DLTs storing of information creates.

In conclusion, the Italian legal system explicitly recognises DLTs and smart contracts and sets forth a legislative framework governing their uses and legal effects, even though the same is currently incomplete. In this contest, the subsequent Subparagraph illustrates institutional and governmental initiatives that have been launched and aimed at better defining the legislative framework of DLTs and promoting their uses.

## *2.2. Institutional and governmental initiatives*

The Italian Government plans to develop a strategy strictly focused on DLTs and blockchain. Several institutional actors have been active in the Italian digitalisation process, in connection to which DLTs are considered to be a relevant tool.

The Ministry of Economic Development ('MiSE') has been actively involved in blockchain and DLTs development, supporting the Italian Government in identifying a national strategy for blockchain and DLTs. The MiSE started a public consultation concerning a summary of a document drafted by appointed experts to gather comments, suggestions or other

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<sup>8</sup> Art. 3, par. 1, num. 33), eIDAS Regulation.

<sup>9</sup> Art. 41, eIDAS Regulation. Art. 42, eIDAS Regulation, sets forth the requirements to be met for an electronic time stamp to be "qualified".

useful elements about DLTs.<sup>10</sup> At the end of the consultation period, the Italian Government was meant to complete a national strategy draft for blockchain and DLTs, based on the comments received. However, such a national strategy is still to be adopted<sup>11</sup>.

The Ministry of Economic and Finance ('MEF') set up the FinTech Coordination Committee<sup>12</sup> to identify objectives, define programs and implement actions to promote techno-finance development, together with

- 10 MiSE appointed 30 experts to provide an overview of the current situation, to identify possible developments and the consequent socio-economic fallout from the introduction of solutions based on DLTs. Based on the analyses and observations made, the experts developed a document named "Proposals for an Italian strategy on technologies based on shared registers and Blockchain". The document contains the guidelines to be followed to enable the development and diffusion of the technology and define the national strategy's reference context; see the summary of the document *Proposte per la Strategia italiana in materia di tecnologie basate su registri condivisi e Blockchain. Sintesi per la consultazione pubblica*, published by MiSE and available at <<https://www.mise.gov.it/index.php/it/consultazione-blockchain#documento>> accessed 25 March 2021.
- 11 In April 2018, the 28 EU Member States founded the European Blockchain Partnership, a form of political cooperation to develop a European infrastructure for services circulating on the blockchain ('EBSI'), for further information see (n 1206); Italy participated in the first phase of the creation of EBSI infrastructure with three nodes managed respectively by Infratel Italia (the in-house company of the MiSE), Istituto Nazionale della Previdenza Sociale (INPS) and the Politecnico di Milano. Moreover, in May 2020, the use case supported by Italy on blockchain management of social security data was chosen for implementation on EBSI in 2020-2021, see *Proposte per la Strategia italiana in materia di tecnologie basate su registri condivisi e Blockchain. Sintesi per la consultazione pubblica*, published by MiSE and available at <<https://www.mise.gov.it/index.php/it/consultazione-blockchain#documento>> accessed 25 February 2021. Also, AgID and Infratel Italia are promoting, together with other entities, the IBSI (Italian Blockchain Service Infrastructure) project, which aims to test the design and development of an ecosystem-based on DLT for the delivery of digital public services, in line with the European strategy concerning EBSI, for further information see <<https://www.infatitalia.it/archivio-news/notizie/innovazione-blockchain-nasce-l-infrastruttura-nazionale>> accessed 25 February 2021.
- 12 FinTech is considered as "*a term used to describe technology-enabled innovation in financial services that could result in new business models, applications, processes or products and could have an associated material effect on financial markets and institutions and how financial services are provided*", European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. FinTech Action plan: For a more competitive and innovative European financial sector' (eur-lex.europa.eu, 2018).

the introduction of FinTech regulatory sandboxes<sup>13</sup>. The Committee was institutionalised by Law no. 58 of 28 June 2019<sup>14</sup>, which also introduced into the national legal system a tool to allow experimentation of FinTech applications<sup>15</sup>. Through new technologies, such as artificial intelligence and DLTs, these applications can enable innovation of services and products in the financial, credit, insurance and regulated markets sectors. Conditions and methods for carrying out these experiments are regulated by the MEF. A public consultation on the draft regulation concerning the FinTech experimentation was launched by the MEF and concluded on the 31 March 2020. The draft regulation lays down rules on the composition, operating procedures and powers of the Committee and identifies the subjective and objective requirements and the methods of access to experimentation. The final regulation was adopted through MEF Decree no. 100 of 30 April 2021, published in the Official Gazette no. 157 of 2 July 2021: it is expected that several FinTech projects may increase also involving DLTs.

Furthermore, the Minister for Technological Innovation and Digital Transition of the Italian Republic was established in 2019. The Minister is placed in charge of the Department for Digital Transformation ('DTD')<sup>16</sup>. The Department for Digital Transformation is a department of the Presidency of the Council of Ministers responsible for defining policies for

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13 Regulatory sandboxes are referred to as experimentation related to techno-finance (FinTech) activities aimed at the pursuit, through new technologies such as artificial intelligence and distributed registers, of the innovation of services and products in the financial, credit, insurance and regulated markets, see Art. 36, par. 2-*bis*, Decree Law no. 34 of 30 April 2019, converted with amendments by Law no. 58 of 28 June 2019.

14 Art. 36, par. 2-*octies*, Decree Law no. 34 of 30 April 2019, converted with amendments by Law no. 58 of 28 June 2019, provides for the establishment of the FinTech Committee at the Ministry of Economy and Finance (MEF). The Committee brings together as permanent members: MEF, MiSE, the Minister for European Affairs, the Bank of Italy, Italian Supervisor on Financial Markets ('Consob'), the Institute for Insurance Supervision ('IVASS'), the Competition and Market Authority (Agcm), the Guarantor for the Protection of Personal Data, AgID and the Revenue Agency. The Fintech Coordination Committee was created initially with the signing of a memorandum of understanding between the entities above.

15 Decree-Law no. 34 of 30 April 2019, converted with amendments by Law no. 58 of 28 June 2019, introduced the discipline of so-called FinTech regulatory sandboxes (see Art. 36, par. 2-*bis* to 2-*septies*).

16 The competencies of this Minister are similar to those of the Department for Innovation and Technology (DIT) active from 2001 to 2011. The structure was established by the Decree of the President of the Council of Ministers of 19 June 2019.

the country's modernisation with digital technologies and coordinating and implementing digital transformation programs. This Minister supported projects concerning, in particular, the "Sistema Pubblico di Identità Digitale" ('SPID') and the "Carta d'Identità Elettronica" ('CIE'). They are identification tools for accessing the Public Administration's online services and some services provided by private individuals<sup>17</sup>. The Minister, however, could play a role together with other institutional actors in the development of DLTs, especially within the Public Administration. The Italian legislator recently introduced rules concerning a platform for digital notifications of acts, measures, notices and communications of the Public Administration. The legislator admits the use of DLTs in implementing such a platform to ensure the authenticity, integrity, non-modifiability, readability and retrievability of IT documents made available by administrations<sup>18</sup>.

In conclusion, several institutional actors have played a role in developing a better legal framework concerning DLTs and promoting their uses in the legal sector. However, the initiatives are far from being considered complete. Nonetheless, different applications of DLTs in the conduct of legal affairs have been experimented and developed, and the most relevant will be discussed in the next Subparagraph.

### *2.3. Applications of DLTs in the legal sector*

The use of blockchain and DLTs has found remarkable development in some sectors of legal affairs. The notarial sector launched DLTs and blockchain related projects. These technologies were experimented about Alternative Dispute Resolution ('ADR') mechanisms, in particular within the banking sector and with specific reference to bank guarantees. No blockchain or DLTs use is made within judicial proceedings.

As anticipated, the use of blockchain has found remarkable development in the notarial sector. The notary's task is to attribute public faith to documents received<sup>19</sup>. For individual acts or prudential reasons, citizens

17 All public administrations shall integrate SPID and CIE in their information systems, as the only digital identity systems to access digital services. Thanks to SPID and CIE, access to public services becomes uniform throughout the country; for further information, see <<https://innovazione.gov.it/>> accessed 25 February 2021.

18 Art. 26, Decree-Law no. 76 of 16 July 2020, converted with amendments by Law no. 120 of 11 September 2020.

19 Art. 1, Law no. 89 of 16 February 1913.

need to recur to authentication services provided by the notaries. This authentication causes costs and the necessary intermediation of notaries in the carrying on of transactions and business. For these reasons, within the national congress of notaries held in October 2017, a project to create "Notarchain" was presented. The project consists of a blockchain in which information is not managed by anonymous subjects but by Italian notaries<sup>20</sup>. This technology aims at ensuring speed, absence of costs for the citizen and diffusion on a global scale while at the same time correctly facing the potential criticalities of a decentralised register model with no checks on the accuracy of the data entered. "Notarchain" technology intends to provide the certainty of the unchangeability of the data entered. Also, it aims to provide a prior check on the parties' identity and the correctness and completeness of the data entered in the chain. Notarchain was thought for storing and managing all types of digital files, and therefore its use may be extended to many fields of application (e.g. drawings, works of Art, movable property in general).

The same blockchain technology is based on a second project presented on the same occasion with SIAE<sup>21</sup>, which involves managing the deposit and archiving of source codes. The latter project aims at enabling citizens to deposit with any Italian notary the source code of a new program, obtaining in real-time the insertion in a register shared with SIAE, which allows the immediate attribution of a timestamp and therefore the certainty that no one will be able to challenge its authorship in the future.

Blockchain and smart contracts were experimented by ADR mechanisms and mediation. An agreement<sup>22</sup> between Jur, an international reference in the field of blockchain legal tech, and Teleskill On-Line Mediation, an ADR system application in agreement with the Cassa Nazionale Fo-

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20 For further information see: <[https://www.notariato.it/it/content/il-notariato-pr  
esenta-%E2%80%9Cnotarchain%E2%80%9D-la-blockchain-certificata-dei-notai  
-e-i-registri>](https://www.notariato.it/it/content/il-notariato-presenta-%E2%80%9Cnotarchain%E2%80%9D-la-blockchain-certificata-dei-notai-e-i-registri) accessed 25 February 2021. see also Massimo Palazzo, 'Informatica e diritto. Un dialogo necessario' (2019) 5 Notariato , 497; Cesare Licini, 'Il notaio dell'era digitale: riflessioni gius-economiche' (2018) 2 Notariato 142; Michele Nastri, 'Registri sussidiari, Blockchain: #Notaio oltre la lezione di Carnelutti' (2017) 4 Notariato, 369.

21 SIAE (Società Italiana degli Autori ed Editori) is the Italian copyright collecting agency.

22 For further information, see <[https://www.teleskill.it/elearning-blog/mediazione  
-on-line-presto-anche-su-blockchain>](https://www.teleskill.it/elearning-blog/mediazione-on-line-presto-anche-su-blockchain) accessed 25 February 2021/; see also <[http://c  
onvenzioni.cassaforense.it/attivit%C3%A0-professionale/strumenti-informatici/m  
ediazione-online/teleskill>](http://convenzioni.cassaforense.it/attivit%C3%A0-professionale/strumenti-informatici/mediazione-online/teleskill) accessed 25 February 2021.

rence<sup>23</sup>, intends to allow parties to access binding arbitration or mediation at the click of a button, resulting in significant savings in time and costs<sup>24</sup>. Teleskill On-Line Mediation currently allows to conduct and define mediation on the internet, leaving the parties and the lawyers comfortably in their offices, or at home, with no need to install any software. Teleskill On-Line Mediation represents a virtual meeting room that allows the practice's management at a distance, without travel costs and optimising users' time. If the mediation is successful, Teleskill On-Line Mediation is prepared to manage the exchange of documents by signing them digitally and concludes the procedure contextually and electronically. Unfortunately, no data is publicly available on the actual use of this tool.

The Italian Institute for insurance supervision (IVASS) and CeTIF (a research center operating within the premises of the Università Cattolica of Milan) collaborated for the development of the first experimentation of blockchain technology in the insurance field, thanks to an initiative also led by ANIA, the Italian Insurers Association. The project entailed an ADR service to resolve disputes between customers and insurance companies dealing with motor liability in the pre-litigation phase. The main phases of the ADR project envisaged the exchange of the amounts entered into the platform by the counterparties for the resolution of a dispute with legal value settled based on the parameters defined for the experimentation, accepted by the client/legal representative and guaranteed by the "Trusted Smart Contract" on the blockchain (a computer protocol that facilitates the execution of the contract)<sup>25</sup>. Two issues were predominant among those arising within the experimentation. The first one concerned how to reconcile the legal terms provided for by the law for the settlement of

23 The Cassa nazionale di previdenza e assistenza forense (also known as Cassa Nazionale Forense) is the Italian social security institution for lawyers. All Italian lawyers registered with the Bar must be registered and covered with such an institution.

24 Michele Giaccaglia, 'Considerazioni su blockchain e smart contracts (oltre le criptovalute)' (2019) 3 Contr. impr., 941; see also Zaccaria (n 2), which affirms that the mediation culture was created to remind us of the possibility of dialogue and doubts on the dialogue and empathy that can arise from computer automation's cold impersonality. During COVID-19 Pandemic, Law no. 70 of 25 June 2020, converting Decree-Law no. 28 of 30 April 2020, has introduced a new case of so-called "compulsory" mediation in addition to those enshrined in Legislative Decree no. 28 of 4 March 2010, by adding par. 6-ter to Art. 3 of Decree-Law no. 6 of 23 February 2020, converted with amendments by Law no. 13 of 5 March 2020.

25 For further information, see <<https://www.cetif.it/le-assicurazioni-avviano-la-sperimentazione-blockchain/>> accessed 25 February 2021

the dispute through mediation based on the traditional "physical mediation" – with the immediacy of blockchain technology in the agreement's execution reached. The second one concerned how to ensure that the people acting through the blockchain were correct representative of parties involved.

The use of DLTs and connected smart contracts is also increasing in the financial sectors. In recent years, the European surety market has notably grown. Estimates made by CeTIF showed that in 2019 alone, the value of the surety market in Italy, in terms of premiums and commissions, reached around €1 billion. In contrast to the European situation strongly led by banks, in the Italian market the situation is the opposite, with insurance companies accounting for more than 64% of the market<sup>26</sup>. However, problems emerged given the lack of digitalization of surety process phases; indeed, the latter are completely paper-based, and this makes it difficult for the beneficiary to verify the authenticity of the surety and the information contained, thus exposing him/her to a high risk of fraud. In this respect, the Bank of Italy center of innovation, "Milan Hub" is launching together with CeTIF, a blockchain-based project concerning "digital" sureties. The project aims at significantly reducing fraud by dematerialising surety documents and providing reliable information to all supply chain actors<sup>27</sup>. The project would entail the creation of a digital item called "asset" that can be transmitted and manipulated via DLT through the use of smart contracts and that describes a relevant subset of characteristics of the surety act and life cycle (e.g. references to the digital identities involved in the process, economic and temporal details, information on milestones for release, enforcement). Blockchain technology would then play a fundamental role in allowing the digitalisation of sureties managing process. The testing of

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26 Source: Impact Study CeTIF – SIA.

27 For further information see <<https://www.ilsole24ore.com/art/fintech-fideiussion-i-digitali-e-onboarding-primi-test-milanohub-banca-d-italia-ADt5VaFB>> accessed 25 February 2021.

blockchain technology, conducted with leading technology partners<sup>28</sup>, has been successful and should be ready for industrialisation<sup>29</sup>.

In conclusion, some sector of legal affairs showed individual activism in the implementation of DLTs and blockchain-related projects. Economic operators and professionals, in some instances together with trade associations and Supervisory Authorities, are willing to experiment and develop DLTs in order to gain their benefits and face correctly potential criticalities. Although some achievements have been so far collected, the process is currently at its starting phases and yet not consolidated.

Having ascertained the above regarding DLTs, the present chapter goes on examining in the next Paragraph how digital tools are affecting judicial proceeding in civil law matters.

### *3. Legal Tech and dispute resolutions*

This Paragraph explores the Italian e-justice experience of developing the Processo Civile Telematico ('PCT'), that is the civil trial on-line. The term PCT substantially means the set of dispositions intended to adapt the procedural rules (in their specific fields of operation) to the new technologies<sup>30</sup>. The PCT project represents a critical e-Government plan in Italy, aiming fundamentally at simplifying formalities, including notification, in the judicial proceeding<sup>31</sup>.

28 According to the CeTIF website, more than thirty organisations from the insurance, banking and financial markets sectors, the Public Administration and businesses, as well as associations and institutions - including the Guardia di Finanza – took part in experimentation phase of the national "Fideiussioni Digitali" project promoted by CeTIF, in collaboration with the Bank of Italy and IVASS and other economic operators; for further information see <<https://www.cetif.it/fideiussioni-digitali-oltre-30-realta-italiane-insieme-per-il-progetto-di-cetif-universita-cattolica-sia-e-reply>> accessed 25 February 2021.

29 Another initiative of Bank of Italy Milan Hub, together with CeTIF, currently in the testing phase, is called O-KYC (that stands for: Onboarding - Know Your Customer), which aims to simplify, streamline and reduce, through DLT/blockchain technology, the time and costs of the customer onboarding process, allowing the control of personal data by the citizen/user, with advantages for customers in terms of simplified processes and data processing by banks, public authorities, utilities and telephone companies; for further information see (n 1223).

30 Claudio Consolo, *Spiegazioni di diritto processuale civile*, (2nd ed., Giappichelli 2014) II, 393.

31 Vito Amendolagine, 'Percorsi di giurisprudenza - il processo civile telematico a cinque anni dalla sua introduzione' (2020) 1 *Giurisprudenza Italiana*, 211; The

The PCT has been the result of various legislative interventions over time<sup>32</sup>. The first discipline was introduced by the Decree of the President of the Republic no. 123 of 13 February 2001 ('D.P.R. 123/2001')<sup>33</sup>. Other regulations followed<sup>34</sup>, including the Legislative Decree no. 82 of 7 March 2005 (the 'Digital Administration Code') that sets forth rules concerning computer documents' legal effects<sup>35</sup>.

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PCT project was developed by the IT Department of the Ministry of Justice since 2001: the PCT strives to increase the availability of online services through a two-way data and document interchange communication system. It provides applications to allow interoperability among a considerable number and variety of external users (lawyers, experts, public administrations officials, citizens, private companies executives, etc.), and courts' internal users (judges, clerks, etc.) involved in civil cases, using a high-security PKI architecture with up-to-date technical features compliant with specific legal provisions and general legislation on the matter, Davide Carnevali, 'Great Success that Was on the Brink of Failure: The Case of a Techno-Legal Assemblage in the "Civil Trial On-Line" System in Italy' (2019) 8(2) EQPAM, 21-35.

- 32 A summary is provided by Francesca. Ferrari, 'Il processo civile telematico' in Lotario Dittrich (ed) *Diritto Processuale Civile* (Utet Giuridica, 2019) I, 1245.
- 33 Named "Regulation on the use of computerised and telematic tools in civil proceedings, in administrative proceedings and in proceedings before the jurisdictional sections of the Court of Auditors". Then, Art. 51, Decree-Law no. 112 of 25 June 2008, converted with amendments by Law no. 133 of 6 August 2008, provided that "notifications referred to in the first paragraph of Art. 170 of the Code of Civil Procedure, notification referred to in the first paragraph of Article 192 of the Code of Civil Procedure and any other communication to the consultant shall be effected by electronic means to the electronic address communicated pursuant to Art. 7 of Regulation referred to in Presidential Decree no. 123 of 13 February 2001", while Art. 4 of Decree-Law no. 193 of 29 December 2009, converted with amendments by Law no. 24 of 22 February 2010, established, among other things, that communications and notifications by telematic means in civil and criminal proceedings shall be made by certified electronic mail.
- 34 See Decree-Law no. 179 of 18 October 2012, converted, with amendments, by Law no. 221 of 17 December 2012 ('Decree Law 179/2012'), and Decree-Law no. 90 of 24 June 2014, converted with amendments by Law no. 114 of 11 August 2014.
- 35 Decree of the Minister of Justice no. 44 of 21 February 2011, named "Regulation on the technical rules for the adoption of information and communication technologies in civil and criminal proceedings" ('d.m. 44/2011') and its implementing provisions shall also be taken into account, in particular the Order of the Director-General for Automated Information Systems of the Ministry of Justice of 16 April 2014, named "Technical specifications provided for in Article 34 par. 1 of the Decree of the Minister of Justice dated 21 February 2011 no. 44" ('Technical specifications of 16 April 2014').

The PCT offers subjects the possibility of managing the various procedural activities in dematerialised form, allowing: (i) the notification and communication of judicial and procedural documents through certified electronic mail<sup>36</sup>; (ii) the filing of procedural documents and documentary shreds of evidence in telematic mode; (iii) the creation of computer trial dossier; (iv) the creation of procedural documents or copies thereof in digital format; and (v) through the telematic transaction, the payment of the fees due for access to justice services<sup>37</sup>.

It is undeniable that some procedural institutions are undergoing a veritable palingenesis that forces a rethinking of the same, as a result of the application of the new technologies<sup>38</sup>.

The PCT produces some practical benefits that may simplify access to justice and lawyers' provision of services<sup>39</sup>.

However, after few years from the adoption of the PCT, exponents of the legal sector highlighted some critical issues for aspects concerning its underlying mechanism<sup>40</sup> and interpretation of its rules<sup>41</sup>. Furthermore, the

36 According to Art. 1, par. 1, lett. v-*bis*), Digital Administration Code, certified electronic e-mail means "a communication system capable of attesting the sending and delivery of an e-mail and providing third-party receipts"; see also Art. 1, par. 1, lett. g), Decree of the President of the Republic no. 68 of 11 February 2005.

37 Art. 30, d.m. 44/2011.

38 Giuseppe Ruffini, 'Il Processo Civile di fronte alla svolta telematica' (2019) 4-5 Riv. dir. proc 973.

39 In particular, it: helps to avoid long queues for the filing of documents at the Court's Registry; allows implementing paperless and environmentally friendly procedures; according to some, ensures the certainty of filing documents at the Registry; makes it possible to extract copies from the computer trial dossier, guaranteeing certification even for personal notifications and also judges' orders are easily downloaded; notifications take place between lawyers without the intermediation of other subjects (such as postal agents), and lawyers can make several deposits of documents at Courts located in different districts without the need to move.

40 For example, it has been highlighted that, when filing a procedural document within an already formed computer dossier trial, PCT cannot allow direct uploading through remote access. In such cases, telematic filing occurs through the transmission of a certified electronic mail message to the address of the Court's clerk. Therefore, the Court's clerk's activity is indispensable for the insertion of documents in the computer trial dossier, see Ruffini, (n 38). Indeed, only when the Court's clerk accepts the filing, the document enters the computer dossier and become visible to the other party and the judge, see Ministry of Justice Directorate General Circular of 23 October 2015, par. 5.

41 Critical issues have been highlighted concerning the judiciary's formalistic approach in the interpretation of the rules governing the PCT. For example, notifi-

incomplete digitalisation of the procedure has been considered to be a problem. Indeed, it has been highlighted that, as a general rule, the parties continue to have the right to file their introductory acts and attached documents in paper format at the Registry; similarly, the judge has the right to file his measures in paper format<sup>42</sup>. It is then a practice often adopted by lawyers at a local level to handle a “courtesy copy” (i.e. in paper format) of the procedural documents to the judge, in addition to the telematic filing of the computer version of the documents<sup>43</sup>.

In civil matters, Italy has been considered to have relatively highly developed IT facilities<sup>44</sup>. Notwithstanding this, there is still a problem with the length of civil proceedings<sup>45</sup>. Therefore, the explanation for these results may lie in the structural difficulties with which Italy is faced. Judicial time is dependent on specific procedural features, which may account for some delay in the processing of cases<sup>46</sup>, not necessarily connected with the application of digital tools to judicial proceedings.

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cations of procedural acts can be made at certified electronic mail (PEC) addresses resulting from public lists identified by the law in this respect. Therefore, the Italian Supreme Court ruled that notifications made to a PEC address referable - depending on the cases - to the party personally or to the defender, but different from the one entered in the public lists are always declared null and void by the judiciary, see Cassazione civile, sec. III, 8 February 2019, n. 3709. The consequence is that even when the notification is made at a PEC address indicated by the party personally or by the defender, it shall always be null and void if different from that resulting from public lists, see Ruffini, (n 38).

- 42 Ministry of Justice Directorate General Circular of 23 October 2015, par. 2; furthermore, Art. 16-bis, par. 9, Decree-Law 179/2012 states that the judge may order the filing of hard copies of individual acts and documents for specific reasons.
- 43 Ministry of Justice Directorate General Circular of 23 October 2015, par. 4. Also, PCT has not been implemented for disputes before "Giudice di Pace", which is an honorary judge competent for civil disputes that do not overcome a certain amount of value, see Cassazione Civile, Sec. II, 29 September 2020, n. 20575.
- 44 Council of Europe European Commission for the efficiency of justice ('CEPEJ'), 'European judicial systems – Efficiency and quality of justice' (CEPEJ, 2016), 60.
- 45 In 2016, it amounted to 1.4 years in the first instance, 2.7 years in the second instance and four years in the third, European Commission, 'Country Report Italy 2018 Including an In-Depth Review on the prevention and correction of macroeconomic imbalances' (eur-lex.europa.eu, 2018) 46.
- 46 CEPEJ. See also European Commission, (n 45); CEPEJ 'Length of court proceedings in the member states of the Council of Europe based on the case-law of the European Court of Human Rights' (CEPEJ, 2018). However, according to (n 1240), the situation is slowly improving with the implementation of Italy's reforms in this concern. On the 5th December 2019, the Italian Council of Ministers approved a draft law entitled "Draft bill delegating authority to the

In conclusion, PCT is a developed reality in Italy. It provides beneficial effects but some exponents highlighted critical issues following its implementation. PCT rules were substantially affected during the COVID-19 pandemic, as better described below in Paragraph 3; it should be then assessed how PCT functioning will be definitely shaped for the future and correctly face critical issues still emerging, in order to ensure the proper functioning of the process and achieve better results.

The following Subparagraphs present a more detailed overview of the functioning of certain aspects of the PCT.

### *3.1. Notifications of procedural documents by electronic means*

The PCT refers to certified electronic mail as the "place" of communication through which the addressee can be reached with reasonable legal certainty and technological ease<sup>47</sup>.

Art. 4 of Decree-Law no. 193 of 29 December 2009<sup>48</sup>, indeed, sets forth that communications and notifications by telematic means in civil proceedings shall be made by PEC. Transmission of documents through PEC is considered equivalent to notification by mail, and the date and time of transmission and receipt of a document may be relied upon against third parties<sup>49</sup>.

Therefore, notifications can nowadays be carried out directly by lawyers<sup>50</sup>. They can send a PEC message to the addressee whose PEC address appears in the public lists identified by the law<sup>51</sup>. The lawyer can

government for the efficiency of the civil process and for the revision of the regulation of alternative dispute resolution systems": the bill has been submitted to the Senate for discussion at no. 1662 and its under consideration

47 Ferrari (n 32) 1278. In this sense, Art. 1, par. 1, lett. n-ter), Digital Administration Code, defines digital domicile as "an electronic address elected at a certified electronic mail service or a qualified certified electronic delivery service", as defined by eIDAS Regulation, "valid for the purposes of electronic communications having legal value".

48 Converted with amendments by Law no. 24 of 22 February 2010.

49 Art. 48, Digital Administration Code.

50 Art. 3-bis, Law no. 53 of 21 January 1994.

51 These are the General Register of Electronic Addresses managed by the Ministry of Justice ('RegIndE'), the National Index of Digital Domiciles of Companies and Professionals ('INI-PEC register'), the Register of Companies, the Register of Public Administrations ('PA register') and the National Index of Digital Domiciles of Natural Persons and other private law entities not required to be registered in

notify his acts (i.e. writ of summons) and acts of a judicial nature (i.e. judgments, orders)<sup>52</sup>. In case the document to be notified does not consist of a computer document, the lawyer can extract a computer copy of the original document on an analogue medium, certifying that it conforms to the original document and proceed by sending it through PEC.

The PEC contains the document to be notified in .pdf format, any power of attorney in .pdf format, the notification report prepared on a separate computer document and signed with a digital signature. The procedural documents notified together with the receipt of acceptance and delivery will be part of the “telematic bag” to file in the Court’s Registry, as better explained below.

Notification by PEC shall be completed for (*i*) the notifying party, at the moment when the receipt of acceptance is generated by the PEC service’s operator and (*ii*) the addressee, at the moment when the delivery receipt is generated by the PEC service’s operator<sup>53</sup>.

In all cases in which the lawyer has to provide proof of notification, and it is not possible to provide such proof by electronic means, the lawyer can extract an analog copy of the PEC message and the receipt of acceptance and delivery. The lawyer attests the conformity with the documents from which they are taken under Art. 23 of the Digital Administration Code<sup>54</sup>.

Furthermore, when the law provides that notifications of acts to the lawyer are to be performed, at the request of the party, at the Registry of the judicial office, notifications by the means mentioned above can be made only when it is not possible, for reasons attributable to the addressee, to execute them at the PEC address shown in public lists<sup>55</sup>. In order to

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professional registers or in the register of companies, see Art. 16-*ter*, Decree-Law no. 179/2012; Ruffini (n 1234), note 15; see the changes made by Decree-Law no. 179/2012, which introduced Art. 3-*bis* to the Digital Administration Code providing for the "digital domicile of the citizen".

52 Art. 3-*bis*, par. 2, of Law no. 53 of 21 January 1994, as amended under art. 16-*undecies*, Decree-Law 179/2012.

53 Art. 3-*bis*, par. 3 to Law no. 53 of 21 January 1994. See also Decree of the President of the Republic no. 68 of 11 February 2005, which sets forth rules governing the use of certified electronic mail. For timely executed notifications, according to Art. 16-*septies*, Decree-Law 179/2012, telematic notifications shall be subject to Art. 147 of the Code of Civil Procedure; therefore, if notification occurs after 9 p.m., it shall be deemed to have been made at 7 a.m. on the following day.

54 Art. 9, par. 1-*ter*, to Law no. 53 of 21 January 1994.

55 Art. 16-*sexies*, Decree-Law 179/2012.

avoid that, in the presence of a digital address in the public lists, notification to the lawyer is made at the Registry and not by PEC<sup>56</sup>.

Following the same approach, Art. 16 of Decree-Law 179/2012 sets forth that, in civil proceedings, communications and notifications by the clerk's office shall be made exclusively by electronic means to the PEC address appearing in public lists or any case accessible to public administrations. Also, it provides that notification to persons required by law to have a PEC address and who have not provided or communicated such an address is made by filing the documents with the Court's Registry. The same procedures shall be adopted in non-delivery of the PEC message for reasons attributable to the addressee. Lastly, the party whose PEC address is not included in a public list but appears in Court in person may indicate the PEC address at which he/she wishes to receive communications and notifications relating to the proceedings. These dispositions are meant to ensure that communications and notifications are always executed by PEC, apart from specific circumstances.

### *3.2. Filing of procedural documents and evidence by electronic means*

According to Art. 16-*bis*, Decree-Law 179/2012, in civil proceedings, filing of procedural acts and documents by lawyers of the parties that have already appeared before the Court shall take place exclusively by telematic means, in compliance with the rules and regulations concerning the signing, transmission and receipt of electronic documents<sup>57</sup>. However, the President of the Court may authorise the filing of the mentioned documents by non-telematic means when the computer systems of the justice domain are not functioning, and there is an urgent need.

For documents other than those just mentioned, it is possible but not mandatory to proceed with their telematic filling: this would be the case for the introductory acts and the first act of defense of a civil proceeding<sup>58</sup>. The Supreme Court of Cassation has specified that the digital signature

56 Ruffini (n 38).

57 The same is provided for civil appeal proceedings, as enshrined in Art. 16, par. 9-*ter*, Decree-Law 179/2012, even though a different initial date of application of the disposition was established. Regarding proceedings before the Court of Cassation (i.e., Italian Supreme Court), see Art. 16, par. 10 and Art. 16-*bis*, par. 4-*bis*, Decree-Law 179/2012.

58 Art. 16, par. 1-*bis*, Decree-Law 179/2012.

- like the signing of the document in paper format - is a requirement of validity for the judgment's introductory act<sup>59</sup>.

Telematic filing is carried out using the transmission of a PEC message to the PEC address of the judicial office, thus making the activity of the Court's clerk indispensable for the insertion of documents in the computer dossier of the trial<sup>60</sup>.

The telematic deposit takes place through the packaging of a "telematic bag" to be sent, as an attachment, to the PEC address of the relevant Court's clerk. The envelope contains the procedural documents, the eventual attachments and, eventually, an XLM file<sup>61</sup>. Procedural documents shall be in .pdf format and obtained "by transforming a textual document, without restrictions on the operations of selecting and copying parts"<sup>62</sup>. Also, scanning of images is not permitted, and a file shall also accompany the documents in XML format that contains all the information of the registration note if any<sup>63</sup>. Attachments shall observe formats allowed<sup>64</sup>. The documents are signed with a digital signature or qualified electronic signature<sup>65</sup>.

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59 Cassazione Civile, Sec. VI, 8 June 2017, n. 14338.

60 Art. 14, Technical specifications of 16 April 2014.

61 Once the telematic envelope has been created with the appropriate software and sent via PEC, four separate receipts are generated, which the party will receive following the sending of the message: (i) receipt of acceptance, which certifies that the message has reached its destination at the PEC system operator; (ii) delivery receipt, which certifies that the message has reached the addressee's e-mail operator (the same is relevant for the completion of the filing and should be kept in computer format to provide proof of filing); (iii) receipt of the outcome of the automatic controls which are inherent to the formal checks of the filing carried out by the operator of the telematic services of the Ministry of Justice; (iv) receipt of acquisition by the Court's clerk which certifies the outcome of the check carried out by the receiving clerk's office.

62 Art. 12, Technical Specifications of 16 April 2014.

63 Art. 12, Technical Specifications of 16 April 2014.

64 Art. 13, Technical specifications of 16 April 2014.

65 CADES and PAdES digital signatures are both accepted and equivalent according to Art. 12, par. 2, Technical specifications of 16 April 2014; see also Cassazione, Sezioni unite, 27 April 2018, n. 10266. Also, Art. 16-bis, par. 9-octies, Decree-Law 179/2012, provides that "*party documents and court orders filed electronically shall be drafted in summary form*"; furthermore, according to Art. 4, par. 1-bis, Decree of the Minister of Justice no. 55 of 10 March 2014, fees for lawyers in judicial proceedings shall, as a rule, be further increased by 30 per cent: the additional fee is due where the documents filed by electronic means are drawn up using information technology techniques designed to facilitate their consultation or use.

Filing by telematic means shall be deemed to have been made when the receipt for delivery is generated by the PEC service operator of the Ministry of Justice. Also, it shall be deemed to have been timely affected when the receipt for delivery is generated before the end of the day on which it is due<sup>66</sup>.

### 3.3. Computer trial dossier

Computer trial dossier is defined as the computer version of the trial dossier, containing the trial documents as computer documents or computer copies of the same documents if they have been filed on paper, under the Digital Administration Code<sup>67</sup>.

The keeping and conservation of the computer trial dossier is among the tasks assigned to the Court's clerk and is equivalent to the keeping and conservation of the trial dossier on paper<sup>68</sup>. The presence of the computer trial dossier does not entail the elimination of the trial dossier on paper. Indeed, notwithstanding the obligation to file certain procedural documents through telematic means as seen above, the clerk's office may need to form and keep the paper files by the methods provided for by the laws, given that the law provides for cases in which the parties still have the right to file documents in paper format. Similarly, there are cases in which the judge has the right to file his measures in paper format<sup>69</sup>.

The computer dossier management system is part of the Ministry of Justice document system dedicated to the storage and retrieval of all computer documents. In this regard, the Ministry of Justice is in charge of managing proceedings using information and communication technologies, collecting in a computer dossier the acts, documents, annexes, receipts of PEC and data of the proceedings themselves whoever formed them, or computer copies of the same acts when they have been filed on paper<sup>70</sup>.

<sup>66</sup> Art. 16-bis, par. 7, Decree-Law no. 179/2012; see also Art. 155, par. 4 and 5 of the Italian Code of Civil Procedure.

<sup>67</sup> Art. 2, par. 1, lett. h), d.m. 44/2011.

<sup>68</sup> Art. 9, par. 3, d.m. 44/2011.

<sup>69</sup> Ministry of Justice Directorate General Circular of 23 October 2015, par. 2.

<sup>70</sup> Art. 9, d.m. 44/2011.

### 3.4. Creation of computer document

A computer document is defined as an electronic document containing the electronic representation of acts, facts or data which are legally relevant<sup>71</sup> and is different from an analog document, which is the non-computer representation of such information<sup>72</sup>.

Therefore, in addition to the written and oral forms of procedural documents, there is also the digital form, a *tertium genus* not precisely corresponding to the written or oral form, based on the use of a different language, intelligible only through a computer, obtained by converting electrical impulses into binary data<sup>73</sup>.

Computer documents comprise documents in digital format (digital native documents) obtained through the transformation into .pdf format of a textual document created through a word processor, but also computer copies, mere or by image, of procedural documents in analog format (analog native documents): the former obtained through the complete transcription of the analog document through a word processor and then transformation of the file into .pdf; and the latter obtained through the scanning of the analog document.

The computer document satisfies the requirement of written form and has the efficacy envisaged by Art. 2702, Italian Civil Code<sup>74</sup>, when it bears a digital signature<sup>75</sup>, another type of qualified electronic signature<sup>76</sup> or an advanced electronic signature<sup>77</sup> or, in any case, is formed, after computer identification of its author. The latter identification must be done through a process having the requirements established by AgID, pursuant to Art. 71

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71 Computer document represents a species of the broader genus of electronic documents, Ferrari, (n 1228); Art. 3, par. 1, num. 35), eIDAS Regulation, states that electronic document means any content stored in electronic form, in particular text or sound, visual or audiovisual recording.

72 Art. 1, par. 1, lett. p) and p-bis), Digital Administration Code.

73 Ruffini (n 38).

74 Art. 2702, Italian Civil Code, “A private deed shall constitute full evidence, up to the point of perjury, of the provenance of the declarations of the person who signed it, if the person against whom the deed is produced acknowledges the signature or if it is legally recognised as having been signed”.

75 Art. 1, par. 1, lett. s), Digital Administration Code.

76 Art. 3, par. 1, num. 12), eIDAS Regulation.

77 Art. 3, par. 1, num. 11), eIDAS Regulation.

of the Digital Administration Code<sup>78</sup> to guarantee security, integrity and non-modifiability of the document and, manifestly and unequivocally, the traceability back to the author<sup>79</sup>. The use of the qualified electronic or digital signature device shall be presumed to be attributable to the electronic signature holder unless he proves otherwise<sup>80</sup>. In all other cases, the suitability of the computer document to satisfy the requirement of written form and its probative value is freely assessable in Court, provided that the date and time of formation of the electronic document may be relied on against third parties if they are affixed under the Guidelines<sup>81</sup>.

A computer copy of an analog document is defined as a computer document whose content is identical to that of the analog document from which it is taken, while a computer image copy of an analog document means a computer document whose content and form are identical to those of the analog document from which it is taken<sup>82</sup>. In civil proceedings, the Italian legislator deems it necessary to carry out an authentication procedure to recognise the copies' validity in question. Indeed, according to Art. 16-decies, Decree-Law 179/2012, when proceeding with the filing of computer copy, including an image copy, of a party's procedural document or of a court order which has been drawn upon an analog medium and is held in the original or a certified copy, it shall be certified that the copy corresponds to the original document<sup>83</sup>.

<sup>78</sup> AgID, *Linee Guida sulla formazione, gestione e conservazione dei documenti informatici*, September 2020, which shall be applicable from 7 June 2021, available at <https://www.agid.gov.it/it/linee-guida>. accessed 25 February 2021.

<sup>79</sup> Art. 20, par. 1-bis, Digital Administration Code.

<sup>80</sup> Art. 20, par. 1-ter, Digital Administration Code.

<sup>81</sup> Art. 20, par. 1-bis, Digital Administration Code; see also Art. 20, par. 1-quarter, Digital Administration Code, according to which the provisions relating to the filing of documents by electronic means under the PCT legal framework shall remain unaffected.

<sup>82</sup> Art. 1, par. 1, lett. i-bis) and i-ter), Digital Administration Code; see also Art. 1, par. 1, lett. i-quarter), Digital Administration Code, according to which computer copy of a computer document is a computer document having the same content as the document from which it is taken on computer support with a different sequence of binary values.

<sup>83</sup> See in this respect Art. 16-undecies, Decree-Law 179/2012. Also, concerning computer copies, Art. 22, Digital Administrative Code, establishes that computer documents containing copies of public deeds, private deeds and documents in general, including administrative deeds and documents of any kind initially drawn upon an analogue medium, sent or issued by authorised public depositaries and public officials, shall have a full effect within the meaning of Artt. 2714 and 2715 of the Italian Civil Code. This effect arises if the above documents are drawn up

### 3.5. Communication of the sentence and access to consultation services

As provided for in Art. 133, Italian Code of Civil Procedure, the judgment shall be made public by lodging it at the Registry of the Court that delivered it and the Court's clerk shall notify the parties within five days, through a note containing the full text of the judgment. Such communication<sup>84</sup> can be executed through a PEC message to the parties, even though it does not have any effect on starting the time limits for appeals<sup>85</sup>.

Among its many functions, the PCT also allows users to consult information regarding civil proceedings at any judicial office, allowing them to know in real-time the status and course of the proceedings and the computer trial dossier documentary content. Access to consultation services takes place through an access point or the portal of telematic services<sup>86</sup>. The portal of telematic services consists of a "public area" and a "reserved area". Only qualified users - lawyers, judges, court clerks, etc. - will be able to access the reserved services area after identification through a cryptographic token. The qualified users can consult, therefore, the status of the proceedings and have access to register data and other information. Besides, citizens and other users can access the public area without having to authenticate themselves. These non-qualified users can consult anonymously and impartially the data of the procedure and other information of the Registry, in compliance with the data protection legal framework<sup>87</sup>.

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under Art. 20, par. 1-*bis*, first sentence, Digital Administration Code. At the same time, it establishes that computer image copies of documents originally generated on an analogue medium shall have the same probatory effect as the originals from which they are extracted. This effect arises if their conformity is certified by a notary public or other public official authorised to do so per the Guidelines. If not certified, such copies of original documents originally generated on an analogue medium under the Guidelines shall have the same probatory effect as the originals from which they are taken if their conformity with the original is not expressly disavowed.

<sup>84</sup> For a distinction between communications and notifications under Italian civil procedure law, see Ferrari (n 1228) 1277, note 81.

<sup>85</sup> In the same line of reasoning, see Cassazione Civile, Sec. IV, 5 November 2014, n. 23526.

<sup>86</sup> Artt. 22 and ss., d.m. 44/2011

<sup>87</sup> Artt. 5 and 6, Technical specifications of 16 April 2014.

#### *4. Civil judicial proceedings during epidemiological emergency*

Dispositions adopted by the Italian legislator to face the outbreak of the COVID-19 pandemic have deeply affected judicial proceedings and access to justice, including civil proceedings. The legislator has enacted several legislations that constitutes a real and autonomous normative body: the so-called civil procedural law of the epidemiological emergency<sup>88</sup>.

Such rules increased the application of digital tools to civil judicial proceedings to correctly face and break down COVID-19 spread among the population. It is questionable whether some of the new dispositions would become definitive dispositions governing civil proceedings.

More in detail, Art. 83 Decree-Law no. 18 of 17 March 2020, converted, with amendments, by Law no. 27 of 24 April 2020 ('Decree-Law 18/2020'), introduced different emergency civil proceedings, alternative to the ordinary one (i.e., in person-hearing). These proceedings are (i) the conduct of civil hearings by remote connections<sup>89</sup> (in such cases, the judge may also be connected from a place other than the judicial office<sup>90</sup>) and (ii) the conduct of civil hearings by exchanging and filing electronically written notes containing only the parties' requests and conclusions<sup>91</sup>. The first proceeding is applicable for hearings that do not require the presence of subjects other than the parties and court auxiliaries, while the second one is applicable for hearings that do not require the presence of subjects other than the lawyers<sup>92</sup>.

Art. 221 of Decree-Law no 34 of 19 May 2020, converted, with amendments, by Law n. 77 of 17 July 2020 ('Decree-Law 34/2020'), modified the emergency proceedings just mentioned, setting more clearly their functioning. The judge has the faculty to decide which civil proceedings is to be adopted (ordinary in-presence hearing, telematic exchange of written notes

<sup>88</sup> Roberto Masoni, 'Diritto processuale civile dell'emergenza epidemiologica (a seguito della conversione in legge del decreto ristori)', (2021) Giust. civ., available at <<https://giustiziacivile.com>> accessed 25 February 2021.

<sup>89</sup> Art. 83, par. 7, lett. f), Decree-Law 18/2020.

<sup>90</sup> Art. 23, par. 7, Decree-Law no. 137 of 28 October 2020, converted with amendments by Law no. 176 of 18 December 2020.

<sup>91</sup> Art. 83, par. 7, lett. h), Decree-Law 18/2020.

<sup>92</sup> Art. 23, par. 6, Decree-Law n. 137 of 28 October 2020 (converted, with amendments, by Law n. 127 of 18 December 2020) extends the applicability of the last-mentioned proceeding to proceedings concerning mutual separation agreement and joint petition for divorce. These proceedings would otherwise be out of the provision's scope, since the parties are required to participate in the relative hearings.

or remote hearings)<sup>93</sup>, provided that for civil hearings through a remote connection, the prior consent of the parties is also necessary<sup>94</sup>. It has also been established that, in civil proceedings, collective judicial deliberations may be adopted through remote connections. The Court's clerk may issue an enforceable copy of a judgment in the form of an informatic document on the application of the party in whose favor the judgment was given<sup>95</sup>.

In conclusion, the epidemiological emergency forced the legislator to adopt rules facing the criticalities of the COVID-19 pandemic and ensure continuity to the functioning of the justice system. Such rules increased the application of digital tools to civil judicial proceedings but were enacted on an exceptional basis.

##### *5. Alternative dispute resolution systems*

In addition to civil judicial proceedings, digital tools are also used in ADR systems in financial sectors. Obviously, ADR systems are alternative and not substitute to the ordinary proceeding<sup>96</sup>: decisions taken by ADR systems are not binding, since they do not preclude the client/consumer who has initiated the procedure from going to Court. If ADR systems are compared to the ordinary proceeding, they are less likely to guarantee respect for the rule of law and due process<sup>97</sup>.

About consumer disputes, in particular, the regulatory framework at the European Union level comprises EU Directive no. 11/2013, which was

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93 Masoni (n 88).

94 Art. 221, par. 4 and 7 of Decree-Law 34/2020.

95 Art. 23, par. 9 and 9-bis, Decree-Law n. 137 of 28 October 2020 (converted, with amendments, by Law n. 127 of 18 December 2020). Another essential provision enables lawyers, in civil proceedings before the Court of Cassation, to file documents electronically, see Art. 221, par. 5, Decree-Law n. 34 of 19 May 2020 converted, with amendments, by Law n. 77 of 17 July 2020: Decree 27 January 2021 of the Ministry of Justice allows the electronic filing of procedural documents by the parties' lawyers as from the 31<sup>st</sup> March 2021.

96 The qualification of such systems as "alternative" is because they aim to resolve disputes outside the courtroom, thus opposing the jurisdiction traditionally exercised by the State, Pietro Sirena, 'I sistemi di ADR nel settore bancario e finanziario' (2018) 9 Nuova giur. civ. comm., 1370.

97 *ibid.*

then supplemented by EU Regulation no. 524/2013 concerning online ADR systems (Regulation on consumer ODR)<sup>98</sup>.

At a national level, regulatory dispositions within the banking sector, adopted by the Bank of Italy, and within the financial markets sector, adopted by Consob, established ADR systems that provide clients of intermediaries with online tools accessible on the website, through which they can submit and manage complaints in case of disputes. Such ADR systems have so far succeeded in granting clients accessible, rapid and less expensive redressing methods<sup>99</sup>. They can, therefore, provide examples of the benefits that digitalisation of dispute resolutions can bring.

Regarding the banking sector, Law no. 262 of 28 December 2005<sup>100</sup> established that all banks and credit institutions operating on the national territory are obliged to adhere to the Arbitro Bancario Finanziario ('ABF')<sup>101</sup>. The same law entrusted the supervisory authority, i.e., the Bank of Italy, to provide the infrastructures (logistic and organisational) necessary for the functioning of the territorial colleges constituting the ABF.

Proceedings before ABF are regulated more specifically by Comitato Interministeriale per il Credito ed il Risparmio (CICR) Decision no. 275 of 29 July 2008 and by Bank of Italy Provisions on out-of-court dispute resolution schemes of 18 June 2009.

98 In the event of disputes involving a foreign intermediary established in the territory of the European Union and arising from banking or financial markets contracts of sale or services concluded online, the Italian consumer client may file an appeal through the ODR platform, pursuant to Regulation 524/2013, see Bank of Italy provisions of 18 June 2009, Section VII, par. 2.

99 Initially, the Arbitro Bancario Finanziario ('ABF') consisted of three territorial colleges (Rome, Milan and Naples). Due to the high number of disputes brought before the ABF, it became necessary to set up another four panels, based in Turin, Bologna, Bari and Palermo.

100 See also Art. 128-*bis* of Legislative Decree no. 385 of 1 September 1993 ('Italian Consolidated Law on Banking'); the ABF was then set-up in 2009. Its functioning has been recently amended by Bank of Italy, Measure of 12 August 2020.

101 Pursuant to Legislative Decree no. 28 of 4 March 2010 and Decree-Law no. 50 of 24 April 2017 (converted by Law no. 96 of 21 June 2017), starting the procedure before the ABF constitutes - as an alternative to recourse to the mediation procedure governed by the same decree - a condition for the admissibility of legal proceedings relating to banking and financial markets contracts, within the limits and conditions laid down by these provisions.

Clients shall use the ABF<sup>102</sup> online portal to submit their complaint<sup>103</sup>. To access the portal, users shall firstly register themselves, clicking on "Reserved Area" at the ABF website<sup>104</sup>: users shall fill in all the fields and, in particular, enter an e-mail address and a mobile phone number on which they will receive notifications and messages updating them on the status of their complaint.

The portal is a simple and interactive tool that assists users in submitting their complaints through a guided procedure and allows them to manage the whole procedure by himself/herself. Users can file an appeal by themselves or on behalf of other subjects using the sample power of attorney available on the ABF website<sup>105</sup>. The online portal will assist users in filling in the complaint<sup>106</sup>, and in the completion of the requested

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102 ABF joins the Fin-Net network. The Fin-Net network has been promoted by the European Commission since 2001, in implementation of its Recommendation of 30 March 1998. This network is among national ADR systems, which are active in financial intermediation sector within the European Economic Area (the EU countries and Iceland, Liechtenstein and Norway). Such network comprises out-of-court dispute resolution bodies operating in banking, financial markets and insurance sectors and established in the above Area. It allows consumers to contact their national ADR system, which, using the information support provided by the network itself, puts them in touch - if it exists - with the equivalent system in the country where the intermediary operates; see Bank of Italy Provisions of 18 June 2009, Section VII, par. 1; see also Sirena (n 96).

103 See Bank of Italy provisions of 18 June 2009, Section VI; for further information, consult the guide for using the ABF portal available at <<https://www.arbitrobancariofinanziario.it/presentare-ricorso/index.html>> accessed 25 February 2021.

104 For further information see the ABF website at <<https://www.arbitrobancariofinanziario.it/homepage/index.html>> accessed 25 February 2021.

105 The complaint can also be submitted by the customer association of which the customer is a member, see Bank of Italy provisions of 18 June 2009, Section VI, par. 1.

106 Once registered and logged into the portal, users can proceed by clicking on "create your appeal" bottom in their reserved area. Users have to make sure they have all the necessary documentation (e.g., the identification document of the person or company for whom the complaint is being submitted; the documentation useful for the complaint, which includes, in particular, the complaint sent to the intermediary: recourse to the ABF presupposes the transmission of a prior complaint to the intermediary, see Bank of Italy provisions of 18 June 2009, Section VI, par. 1), copy of the signed agreement, account statements, the receipt for payment of contribution to the ABF.

actions<sup>107</sup>. Files that may be attached shall observe formats allowed<sup>108</sup>; for example, "video" files are not accepted in support of the complaint and cannot be uploaded to the portal<sup>109</sup>. The complaint will be finalised and submitted by clicking on the bottom "transmit the appeal".

Through the online portal, users can perform all the relevant activities concerning the complaint, which are in particular: (i) monitor the status of his/her complaint; (ii) respond to requests for additional documentation sent by the ABF<sup>110</sup>; (iii) receive and send documentation; (iv) renounce the complaint or inform the ABF on reaching an agreement with the intermediary; (v) receive the intermediary's counterarguments and reply to them; and (vi) request support and contact the ABF.

Once the procedure is finalised, the complaint dossier<sup>111</sup> will be submitted to the ABF panel in charge of resolving the dispute<sup>112</sup>, which may also meet by videoconference<sup>113</sup>. The decision of the ABF will be communicated through the online portal<sup>114</sup>.

<sup>107</sup> The guided procedure requires the user to provide the necessary information (e.g., the name of the intermediary) and to give a description of the dispute and the reason for the complaint in a specific box; users are then required to upload the documents necessary to submit the complaint. For further information, consult the guide for using the ABF portal available at <<https://www.arbitrobancariofinanziario.it/presentare-ricorso/index.html>> accessed 25 February 2021.

<sup>108</sup> Files allowed are the following:  
doc, .docx, .pdf, .xls, .xlsx, .rtf, .txt, .jpg, .jpeg, .tiff, .bmp, .png.

<sup>109</sup> In addition, it will not be possible to transmit documentation containing special categories of personal data or data relating to criminal convictions and offences (provided for in Artt. 9 and 10 of EU Regulation no. 679/2016) through the ABF Portal. After submitting the complaint online, users will still be able to send relevant documentation to the PEC address of the Bank of Italy branch where the relevant technical secretariat operates; for further information, consult the guide for using the ABF portal available at (n 1299).

<sup>110</sup> The Panel in charge of resolving the dispute can request further evidence from the parties, see Bank of Italy provisions of 18 June 2009, Section VI, par. 2.

<sup>111</sup> A technical secretariat is in charge of compiling the complaint dossier, see Bank of Italy provisions of 18 June 2009, Section IV.

<sup>112</sup> Each panel consists of five members, operating on a territorial basis, see Bank of Italy provisions of 18 June 2009, Section III, par. 1 and 2.

<sup>113</sup> The Panel is duly constituted with the presence of all five of its members: if necessary, the member appointed as President arranges for the panel meeting to be held by videoconference, with the connection from one of the Bank of Italy's branches, see Bank of Italy provisions of 18 June 2009, Section III, par. 4.

<sup>114</sup> Relevant decisions are published online on the ABF's website, see Bank of Italy provisions of 18 June 2009, Section IV, par. 2; notice of the intermediary's failure to comply or lack of cooperation is published online on the ABF website for

Filing a complaint in paper copy to the ABF is possible only under specific circumstances<sup>115</sup>; the ABF will not accept complaint filed in paper copy under circumstances other than those expressly provided for.

Based on the ABF model, the Arbitro per le Controversie Finanziarie (ACF) was established in 2016 concerning disputes in the financial markets sector. Thus, ACF is competent for disputes concerning investors<sup>116</sup> and financial intermediaries (including banks) within the realm of the provision of investment services and activities, while ABF is competent for disputes involving customers and (also) banks about the provision of banking services and activities.

Provisions regulating the submitting of complaints to the ACF almost replicate those governing the submission to the ABF<sup>117</sup>. In particular, Consob Resolution no. 19602 of 4 May 2016 and Consob Resolution no. 19700 of 3 August 2016 are to be taken into account<sup>118</sup>.

Users are required to register themselves firstly at the ACF website<sup>119</sup>. Then, submit the complaint by accessing the "reserved area" on the same; the procedure is free (no contribution is needed in comparison to ABF procedure) and takes place exclusively online following the guided procedure once entered in the reserved area. All documents shall be uploaded only in PDF or image format<sup>120</sup>.

Users can monitor their complaint, access and view the complaint dossier, receive and transmit communication and documentation online

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five years and prominently on the home page of the intermediary's website for 6 months, see Bank of Italy provisions of 18 June 2009, Section VI, par. 4.

115 These are the following: (i) when the complaint is made against two or more intermediaries at the same time; (ii) when the complaint is made against a foreign intermediary operating in Italy under the freedom to provide services; (iii) when the complaint is made against a loan guarantee consortium, according to Art. 112, par. 1, Italian Consolidated Law on Banking. When a complaint is filed in paper copy, the complaint form may be filed, together with all the relevant documents, by mail or fax to the competent technical secretariat or any other Bank of Italy branch. The complaint may also be presented in person at one of the Bank of Italy branches open to the public.

116 Retail investors, according to Art. 2, par. 1, lett. g), of the Regulation concerning ACF, adopted by Consob Resolution no. 19602 of 4 May 2016.

117 Even in such cases, a pre-condition to starting the procedure is that a prior complaint has been submitted to the intermediary, see Art. 10, Regulation concerning ACF, adopted by Consob Resolution no. 19602 of 4 May 2016.

118 For further information, consult the practical guide available at (n 103).

119 For further information, see <<https://www.acf.consob.it>> accessed 25 February 2021.

120 For further information, consult the practical guide available at (n 103).

by accessing their reserved area at the ACF website. Users are informed of each stage of the complaint and the inclusion of documents in the complaint dossier through the pec/mail address they have indicated when registering themselves at the ACF website.

The panel in charge of solving the dispute can also meet through teleconferencing or videoconferencing remote connection systems<sup>121</sup>.

Based on the favorable experience already gained in the banking and financial markets sector, an ADR body ('Insurance Arbitrator') is to be established for the insurance sector to match the significant results achieved by ABF and ACF in ensuring an accessible, rapid and less expensive redressing methods for customers<sup>122</sup>. However, the approval of the regulation of this new ADR is still pending.

In conclusion, ADR systems in financial sectors are examples of applying digital tools in dispute resolutions and the benefits these can bring. It should be pointed out that ADR systems are not subject to the same procedural and constitutional safeguards characterizing ordinary judicial proceedings; therefore, it seems more comfortable for ADR systems to reconcile the application of digital tools with rights granted to the parties involved in the dispute.

## *6. Conclusive remarks*

The Italian legal system explicitly recognises DLTs and smart contracts and sets-up a legislative framework governing their uses and their legal effects, even though the same is currently incomplete. The legal definition of DLTs and smart contracts has been criticised on the assumption that it violates the principle of technological neutrality, and that it provides

121 See Art. 7, Resolution no. 19700 of 3 August 2016. If the panel accepts the complaint made by the investor, it will indicate the action to be taken by the intermediary, specifying a time limit within which such actions shall be executed. If the intermediary does not comply with the decision, notice will be given on the ACF website, in two national newspapers and on the home page of the intermediary's website, see Art. 16, Regulation concerning ACF, adopted by Consob Resolution no. 19602 of 4 May 2016.

122 Art. 187.1 of Legislative Decree n. 209 of 7 September 2005, as recently introduced by Legislative Decree n. 187 of 30 December 2020. The provision sets forth that insurance companies and insurance distributors shall adhere to alternative resolution systems for settling disputes with customers concerning insurance services arising from all insurance contracts, without any exclusions. In agreement with the Minister of Justice, a decree by the MiSE should set up these systems.

for additional requirements for the fulfilment of the written form. The AgID guidelines should help setting out and clarifying the DLTs legal framework.

Specific sectors of the legal affairs showed individual activism in the implementation of DLTs and blockchain-related projects in comparison to others. Some projects have been dropped and others are still in use and object of further development. In general terms, the process is currently at its starting phases and yet to be consolidated. However, some achievements have been so far collected.

Furthermore, Italy has been considered to have relatively highly developed IT facilities about digital tools applied to civil court proceedings. Notwithstanding this, criticisms have highlighted for the complexity of certain aspects of the system underlying the PCT and the formalistic interpretation of its rules adopted by the judiciary. Besides, the epidemiological emergency due to COVID-19 forced the legislator to adopt rules which increased the application of digital tools to civil judicial proceedings; it is not sure whether and how eventually they will shape on a definitive basis the PCT.

Lastly, ADR systems in financial sectors are seen as encouraging experiences in terms of applying digital tools in dispute resolutions and the benefits these can bring; on this basis, a similar ADR system will also be established also in the insurance sector. It may be appropriate to exploit such experiences to identify digital tools that can grant parties rights and the proper functioning of dispute resolution mechanisms also in other sectors<sup>123</sup>.

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123 EU Commissioner for Justice Didier Reynders stated recently that “Italy has to deal with very long trials [...] There are ways to use digital tools to improve the situation. We believe that in the recovery plans it is necessary to invest in the digitalization of justice”; further information available at <<https://24plus.ilsole24ore.com/art/il-commissario-ue-giustizia-reynders-processi-troppo-lunghi-l-italia-in-vesta-strumenti-digitali-ADAwiyLB>> accessed 25 February 2021.

## Lithuania

*Vytautas Nekrošius*

### *1. To which extent are LegalTech means used in your country: in courts, arbitrations, law firms?*

LITEKO and ESP (electronic service portal which is a component of LITEKO system) are electronic systems of the court. Both natural and legal persons, where relevant, may use the services of those systems by obtaining access through E-Government Gateway. LITEKO system is managed and maintained by the National Courts Administration. Electronic signature is not required to log into E-Government Gateway. One may log in through e-banking or by means of mobile signature. In other words, the current system ensures quite an easy access to the system.

The LR Law on Commercial Arbitration provides for a fragmented regulation of the use of electronic means in the process of arbitration; basically, the competence to decide on the use of electronic means is handed over to the arbitral institutions themselves. As for the legislative governance, Article 10(1)(3) may be singled out as it provides for that an arbitration agreement may be concluded by using electronic communications terminals provided that the integrity and authenticity of information so transmitted is ensured and the content of the transmission is made available for later access; Article 34(1) stipulates that an arbitral tribunal shall decide on the form of arbitral proceedings, unless agreed by the parties. Arbitral proceedings may be conducted in the form of oral hearings or a written or any other procedure. Where it comes to the activities of arbitral institutions, it may be stated that the main Lithuanian arbitral institution, Vilnius Court of Commercial Arbitration, uses ARBIS (arbitration information system) as the principal platform which is employed to ensure the existence of an electronic arbitration case. It must be noted that Article 31(1) of the Arbitration Rules of the VCCA establishes the general rule that all disputes falling within the scope of these Arbitration Rules shall be administered and dealt with through the Vilnius Court of Commercial Arbitration Information System (ARBIS).

2. *Are Blockchain and DLT technologies used in courts or other public institutions?*

Blockchain technologies are not used in Lithuanian public institutions.

3. *Electronic communication with courts. Regulatory framework, delivery and submission of documents. Is electronic signature required? How does communication with the persons other than natural persons take place? Online hearings. How are arbitral awards adopted and pronounced?*

The use of information technologies in court proceedings and existence of electronic cases are established in Article 371 of the LR Law on Courts. Paragraph 1 of this Article provides for that electronic data related to court proceedings shall be handled, included in accounting and stored by means of information and electronic technologies following the procedure established by the Judicial Council and approved by the Office of the Chief Archivist of Lithuania. The cases concerning the issuance of the court order as well as other cases established by the Judicial Council and information related to the court proceedings may be handled by electronic means only. In the event of an electronic case, the written information received and sent by courts shall be digitalised following the procedure laid down in paragraph 6 of this Article, whereas the written documents shall be handled, stored and destroyed as per procedure established by the Judicial Council and approved by the Office of the Chief Archivist of Lithuania. Paragraph 3 of the same Article provides for that the parties to the proceedings shall be entitled to submit all procedural documents and information related to the court proceedings in an electronic form by electronic means following the procedure established by the Minister of Justice. The persons submitting the procedural documents by electronic means shall sign them using advanced electronic signatures or shall confirm their identity by other means (through e-banking systems, etc.), or shall log into the court information system. The requirements for authentication and ways of authentication shall be established by the Minister of Justice. Finally, paragraph 4 therein provides for that in the cases established by law, the courts shall notify the parties to the proceedings of procedural actions or procedural decisions by electronic means following the procedure established by the Minister of Justice.

The format of electronic cases is considerably common in civil and administrative procedures but this option is basically abandoned in criminal procedures.

Several amendments to the Code of Civil Procedure (CCP) contributed significantly to the spread of information technologies in the civil procedure. First of all, it is the provision of Article 80(7) of the CCP which establishes that where a person submits a procedural document to the court by electronic means, stamp duty of 75 % shall be paid. This provision, without doubts, encouraged the applicants and their counsels to make use of the option of submitting procedural documents by electronic means and thus initiate the conduct of the electronic case in specific proceedings, which leads to the submission of all other procedural documents and notification of the time and venue of court hearings by electronic means as well. Another important provision is stipulated in Article 1751(9) of the CCP which establishes quite an exhaustive list of entities which are, in all cases, submitted procedural documents in an electronic form. The mandatory entities subject to electronic submission are lawyers, paralegals, bailiffs, assistant bailiffs, notaries, public and municipal enterprises, institutions and organisations, financial institutions, insurance and audit firms, judicial experts and insolvency administrators. The Law also provides for that the court shall deliver procedural documents to other persons by electronic means, where such persons desired to receive them by electronic means under the procedure laid down in the Code and have provided the contact details required. The procedure and form of delivery of procedural documents by electronic means shall be established by the Minister of Justice.

As for the use of information technologies during court hearings, Article 1752 of the CCP must be emphasised as it establishes the ability to use information and electronic communications technologies (video conferences, teleconferences, etc.) to ensure the participation of the parties to the proceedings at the court hearing and enable the witness's interrogation at his location. It is also worth mentioning that Lithuanian courts, in the face of pandemic, are actively using TEAMS and ZOOM platforms. Paragraph 2 of the same Article provides for that information and electronic communications technologies (video conferences, teleconferences, etc.) may be employed to take evidence.

In terms of the use of information and electronic means in the Lithuanian civil and administrative procedures it is very important to note that LITEKO system publishes information on the time and venue of court hearings, deliveries of procedural documents are made public and anonymised decisions and rulings of the courts of all instances are uploaded.

*Vytautas Nekrošius*

*Future plans*

On the subject of the perspective, it must be noted that the State is currently financing the essential upgrade of LITEKO system as the capacities of the existing system are clearly insufficient for considerably developed abilities to use information and electronic technologies in the proceedings.

# Mexico

*Mauro Arturo Rivera León*

## *1. LegalTech used in Mexico*

Law firms in Mexico rarely rely on advanced LegalTech. According to "Thomson Reuters 2018 Poll Opinion on Tech in Law in Mexico", 84 % of Mexican lawyers utilize some basic form of technological aid to perform legal work. However, the usage and knowledge of artificial intelligence (AI) are relatively low, and current resources are used mainly in administration and billing matters. The same poll concluded that Mexican lawyers are generally non-familiar with LegalTech and perceive its advance as rather slow. Nonetheless, singular exceptions may be pointed out,<sup>1</sup> in what must be considered a promissory future<sup>2</sup>.

Arbitration in Mexico has yet to incorporate LegalTech. However, regarding mediation, a significant project exists related to consumers' rights. In 2008, the Consumer Protection Federal Agency (Procuraduría Federal del Consumidor- PROFECO) initiated the "Concilianet" project. Concilianet is an online dispute resolution (ODR) mechanism that allows a simplified version of the registration and filing of complaints relative to a breach of warranty, breach of contract, or refusal to surrender<sup>3</sup> not restrict-

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1 For example, Advosoft (software which organizes the workload of Law Firms and additionally manages Court Dates), Trato (a system that manages and controls electronic contracts securely through Blockchain technology), or Contactabogado (a system that generates automatic contacts between potential clients and lawyers through offer and demand in an automatized system). Noteworthy is also "Max", the virtual lawyer of the Fractal Abogados Law Firm (which offers automatized legal advisory through a Facebook bot chat capable of calculating precise compensations in Labor Law cases). Finally, worth mentioning is also the GEBD Legal-Tech Firm, which offers e-consulting and digital administration of cases and CIAJ (developing legal technology regarding access to justice), *inter alia*.

2 See the Mexican report on LegalTech by Legaltechies: Legaltechies, 'El estado de la Legaltech en... México' (legaltechies.ec, 25 November 2020) <<https://bit.ly/371wbZk>> accessed 10 February 2021.

3 Louis Del Duca, 'Facilitating expansion of Cross-Border E-Commerce- Developing a Global Online Dispute Resolution System' (2012) 1, 1 Penn State Journal of Law & International Affairs 66.

ed to online contracts or services. Conciliánnet does not allow PROFECO to determine compensation coercively but instead relies on the parties' agreement. However, the lack of a mediation agreement does not ban consumers from bringing actions to Court if the parties disagree on the remedy or want to pursue damage claims (which are inadmissible under Conciliánnet). The ODR managed to reduce the resolution time per complaint from 73 days to 22<sup>4</sup> while maintaining a high percentage of positive outcomes<sup>5</sup>.

Despite recent criticism,<sup>6</sup> the Federal Judiciary rarely employs Legal-Tech in automatized procedures (actual legal workers perform most bureaucratic procedures such as the processing and serving of court notices, including hearing notices, as well as undertaking agenda management and the publishing of rulings and procedural decisions). The standard "digital" resources remain the "SISE" electronic system which allows the tracking of case files, procedural history and documents as well as the compilation of binding precedents (*Semanario Judicial de la Federación*), and a relatively complex Search engine (*Buscador Jurídico*, employing AI in data search algorithms). Also worth mentioning are the auxiliary search engines of "*Consulta Temática*" and "*Módulo de informes*". Besides the abovementioned tools, there is extensive use of electronic case files, the possibility of filing documents using electronic signatures, and a recently introduced automatized website for the management and generation of hearings (System "*Agenda OJ*"), which generates a QR code correlated to the Court hearings. Some of these features will be analyzed further in this report.

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4 Gabriela Szlak, 'Online Dispute Resolution in Latin America: Challenges and Opportunities', in Mohamed Abdel Wahab and others (eds) *Online dispute resolution: Theory and Practice* (Eleven International Publishing, 2012) 554.

5 For example, in 2019, the percentage of favorable conciliations was 84.73 %, over the 7,780 cases processed. See the Consumer Protection Federal Agency, Procuraduría Federal del Consumidor, 'Informe Anual de la Procuraduría Federal del Consumidor 2019' (PROFECO, 2019) 22.

6 Santiago Oñate and Martín Haissiner, 'Tribunales digitales y jueces máquina' (2020) El mundo del abogado 22.

## *2. Blockchain and DLT in government systems.*

Currently, neither the Judiciary nor any other state bodies employ Blockchain in Mexico. However, recently a legislative initiative<sup>7</sup> proposed a transition to full electronic voting through Blockchain; thus, a future discussion may arise on this topic. Blockchain is sometimes used by private companies.

## *3. Electronic communication with the Court.*

Mexico is a federal country. The 32 states are entitled to issue Civil, Administrative, and Criminal legislation. Although recent centralization amendments to the Constitution have transferred to the federation legislative competences to issue unifying legislation regarding Civil and Criminal law<sup>8</sup>, the states are still in charge of applying that legislation if the case falls within their jurisdiction. This fragmentation implies that the federal entities' situation mostly depends on implementing programs by their judicial powers (administered by Judicial Councils) while the federal procedures hold a separate and autonomous status. Mexican "Amparo" is a remedy for protecting constitutional rights, which allows the Federal Judiciary to review in practice both local and federal ordinary judicial decisions<sup>9</sup>. Hence, this report will center mostly on the Federal Judiciary.

<sup>7</sup> Deputy Adriana Medina, "Iniciativa con Proyecto de Decreto que reforma diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos y la Ley General de Instituciones y Procedimientos Electorales en Materia Electoral", in Gaceta LXIV/1SR-25/97621. Available at: <<https://bit.ly/3pjngsF>>, accessed 24 July 2018. Mexican Electoral Law seems particularly prone to considering Blockchain in certain processes. For a proposal regarding the financial audit of political parties see: Gabriela Valles, 'Financiamiento Público de los Partidos Políticos en México: tópicos controversiales y propuesta de alternativa tecnológica para su fiscalización', (2018) 27, 2 Díkaion 303-305.

<sup>8</sup> The National Code of Criminal Procedures was published on 5/03/2014 at the DOF. In contrast, even though a constitutional amendment (DOF 15/09/2017) established a federal constitutional competence to regulate a common National Civil and Family Procedural Code, to date such a Code has not been issued. Therefore, Civil Procedure in the states is still governed by local legislation.

<sup>9</sup> Recently I provided an introductory account of our complex Amparo procedure. See: Mauro Arturo Rivera, 'An introduction to Amparo Theory' (2020) 12, 2 Krytyka Prawa 190-208.

Amparo was the first procedure to employ electronic communications. In 2013, the Amparo Act (DOF 02/04/2013) introduced the possibility of employing electronic communications with the Courts in Amparo cases (District Courts, Unitary Courts, Circuit Courts, and the Mexican Supreme Court).

Article 3 of the Amparo Act, as inherited from the 1936 Amparo Act, maintained the traditional written nature of the Amparo trial (the procedure lacks formal oral hearings). However, the second paragraph openly stated that the plaintiff might discretionally choose whether to file documents physically or electronically. Article 3 issued a relatively extensive regulation of such communications. In the first place, it stated that parties must file all digital communications employing an electronic signature, designed by the Federal Council of the Judiciary<sup>10</sup>. Therefore, the law required an electronic signature *sine qua non* regarding the digital filing of documents, with the sole exception of a *numerus clausus* catalog of cases<sup>11</sup>. Ordinary federal procedures followed the Amparo legislation by an amendment to article 81.XVIII of the Federal Judiciary Act, granting competence to the Federal Judicial Council to establish digital judicial files and electronic signature usage in these procedures (homologating them somewhat to the possibilities in Amparo).

Notwithstanding, the law upheld the obligation for the Courts to hold physical files matching the digital archives. Only the involved parties may access physical case files. In contrast, digital files are openly accessible to everyone through an electronic system called "SISE" (Sistema Integral de Seguimiento de Expedientes), which offers unlimited access to any rulings or procedural decisions (with name suppression). The Amparo Act equally

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10 Jaime Cardenas, 'La nueva Ley de Amparo', *Cuestiones Constitucionales* (2013) 29 Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional 389.

11 For example, cases regarding situations which may endanger the plaintiff's life or affect personal freedom outside the procedure, among others, are exempt from the electronic signature. This catalog of situations corresponds to what the doctrine has called the hypotheses of "Universal Representation", that is, cases in which any person may file an Amparo in the name of another person given the severe nature of the acts. See: Mauro Arturo Rivera, 'Las partes en el juicio de amparo' in Juan González and others (eds) *Teoría y Práctica del Juicio de Amparo*, (Flores Editor, 2018) p. 156, Supreme Court of Mexico City. Besides this case, any plea without an electronic signature must be dismissed, as the Supreme Court stated recently in the CT 45/2018 and in the legally binding precedent P.J. 8/2019 (10a.), titled: "Demanda de amparo indirecto presentada a través del portal de servicios en línea del poder judicial de la federación. Procede desecharla de plano cuando carece de la firma electronica del quejoso" (Digital Registry 2019715).

regulated the electronic service of court documents, although it expressly made such a service optative and binds this possibility only to those parties possessing an electronic signature. Under the 21/2020 Regulation of the Federal Judicial Council, the Courts serve documents regarding future Court hearings or procedural obligations, providing them with a QR code which contains the relevant information and access permits to the Court.

In 2013 the Federal Judiciary issued the 1/2013 Joint Regulation by the Supreme Court, the Electoral Court of the Federal Judiciary, and the Judicial Council. The regulation stipulated a procedure to obtain an electronic signature for natural persons only. Legal persons may not have an electronic signature, and their representatives must open accounts as natural persons and only then file documents in the representation of the legal person. The newly created electronic signature (called "FIREL") established a distinctive procedure for its access comprising electronic registration and a verification consisting of several steps. Nevertheless, the regulation (article 5) established the possibility of employing other "digital electronic signatures" issued by an official state body if the Federal Judiciary has concluded a coordination agreement of the recognition of such digital certifications (although the apparent rigidity of the need of such agreements was the subject of analysis by the Supreme Court in the CT 220/2017)<sup>12</sup>. The joint regulation created a full special unit at the Federal Judiciary solely devoted to the issuing and administration of the electronic signature ("Unidad para el Control de Certificación de Firmas"). The 1/2015 Joint Regulation substituted the previous 1/2013 Joint Regulation and clarified the hypotheses in which the parties may employ the electronic signature while adhering to the original concept (according to the Supreme Court itself in the CT 45/2018).

Filing of evidence is also possible through digital means. The validity of evidence is assessed by the rules established in the Joint Agreement 1/2013 (principally in article 12), which classifies the types of documents whose validity is presupposed in virtue of their digital certificates (mainly a distinction between "public" and "private" documents). The Supreme Court (for example, AR 307/2020) has stated that physical documents may

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12 In the CT 220/2017, the Second Chamber of the Supreme Court established a binding precedent for all judicial bodies (bar the Electoral Court and the Supreme Court itself). The Court stated that in the case of Amparo against final judicial rulings (Amparo Directo), if the authority who issued the appealed act (for example, the judicial power of a state) recognized such an electronic signature, the lack of an institutional agreement was irrelevant to grant that electronic signature full validity in the legal process before the Federal Judiciary).

only be exceptionally required when the authenticity of such documents is doubted by the parties and the judge. All digital trial services are detailed on a special website created by the Federal Judiciary<sup>13</sup> with online support. Parties may file documents in pdf, .doc or .docx extensions.

#### *4. Online court proceedings.*

Mexico currently employs online Court proceedings<sup>14</sup>. Given the fact that "Amparo" is a predominantly written procedure, as from the introduction of the electronic signature (FIREL) in the 2013 Amparo Act, the full procedure may be performed online by filing the documents and evidence as digital attachments (as explained above). The Federal Judiciary was already holding fully functional trials seven years before the 2020 pandemic. Rulings and procedural decisions are produced, updated, and served directly through the website in the case of online proceedings. Oral hearings concerning argumentation by the parties are neither forbidden nor expressly regulated. Therefore, Judges may discretionally grant private oral hearings through platforms such as Zoom.

Other procedures concerning the Federal Judiciary may have a rather smooth transition to online regulation in 2020, given the Amparo trial experience. However, criminal procedures have posed some concerns because of their oral and accusatorial nature<sup>15</sup>. Criminal cases currently employ Cisco or "Telmex" software for hearings. However, prisons often lack the type of internet connection or spaces required to perform a hearing properly (a substantial number of processes involve preventive prison). The lack of infrastructure in prisons led to the paradoxical fact that audiences are often undertaken with the accused's physical presence in the Courtroom while the Judge, Prosecutor, attorneys, and remaining parties attend the audience remotely.

Even though, initially, online proceedings pertained to Amparo, given the pandemic, the Supreme Court issued the 10/2020 regulation, establish-

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13 <<https://www.serviciosenlinea.pjf.gob.mx/juicioenlinea/juicioenlinea>> accessed 12 February 2021.

14 *In toto*, is well illustrated in the following report: Arturo Ramos, (coord.), 'Observatorio: Avances de Justicia Abierta en Línea en México 2020' (Escuela Libre de Derecho, 2020) 41-46.

15 Campos analyzed some of this problems: Jorge Campos, 'La justicia penal en tiempos del Covid-19. Los retos de las videoconferencias'(2020) VI, 6 Paréntesis legal.

ing online procedures of conflicts of competences and abstract normative control, thus fully transitioning to online proceedings in its three main competences. The first half of 2020 featured a generalized suspension of procedures in Mexico due to the pandemic, with a transitory partial return of certain procedures in the second half of the said year. Depending on the epidemiological situation, some judicial circuits returned to suspension in 2021, while the ones functioning do so mostly by resolving only digitally filed procedures or procedures with digitalized case files.

Traditionally in Mexico, judicial deliberations must be public (article 96 of the Constitution). Even prior to the pandemic, the Judicial TV Channel was already transmitting the Supreme Court's sessions (both in full composition and in chambers) and the Electoral Court's sessions. In 2020 the Supreme Court issued the 4/2020, 5/2020, and 6/2020 Regulations, establishing binding guidelines in relation to Zoom deliberating sessions. Such regulations stipulated safety measures and protocols concerning potential internet issues. The sessions are transmitted simultaneously on the Judicial Channel and YouTube. The Electoral Court of the Federal Judiciary<sup>16</sup> and the Circuit Courts<sup>17</sup> followed up the mechanics of remote sessions.

The Federal Judiciary does not allow Judges or legal clerks to perform official work or hearings on private computers. Usually, every judicial functionary is assigned a working laptop, which is mandatory to perform remote work. Only an official laptop may activate the internal informatics systems and databases of the Federal Judiciary (a Judge or Law Clerk would not be capable of accessing any files or legal documents if not in possession of an official laptop with the updated permits). The Federal Judiciary employs a VPN system that provides an encrypted connection to the judicial network (Commonly through "Global Protect").

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16 Regulation 4/2020, "Acuerdo general de la Sala Superior del Tribunal Electoral del Poder Judicial de la Federación Número 4/2020, por el que se emiten los lineamientos aplicables para la resolución de los medios de impugnación a través del sistema de videoconferencias", (DOF 22/04/2020).

17 Regulation 12/2020, "Acuerdo General del Pleno del Consejo de la Judicatura Federal, que regula la integración y trámite de expediente electrónico y el uso de videoconferencias en todos los asuntos competencia de los órganos jurisdiccionales a cargo del propio Consejo", (DOF 12/06/2020).

*5. AI in the justice system.*

AI is not employed in the judicial system for decision-making. However, the Supreme Court recently (2019<sup>18</sup>) created a unit dedicated to legal knowledge administration (Unidad General de Administración del Conocimiento Jurídico). Among its functions, the Unit must implement open government policies concerning the Supreme Court, develop systems of data management, and propose appropriate tools for the use of technology to strengthen the justice system (article 3 of the XIII/2019 Regulation).

The Unit developed a search tool ("Buscador Jurídico") that relies on artificial intelligence algorithms to search for information in a matrix that combines all the databases available to the Federal Judiciary (rulings, decisions, precedents, dissenting opinions, legal doctrine). The system can analyze legal text (such as a plaintiff's argument) and suggest applicable precedents to the argument or binding case law regarding the legal topic described. Currently, the Federal Judiciary is working on improving the "Buscador Jurídico" to enable searches to comprehend even Zoom oral hearings and Zoom public deliberations by the Court.

*6. Future plans and challenges.*

The challenges for the future are clear. The Federal Judiciary must make a full transition to online procedures as this would enable addressing the backlog of cases, especially under the current circumstances in which a return to normality seems rather a distant possibility. Amparo's electronic procedure was designed before the pandemic, allowing for a careful configuration. However, the Federal Judiciary took the remaining measures in direct reaction to the pandemic through administrative regulation of the Supreme Court of the Council of the Judiciary. Therefore, in front of the legal system lies the challenge of creating a further comprehensive regulation that stays ahead of procedural needs and one which is not a mere reaction to the complex circumstances of 2020-2021. Despite a

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<sup>18</sup> See the General Regulation XIII/2019, "Acuerdo General de Administración número XIII/2019 del Presidente de la Suprema Corte de Justicia de la Nación, de doce de noviembre de dos mil diecinueve, por el que se establece la denominación de la Dirección General de Justicia TV Canal del Poder Judicial de la Federación y de la Dirección General de Derechos Humanos y se crea la Unidad General de Administración del Conocimiento Jurídico" (DOF 21/11/2019).

few states having implemented similar measures even before the Federal Judiciary<sup>19</sup>, local justice must also notably increase its efforts.

In summary, the success of online procedures lies in the transition from "digitalizing" the existing trials to creating unique online procedures with their own specifications and distinctive dynamics. Further challenges lie ahead in terms of extending the usage of LegalTech to process, analyze and locate legal precedents (a challenge in which the brand new "Unidad General del Conocimiento Jurídico" might play a key role). The 2021 constitutional amendment introduced a complex new system of binding legal precedents, and therefore developing the proper technological tools to be able to track, identify and analyze thousands of rulings and legal precedents is paramount to its functioning.

Furthermore, it is worth noting that most technological developments have centered on administration tasks and not on decision-making tools: a clear opportunity area. In the legal market, the consolidation of a solid LegalTech ecosystem may happen in the foreseeable future, despite resistance from traditional lawyers. Finally, 2021-2023 may feature legislative discussions on the potential usage of Blockchain by governmental bodies.

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19 A notable case is Nuevo León. See García Myrna, 'Juzgado sin papel, un paso más de la justicia electrónica' (2018) 12, 41 Revista Ius133-154.



# Poland<sup>1</sup>

Aleksandra Partyk

## *Introduction*

The process of informatisation of the Polish administration of justice is far from being perfect. Polish judicature cannot be regarded as the most modern and effective system of the old continent. Judges and employees of the Polish administration of justice have become, however, equipped with certain – wider and wider – possibility to use modern technologies for professional purposes, although it seems that this possibility could be significantly broader. Undoubtedly, the absence of optimal utilisation of IT tools in the functioning of the administration of justice constitutes one of the causes – not as serious as understaffing and overburdening judges with work, though – that result in lengthiness of court proceedings<sup>2</sup>. For it is impossible to disagree with the claim that the final effectiveness is influenced not only by procedures, but also by the work environment<sup>3</sup>.

In the current legal circumstances, it is out of the question for the administration of justice to be executed by artificial intelligence. It does not mean, however, that there is no possibility for the judges and court employees to use dedicated computer programs, including those utilising selected artificial intelligence mechanisms, which could have positive influence on the way the Polish administration of justice functions. Usefulness of these programs is beyond doubt. On the one hand they greatly contribute to improvements in the workings of courts (although undoubtedly there is still significant room for utilising modern technologies within the administration of justice in order to improve its effectiveness). On

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1 The research was financed from the funds allocated for the maintenance and development of research potential in the discipline of legal sciences no. WPAiSM/PRAWO/SUB/12/2021. Translated by Krystyna Sylwestrow.

2 Aleksandra Partyk, 'Initiating proceedings in a civil case using AI? Selected comments regarding Polish civil procedure' in: García G. Javier, Alzina L. Álvaro and Martín R. Gabriel (eds), *El derecho público y privado ante las nuevas tecnologías* (Dykinson 2020) 662.

3 Ł. Małecki-Tepicht, 'Rewolucja cyfrowa w sądownictwie – przegląd obszarów i narzędzi wzmacniania efektywności wymiaru sprawiedliwości' (2020) 2 *Iustitia* 70.

the other hand, informatisation of the administration of justice, even at its current stage, undoubtedly facilitates – and does so to a considerable extent – the accessibility of courts for the public, especially thanks to Court Information Portals which enable the parties, proxies and other authorised persons to access – by digital means – information on their court cases. In this study key IT solutions will be presented which are used on various fronts of the fight for an efficient legal process. As it will be demonstrated not all solutions which are currently in use entirely fulfil the tasks, they are assigned which demands the question to be asked about the need and possibility of modernising them.

### *Electronic writ of payment procedure*

First of all, the so-called e-court (<https://www.e-sad.gov.pl>) is worth presenting. It is not an IT tool available to Polish courts at large. There is only one court which has been equipped with it so far, namely the District Court Lublin-West in Lublin, 6<sup>th</sup> Civil Division which performs the function of a national court proceeding electronic writ of payment procedures<sup>4</sup>. The said district court is partially competent to adjudicate cases under electronic writ of payment procedures regardless of the value of the asserted claim<sup>5</sup>. Proceedings under this formula are subject to regulations included in the Code of Civil Procedure (CCP hereinafter) and were introduced in Poland on the 1st of January 2010. As it emphasized in literature court proceedings before the e-court are equivalent to proceedings taking place in an ordinary writ of payment procedure in which a court issues an order for payment, should it recognize a claim as well-grounded, while defendants may dispute the decision issued and have the right to submit a statement of opposition resulting in the order for payment becoming void<sup>6</sup>.

The legislator has unambiguously regulated what kind of claims can be considered under the electronic writ of payment procedure. Above all, this procedure is dedicated to prosecuting monetary claims only. It arises

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4 Cf The regulation by Minister of Justice issued on the 14 December 2010, amending the regulation regarding determination of the district court to which adjudication is transferred of cases under the electronic writ of payment procedure, when other district courts are competent (Dz.U. 2010.245.1646).

5 Cf Katarzyna Jasińska, 'Czy "referendarza z Lublina" może zastąpić "sędzia robot"?' (2020) Studia Prawnicze. Rozprawy i Materiały 91.

6 *ibid.*

from the procedural regulations directly that the issuance of an order for payment is excluded in cases where the plaintiff seeks to claim something else than money and when the order was to be served to the defendant out of the country. Only claims which became due during three years preceding the day the statement of claim is filed can be brought under this procedure. This corresponds to the general term of limitation considering claims for periodical payments and claims prosecuted by entities running economic activities (*Cf.* art. 118 of Polish Civil Code<sup>7</sup>). Prerequisites that prevent issuing an order for payment under the electronic writ of payment procedure are also as follows: an obvious lack of grounds for the claim and doubts regarding the facts on which the suit is based<sup>8</sup>. It is significant that no evidence is attached to the statement of claim filed under the electronic writ of payment procedure; the e-court takes a decision – to issue an order for payment or to discontinue proceedings due to the lack of grounds for issuing the order for payment – solely basing on the statements put by the claimant into the statement of grounds for the claim. This regulation, on the one hand, enables the claimant to obtain an order for payment relatively easily, it entails, however, the requirement of explaining all the circumstances important for the case precisely in the statement of grounds, as the court does not investigate any facts whatsoever beyond what the claimant offers. Whereas any doubts concerning the grounds for the brought claim lead to the refusal to issue an order for payment and termination of the lawsuit. What is more, the defendant can bring the legal existence of the order for payment to nullification by submitting a statement of opposition within two weeks counted from the day of service of the certified copy of the order<sup>9</sup>. The statement of opposition does not require any reasons, even a one-sentence defendant's letter from which it appears that they do not agree with the decision issued has legal effect. When a statement of opposition is submitted the court terminates the proceedings to the extent to which the order for payment which became null and void. Whereas an order for payment concerning which the defendant did not submit a statement of opposition within statutory period is effective equally to a valid judgment.

The electronic writ of payment procedure is not of obligatory character. And so the plaintiff can take advantage of the possibility for their case to

<sup>7</sup> The Act of 23 April 1964, Civil Code (Dz.U. 2020.1740).

<sup>8</sup> Cf Łukasz Goździaszek, 'Informatyzacja postępowania cywilnego' in: Kinga Flaga-Gieruszyńska, Jacke Gołaczyński (eds), *Prawo nowych technologii* (Wolters Kluwer 2021) 153.

<sup>9</sup> See the Supreme Court resolution of 9.06.2017, III CZP 21/17 (LEX no. 2301818).

be adjudicated under this procedure (provided that certain prerequisites occur)<sup>10</sup> or they can file the case immediately under the „traditional” court procedure. What is more, the plaintiff has the possibility to initiate a „traditional” court proceeding later if the electronic writ of payment procedure ended when the decision to discontinue it was issued – whether because of the lack of grounds for issuing an order for payment or in connection with submission of a statement of opposition against the order for payment by the defendant<sup>11</sup>. Pursuant to art. 505(37) § 2 CCP if within the period of three months counted from the day the decision concerning discontinuation of the electronic writ of payment procedure was issued the plaintiff files the case against the defendant concerning the same claim but this time under a procedure other than the electronic writ of payment procedure, legal consequences which – pursuant to the relevant act – are connected with bringing legal action are effective as of the day of filing the case under the electronic writ of payment procedure. Should the parties demand that, the court – while adjudicating the case – will take into account the costs borne by the parties during the electronic writ of payment procedure.

The e-court is served by a dedicated IT system which operates the electronic writ of payment procedure. This system enables plaintiffs to file a case in electronic form, and if there is a need, submit documents complementary to the statement of claim. The plaintiff – pursuant to art. 505(31) § 1 CCP - can submit such a document solely using the teleinformatic system; and so there is no possibility for the plaintiff to submit any paper documents during the proceedings under the electronic writ of payment procedure. Therefore, in order to initiate legal action, the plaintiff has to possess an individual, secure account on the internet portal of the e-court. Filing a case results in creation of electronic case records<sup>12</sup>. Next, the case undergoes examination by e-court (a judge or a court clerk, Polish: *referendarz sądowy*) who decide if there are grounds for issuing an order for payment or for issuing a decision to discontinue the proceedings (if there are no

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10 Katarzyna Franczak, ‘Elektroniczne postępowanie upominawcze - zalety i wady dla stron postępowania’ (2011) 7 PPH 48.

11 In previous legal environment filing the objection caused the order for payment to cease to have full effect and the case was transferred to a court of general jurisdiction. For example: the judgement of District Court in Oleśno of 4.03.2021, I C 962/19 (LEX no. 3153282).

12 Jasińska (n 5) 95.

grounds for awarding the claim)<sup>13</sup>. The order for payment, as well as any other decisions and orders are created in the form of electronic documents. Pursuant to art. 505(30) § 2 CCP actions of the court, the court official and the presiding judge are recorded solely in the teleinformatic system and qualified electronic signature is affixed to the electronic data created as a result of those actions<sup>14</sup>.

The legislator, however, stipulated two exceptions to the purely electronic form of the procedure discussed. Firstly, any judgements (an order for payment, a decision) and orders undergo serving in paper form, after their printouts are prepared. The delivery takes place via traditional post. Secondly, the defendant can submit their statement of opposition to the order for payment in paper form. The defendant may also, however, make a choice regarding submission of pleadings via the teleinformatic system, and in such a situation any following documents in the case are submitted by them via the system. According to art. 505(31) § 3 CCP documents submitted via the teleinformatic system do not require a handwritten signature.

It is emphasised in literature that the e-court cannot be reduced to the role of an administration of justice unit which runs electronic writ of payment procedures. For it is a qualified team of people who take care of the implementation of the rules of civil procedure<sup>15</sup>. Regardless of the in principle electronic form of the procedure discussed, this procedure is a sub-type of civil procedure and all the general rules of that procedure are applicable here. Therefore the electronic writ of payment procedure maintains all the basic procedural standards without which the right for a case to be adjudicated by an autonomous and unbiased court does not exist, in compliance with the *fair play* rule; still, because of the lack of running any evidentiary proceedings by this court, a number of recommendations proposed the judicature and within legal sciences, addressing the so-called procedural justice do not apply under this procedure at all.

13 Realizacja projektów informatycznych mających na celu usprawnienie wymiaru sprawiedliwości [Execution of IT Project Aimed at improvements in the administration of justice], Supreme Audit Office Department of Public Order & Internal Security, evidence number: 160/2020/P/19/038/KPB.

14 Cf. Anna Brenk, ‘Elektroniczne postępowanie upominkowe - kilka uwag na temat e-sądu’, (2014) 3 KRS 10.

15 ibid 14.

The IT system dedicated to the electronic writ of payment procedure is operated by people and is not in artificial intelligence systems' hands<sup>16</sup>. Not unreasonably, it is pointed out that the electronic system itself, dedicated for the electronic writ of payment procedure, is intuitive and relatively easy to operate. It is not flawless, however. For the system is not sufficiently adjusted to everyday reality's requirements, in particular, as of today, no application dedicated for mobile devices has been created. The system is also of autonomic character and is not sufficiently integrated with other services<sup>17</sup>. Breaks in its functioning happen, too, due to technical issues<sup>18</sup>. Periodically, in 2016 and 2017 the teleinformatic system was not adjusted to procedural regulations. This negligence resulted in a number of complications and forced judges and court officials working at that court to undertake several additional activities. The situation caused prolongation of e-court proceedings as well<sup>19</sup>.

Undoubtedly, for many entities the possibility to obtain an order for payment issued after completion of an electronic writ of payment procedure is a desired solution. The above stated is distinctively shown by the enormous number of cases filed under the electronic writ of payment procedure<sup>20</sup>. For it is a procedure which – in Polish circumstances – enables an order for payment to be obtained remarkably fast. As it is demonstrated by the available data during the first half of 2019 the duration of a proceeding under the electronic writ of payment procedure amounted to (rounding off) 24 days, while in the year 2018 the figure was 26 days, whereas in 2017: 39 days respectively<sup>21</sup>. Unless a statement of opposition regarding the order for payment is submitted by the defendant, the order leads to the same effects as those connected with a legally valid judicial decision, in particular it can become an enforceable title subject to enforced debt collection, which undoubtedly constitutes an attractive alternative for the

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16 Cf Jakub Pawliczak, Artur Pietryka, ‘Elektroniczne postępowanie upominawcze - ocena skutków regulacji’, (2011) 4 KRS 31.

17 (n 13).

18 Information about such interuptions is presented on the website of e-court. For example: <[https://www.e-sad.gov.pl/Aktualnosci.aspx?news\\_id=253](https://www.e-sad.gov.pl/Aktualnosci.aspx?news_id=253)> accessed 22.05.2021.

19 (n 13).

20 In 2018 under electronic writ of payment procedure 1.419.190 writs of payments were issued; in 2019 – 1.482.845 and in 2020 – 1.1516.277. Cf. ‘Ewidencja spraw w zakresie elektronicznego postępowania upominawczego (EPU) w latach 2010-2020’, <<https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wiekoletnie>> accessed 01.06.2021.

21 (n 13).

'traditional' court proceedings, especially regarding class action (against banks, money lenders, or other entities rendering services to/for a broad array of consumer).

A doubt could be voiced, however, whether such mass issuance of orders for payments does not show in a sense that the administration of justice becomes fiction<sup>22</sup>. As it has already been discussed, a decision to issue an order for payment or to refuse to issue it is taken by a judge or a court clerk solely on the basis of the claims presented by the plaintiff, without verifying their genuineness using any evidence whatsoever, consequently – in a sense – automatically<sup>23</sup>. On the other hand, a statement of opposition, even if worded in general terms and lacking any grounds, results in an immediate annulment of the order for payment which was issued under the procedure. And so, the electronic writ of payment procedure is in a sense based exclusively on the statements presented by the parties involved in the procedure and the e-court does not undertake any evidentiary proceedings aimed at determining the actual state of affairs regarding the adjudicated case, consequently does not exercise the so-called objective truth rule.

#### *Programs used for managing court proceedings and secretariat's work (Sawa, Sędzia-2)*

The process of informatisation of Polish courts brought widespread replacement of court registers (repertories, lists, indexes) with electronic tools. For this purpose, programs Sawa and Sędzia-2 remain widely used by courts<sup>24</sup>. The primary function of these IT tools is maintaining a repertory/office system for court secretariats, they undergo, however, frequent modernisations and get equipped with new, additional functionalities<sup>25</sup>.

22 ibid.

23 Marek Załucki, 'LegalTech w sądownictwie' in: Dariusz Szostek (ed), *LegalTech. Czyli jak bezpieczni korzystać z narzędzi informatycznych w organizacji, w tym w kancelarii oraz dziale prawnym* (C.H. Beck 2021) 127.

24 Cf <<https://lodz.so.gov.pl/container/wydzial-wizytacyjny/2016/sekretariaty/iii-rodz.-sr-pabianice.pdf>> accessed 05.06.2021; <[https://rzeszow.so.gov.pl/files/2a\\_spr.pdf](https://rzeszow.so.gov.pl/files/2a_spr.pdf)> accessed 05 June 2021.

25 Joanna Korolczuk, Informatyzacja postępowania sądowego. Szanse i zagrożenia, (2018) 4 Młody Jurysta 43 <<https://www.google.com/url?sa=t&rct=j&q=&csrc=&source=web&cd=&ved=2ahUKEwj5zez63oDxAhUymIsKHTbhC1QQFjACegQIAhAD&url=https%3A%2F%2Fczasopisma.uksw.edu.pl%2Findex.php%2Fmj%2Far>>

These programs comprise databases where basic information on every case adjudicated by a particular court division is (may be) posted. Each court proceeding is subject to registration according to a case reference number that has been assigned to it (including a designation of the court division, the repertory in which the case has been filed, the number of the case assigned to consecutive cases in the order they are filed and the year of registration). Personal information concerning the parties to the proceedings and other individuals taking part in the proceedings e.g. court experts or witnesses (names and surnames of natural persons, businesses and legal persons, as well as organizational units which are not legal persons) is entered into the system, as well as are their addresses. It is also possible to include some additional data regarding those entities, e.g. PESEL number, telephone numbers, e-mail addresses<sup>26</sup>. All significant actions connected with a particular judicial proceeding are subject to registration in the system, beginning with the fact and date of filing the suit or a motion which initiates proceedings, following with further procedural acts right up to the legally valid completion of the proceedings and sometimes even after it finishes (e.g. issuance of an enforceable title). Concerning documents submitted by the parties to the proceedings or other persons, only a note is posted in the system – indicating what type of document it was – from which one can learn just who and when submitted the document. Whereas all the documents originated in court (decisions, minutes of sessions, official written records) are entered into the system in their entirety (an electronic document whose content is identical to the paper document, e.g. a judicial decision, which is in the files of the case) is put into the system. That enables a quick determination of the course of a particular judicial proceeding even if there is no possibility to physically access the files of the case; moreover, it facilitates the process of creation of certified copies of court-originated documents. It is also noted down in the system where the case files are currently located, which is exceptionally useful in everyday court functioning practice<sup>27</sup>.

The possibility to search through information stored by those programs according to various criteria is their key function. Obtaining detailed information on a particular court proceeding can take place not only after the case reference number is entered into the search window, but also in a

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ticle%2Fdownload%2F2990%2F2727%2F&usg=AOvVaw3p7bnSlpZXcKkGpdY9  
x91m> accessed 05 June 2021.

26 ibid.

27 Cf <<https://nawokandzie.ms.gov.pl/numer-13/wokanda-13/akta-pod-kontrola.htm>> accessed 05 June 2021.

different way. In particular, it is possible to determine whether any court proceedings are underway which involve a certain person. It is not out of the question that the desired information is unearthed basing on the date of a hearing, or even in the course of searching through all proceedings conducted by a particular judge<sup>28</sup>.

The abundance of information disclosed by these programs makes them effective tools in the course of preparing various statistics regarding operations of courts. In particular, it is possible to establish – in a fully automated manner – how many active lawsuits is a certain judge conducting at a given moment, how many cases were filed in their department during a certain period, how many cases the judge has closed or how many statements of reasons they prepared. Functionalities connected with statistics enable also to establish, for example, the number of court cases which within a given period of time ended with a judgement awarding the complaint or petition, a decision to dismiss it, discontinuation of the lawsuit or a settlement.

A function which is very important from the perspective of care for a correct course of court proceedings is the integration of repertory-office programs with the system of electronic confirmation of correspondence reception which is run by Poczta Polska [the Polish national state-owned mail company] which has been appointed the operator performing the delivery of court letters. An electronic confirmation of reception consists in delivery of a letter or parcel basing on a record present on a teleinformatic system and subsequently setting down a signature by the recipient on a mobile device<sup>29</sup>. Thanks to linking the electronic confirmation of reception with the repertory-office programs immediately after correspondence is delivered to a recipient, appropriate information appears in the court's system. Electronic confirmations of reception of correspondence sent regarding every court case undergo printing out and putting into the case's records. The functionalities presented are therefore of great importance from the practical point of view, more so, however, for the court administrative staff than members of judiciary. From the judges' perspective usefulness of the discussed tools is sometimes evaluated point-blank critically<sup>30</sup>. It stems from the very essence of these programs which – being

<sup>28</sup> ibid.

<sup>29</sup> Cf <<https://www.poczta-polska.pl/biznes/korespondencja/elektroniczne-potwierdzanie-odbioru>> accessed 01 June 2021.

<sup>30</sup> Cf 'Currenda, czyli program "nowocześnie utrudniający życie sędziom"', <<http://www.pozywam.pl/2015/08/currenda-czyli-program-nowoczesnie.html>> accessed 29 May 2021.

repertory and office connected – are dedicated for court secretariats, not for judges. Nevertheless, it is impossible to avoid coming to conclusion that from the perspective of efficient handling court proceedings and managing the work of court secretariats utilizing IT tools of such kind (obviously, allowing for the purposefulness of their modernization and up-dating) is necessary and constitutes a real improvement, uncomparable to the previous solutions based on paper repertoires, lists and indexes.

#### *Software used for recording court sessions*

Pursuant to art. 157 § 1 CCP an open session results minutes prepared by a court reporter. Minutes are prepared using a device that records sound or sound and video as well as in writing as instructed the presiding judge. Currently it is common to record the course of open sessions (particularly hearings) using sound and video recording devices. Most courtrooms have been equipped with video cameras and microphones that enable that task to be completed.

Operation of the process of recording court session is conducted using dedicated software. One of such programs is ReCourt which has been adjusted to the specific character of recording court sessions. This software combines functions of sound and video recorder with word processor which enables drawing up written minutes. The written record is in such a situation edited in the form of ‘notes’ synchronized in time with the sound and video recording<sup>31</sup>. The written minutes are also subject to copying and pasting into the repertory-office system functioning at a given court (Sawa, Sędzią-2).

The sound and video recording, along with the written notes is saved, and after that it can be played without any limitations. On application from the parties to the proceedings a CD/DVD containing the recording can be given to them. It is also possible to familiarize oneself with it via the Information Portal (*Portal Informacyjny*)<sup>32</sup>.

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31 Cf <[https://www.rzeszow.so.gov.pl/files/instrukcja\\_v.3.0.pdf](https://www.rzeszow.so.gov.pl/files/instrukcja_v.3.0.pdf)> accessed 05 June 2021.

32 For more about the recordings of court sessions see: <<https://www.arch.ms.gov.pl/sady-w-internecie/e-protokol>> access: 01 June 2021.

### *Software used for operating remote court hearings*

Covid-19 epidemics influenced numerous changes in law, which was postulated in literature<sup>33</sup>. In particular, that challenging time brought about acceleration of the pace of work on conducting sessions by Polish courts in a remote mode. Pursuant to art. 15zzs(1) clause 1 of the Act of 2 March 2020 on exceptional solutions connected with preventing, counteracting and fighting COVID-19, other contagious diseases and crisis situations caused by them<sup>34</sup> during the period when the state of epidemiological threat or the state of epidemic announced due to COVID-19 and for a year after the latter was called off, in cases heard under the Code of Civil Procedure regulations, hearings or open sessions are conducted using technical devices which enable conducting them remotely, directly transmitting the sound and video simultaneously over the distance, provided that the persons taking part do not need to be present in the building where court is located, unless conducting the hearing or the open session without the use of the above mentioned devices will not cause excessive risk for the health of individuals taking part in proceedings.

The introduction of software operating remote sessions into Polish courts involved the necessity to couple the functions indispensable for conducting teleconferences with the option to record the course of the session using the already existing software (ReCourt). As a result of the above mentioned, recording a hearing conducted in the remote mode involves recording video and sound from the courtroom and from the program operating the teleconference.

The videoconference system is based on the Videoconference Platform which utilizes Avaya-Scopia or Jitsi software and is made available by the Court of Appeal in Wrocław. The court before which a certain proceeding is taking place becomes the organiser of the session or hearing conducted in the videoconference mode and moderates its course. The organizer of the videoconference manages its course and decides about participation of Attendees. The session moderator (a judge) can switch off all the attendees' microphones and give floor solely to chosen persons<sup>35</sup>.

33 Cf Aleksandra Partyk, 'Epidemia (COVID-19) a tok postępowania cywilnych i sądowo-administracyjnych' (2020) 5 PPP 42.

34 Dz. U. 2020.1842.

35 Cf <[https://wroclaw.sa.gov.pl/container/Wideokonferencje/Regulamin%20Systemu%20Wideokonferencji%20\(003\)%20-%20Kopia.pdf](https://wroclaw.sa.gov.pl/container/Wideokonferencje/Regulamin%20Systemu%20Wideokonferencji%20(003)%20-%20Kopia.pdf)> accessed 01 June 2021 and <[https://wroclaw.sa.gov.pl/container/Wideokonferencje/Zestaw%20dobrych%20-praktyk\\_v2-0.pdf](https://wroclaw.sa.gov.pl/container/Wideokonferencje/Zestaw%20dobrych%20-praktyk_v2-0.pdf)> accessed 01 June 2021.

Organising videoconferences using Avaya-Scopia software takes place via a portal accessible at the internet address: <https://cpw.wroclaw.sa.gov.pl>. The essential condition for organisation of a videoconference based on the Avaya-Scopia software is establishment of an account<sup>36</sup>. Whereas if Jitsi software is used, the court sends e-mail messages to the parties, their proxies or other persons. The messages contain a link which enables joining the remote hearing. Downloading or installing any software is not required ahead of the hearing. It is also possible to take part in a remote hearing using a smartphone via the Jitsi Meet application<sup>37</sup>.

### *Information Portals*

From the perspective of the parties to the proceedings, and especially from the point of view of legal professionals representing them, Common Courts' Information Portals are exceptionally useful tools. For they constitute tools which enable entitled or authorized entities to access information on a lawsuit taking place with their involvement. Information Portals are linked with repertory-office systems used at a particular court, as well as with software used for recording hearings<sup>38</sup>. By way of example, persons who decide to use the Portal do not need to contact the secretariat employees in order to find desired information<sup>39</sup>.

In order to use the Information Portal one is required to set up a free-of-charge personal account. Thanks to such an account the registered users gain access to plentiful information regarding, among others, the state of their court case (which means the stage a certain proceeding is at), actions undertaken in the course of the case (with annotations pointing to dates and persons performing them), dates of sessions and hearings. The

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36 Cf <<https://wroclaw.sa.gov.pl/container/Wideokonferencje/Instrukcja%20instalowania%20Scopia%20-%20przegl%C4%85darki%20%2B%20mobile%20v1-4.pdf>> accessed 01 June 2021.

37 Cf <<https://wroclaw.sa.gov.pl/container/Wideokonferencje/instrukcja%20po%C5%82%20%C4%85czenia%20JITSI%20-%20dla%20obywatela%20v1-3.pdf>> accessed 01 June 2021.

38 Cf <<https://czestochowa.so.gov.pl/portal-informacyjny,new,m1,190,231.html,1370>> accessed 01 June 2021.

39 Cf Ewelina Mikołajczuk, *Analiza funkcjonowania Portali Informacyjnych Sądów Powszechnych*, Instytut Wymiaru Sprawiedliwości, Warszawa 2020, 16. <[https://iws.gov.pl/wp-content/uploads/2021/02/IWS\\_Miko%C5%82ajczuk-E.\\_Analiza-funkcjonowania-Portali-Informacyjnych-S%C4%85%C3%B3w-Powszechnych.pdf](https://iws.gov.pl/wp-content/uploads/2021/02/IWS_Miko%C5%82ajczuk-E._Analiza-funkcjonowania-Portali-Informacyjnych-S%C4%85%C3%B3w-Powszechnych.pdf)> accessed 1 June 2021.

Information Portal makes it also possible to familiarize oneself with documents generated by the court while adjudicating the case which are subject to being entered into the repository-office system (e.g. decisions and their grounds, session minutes). One significant function of the Information Portal is access to electronic minutes. If the session underwent recording using voice and video capturing devices the audio recording from that session is subject to being made available via the Information Portal<sup>40</sup>.

Information Portals have become working tools exceptionally willingly used by persons who take part in court proceedings. In the period between the 1<sup>st</sup> of December 2019 and 30<sup>th</sup> of November 2020 Information Portals have been logged on to over 23 million times, over 21 million documents and nearly 0.5 million minutes were downloaded from them or read. Around 70 % of Polish legal practitioners, who took part in the research conducted, use Information Portals daily, while further 26 % do so a few times a week. Almost 95 % respondents expressed generally positive opinions as for their functioning<sup>41</sup>.

#### *PESEL-SAD*

From the perspective of informatisation of courts another system is significantly important as well, namely PESEL-SAD which is an exact copy of the PESEL base, only created for the purpose of being used during court proceedings<sup>42</sup>. The PESEL number (*Powszechny Elektroniczny System Ewidencji Ludności*, English: *Universal Electronic System for Registration of the Population*) is assigned to every Polish citizen (and to foreigners, in certain situations)<sup>43</sup> and – thanks to its unique character – enables individualisation of every person to whom it was assigned<sup>44</sup>. Selected employees of

40 (n 38).

41 Cf Mikołajczuk (n 39).

42 Cf The Province Administrative Court in Warsaw judgment of 26.10.2015, II SA/Wa 1135/15, LEX no. 1940909.

43 Data gathered in the register concerns people who reside in Polish Republic on a permanent basis, have a permanent residence or temporary residence (over 3 months) registration, as well as individuals who have applied for an ID card or passport. It also contains information regarding individuals for whom there are grounds for possessing the PESEL number pursuant to separate regulations. Cf. <https://www.arch.ms.gov.pl/pl/sady-w-internecie/peselsad/> (access: 17.05.2021).

44 Pursuant to regulations of the Act of 24.09.2010 on population registration (Dz.U.2021.51) changing the PESEL number is acceptable only in exceptional situations, among others, following sex change.

common courts, judges and court secretaries in particular, are authorised to use the PESEL-SAD database<sup>45</sup>. The documentation concerning the PESEL-SAD system is subject to protection. As The Province Administrative Court in Warsaw stated in the judgment of 26<sup>th</sup> October 2015 in the case II SA/Wa 1135/15<sup>46</sup> the Polityka Bezpieczeństwa Systemu Informatycznego PESEL-SAD (PESEL-SAD IT System Security Policy) constitutes classified information and disclosing it to unauthorised persons could negatively impact executing tasks within the realm of public safety and administration of justice, or even lead to threatening the rights and freedoms of the citizens.

Access to the PESEL-SAD database results in streamlining proceeding in court cases primarily because it enables unequivocal identification of the parties to a particular proceeding, therefore eliminating the risk arising from concurrence of names and surnames. On the other hand, linking a PESEL number with a particular individual (e.g. the defendant) makes it possible for a judge to verify whether the lawsuit is conducted in fact against the person indicated in the statement of claim as being sued<sup>47</sup>. It is worth pointing out that the plaintiff, while initiating a legal action, is obliged to indicate their own PESEL number in the statement of claim and at the same time they should include information which enables identification of the defendant<sup>48</sup>. Pursuant to art. 208(1) *in principio* CCP the court *ex officio* determines the PESEL number of a defendant who is a natural person. The Regional Court in Bydgoszcz in its decision of 14<sup>th</sup> of March 2014 in the case II Cz 73/14 (LEX no. 1661570), emphasised that the act described in art. 208(1) CCP, should be performed by the presiding judge in the court hearing the case, using the PESEL-SAD database which was created for this purpose and only upon establishing that data provided in the statement of claim are insufficient for the purpose of determining the PESEL number should they order the plaintiff to supplement the missing information under the threat of suspending the action pursuant to art. 177 § 1 clause 6 CCP. Determining the number which identifies the defen-

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45 Probation officers are also authorised to access the database.

46 LEX no. 1940909.

47 Cf The judgment of District Court in Gdynia of 4.07.2019, I1 C 3473/2018 (LEX no. 2748032).

48 It could be pointed out that within the electronic writ of payment procedure the plaintiff is obligated to indicate the defendant's PESEL number as well, what remains, however, a kind of peculiarity comparing to cases heard under other procedures. *See also:* [https://www.e-sad.gov.pl/Subpage.aspx?page\\_id=42](https://www.e-sad.gov.pl/Subpage.aspx?page_id=42)(access: 17.05.2021).

dant is at most times uncomplicated once the court has a set of data (name, surname, address, and sometimes the date of birth)<sup>49</sup>.

Access to the PESEL-SAD database is of great importance also due to the fact that the discussed database contains address information. Regarding selected court cases adjudicated under non-contentious procedures (e.g. concerning establishment of easement, acquisitive prescription, or inheritance) the court *ex officio* determines the circle of persons interested in the case and summons them to take part in the proceedings. The possibility to establish those persons' address information on the spot, by means of the PESAL-SAD system, significantly streamlines and accelerates the proceedings.

Moreover, information regarding civil status of individuals, including their deaths, is entered into the PESEL-SAD database and regularly up-dated. Whereas the death of a party to proceedings constitutes an obligatory prerequisite for suspension of a civil proceeding (art. 174 § 1 clause 1 CCP), whereas conducting proceedings involving a deceased person constitutes grounds for invalidity of those proceedings (art. 379 clause 2 CCP). And so the possibility to verify whether parties to a proceeding are alive is exceptionally useful from the perspective of ensuring the proper course of proceedings. Unfortunately, until today repository-office systems used by courts have not been integrated with the PESEL-SAD database, therefore the function of automatic verification of whether the parties to a proceeding remain alive does not exist. Introduction of such a solution in future is worth postulating.

### *System of Random Allocation of Cases*

In the current legal environment allocation of cases to judges for adjudication is done by means of an IT tool, named: 'System Losowego Przydziału Spraw (SLPS)' [*System of random allocation of cases*]. The system is supposed to evenly distribute cases to be heard by particular judges adjudicating in a certain court. Nevertheless, not every court case is equally complex and requires identical amount of time and work in order to be adjudicated. Allocating the same number of cases to judges itself would not mean that they are equally burdened with work. As it is pointed out in literature

49 Aaleksandra Partyk and Tomasz Partyk, 'Niewskazanie numeru PESEL jako brak formalny pozwu. Glosa do postanowienia s. apel. z dnia 11 marca 2015 r., I ACz 244/15' (2015) LEX/el.

“creating a system which exercises the rule of even load fully and in an extreme and inflexible manner must take place at the expense of infringing equal chances of parties for their cases to be adjudicated within reasonable timeframe”<sup>50</sup>. Since one could envision a situation when two judges receive the allocation of identical number of cases, yet those allocated to the first judge are really simple, whereas the ones allocated to the other judge are complicated and multi-thread. The SLPS system is supposed to solve this problem thanks to classifying cases into certain categories before the random draw.

The Ministry of Justice points out that the report generated by the system upon the draw is a result of a greatly complex process influenced by a number of various factors which are usually known only at the court conducting the draw<sup>51</sup>. Such a report contains the case reference number, the date of the draw, the number of the draw, category and symbol of the case, the cost of the case, the result of the draw, indication of the judge to whom the case was assigned, as well as the number of judges who took part in the draw. Additionally, the load of cases existing before the draw is indicated, along with the figure randomly assigned to the case. Consequently, the report allows one to determine that the draw did take place and which one of the judges working in a certain court is to adjudicate in the assigned case, basing on several variables<sup>52</sup>.

Allocation of cases should be transparent, in order to eliminate any abuse. What still remains problematic is the fact that it has not been revealed to the public and to judges at large, exactly how SLPS functions and precisely what algorithm the draw is based on. It is noted in literature, and rightly so, that the lack of openness in this matter might infringe the right for a case to be adjudicated by an independent and unbiased court, since it is not known how the cases are allocated to particular adjudicators<sup>53</sup>. The outright fear arises of an instrumental use of the tool in order to influence the makeup of a particular judging panel. Although an assumption should be made that every judge to whom a case is allocated for adjudication will conduct it in a way compliant with the code of conduct in order for the judgement issued to be fair and to take substantive and procedural

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50 Paweł Rygiel, ‘Losowy przydział spraw cywilnych w sądzie drugiej instancji’ (2019) 2 PS 49.

51 The Province Administrative Court in Warsaw judgment of 12.11.2020, II SAB/Wa 352/20, LEX no. 3106939.

52 The Province Administrative Court in Warsaw judgment of 12.11.2020, II SAB/Wa 352/20, LEX no 3106939.

53 Rygiel (n 50) 50.

regulations into account, it does not seem to be an argument, however, which sufficiently justifies acknowledging that the failure to reveal the mechanism of SLPS's functioning does not remain a problem<sup>54</sup>.

### *Summary*

In the last decade the Polish justice system has undergone a revolution which was connected with the computerisation and informatisation, whereas the work in the field has not been finished yet. The existing solutions need to be assessed in principle positively. However, they are not sufficient to meet the actual needs, in particular when assessed from the view of the problem of the lengthiness of court proceedings. One can say that the solutions based on modern technologies have been introduced in Polish civil cases across some spots, but not in a global way. Surely the already existing mechanisms significantly support the performance of the justice system. The exploitation of information technology advancements makes access to courts much more convenient for parties and their proxies. Electronic Procedure by Writ of Payment is of autonomous character, however on the national scale it is a huge relief for the courts of their workload with regard to cases connected with payments (particularly for a small value of the matter in issue). Still, a coherent, complex solution aimed at full informatisation of court cases, for instance by digitalisation of court records, is missing. An overhaul which will usher the Polish justice system into the XXI century needs to be deemed desired. This undoubtedly requires a broad discussion from both legal and technological perspective, and what is more, an analysis of regulations implemented in other countries, along with their effectiveness, so that the modernisation of Polish courts could live up to the expectations aroused by it.

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<sup>54</sup> It is worth mentioning that the stance has been expressed in the body of penal judicial decisions according to which infringement of the rules concerning allocation of cases based on a system does not as such automatically mean that unconditional grounds for appeal exist regarding particular proceedings; it does not exclude, nevertheless, examination whether such a circumstance does not result in a violation of procedural provision if it could have influenced the content of the judgment. The Supreme Court decision of 17.07.2019, V KK 296/19, LEX no. 2696866.



## Summary of the book

Lawyers, including advocates, legal advisers, judges and prosecutors are facing a major revolution both in the way they operate, such as running law firms, and in the substantive and legal aspects of legal assistance provided, to include court proceedings. The changes are already taking place. For some lawyers, they are obvious, noticeable and they willingly participate in them, for others, they are a problem, an attitude of denial emerges and an attempt to maintain the current *status quo*. Many do not see the changes coming.

Depending on the digital competence of the state, lawyers function at different levels of use of LegalTech tools. In states with low levels of digital competence, it is LegalTech 1.0, reinforced by the Covid19 pandemic based on simple tools to support the work of lawyers (expert systems, online services, instant messaging, online communication with courts). In countries with higher digital competencies, it is LegalTech 2.0 (such as smart contract, process tokenization, etc.) or LegalTech 3.0 based on process automation, including decision and judgment issuance, AI or machine learning support.

Algorithmic codes, including algorithmization of law, are increasingly used not only by lawyers but also by entrepreneurs in the area so far reserved exclusively for lawyers. Many activities that used to be performed by people are more and more often and even with better results performed by algorithms. The development of machine learning, AI and algorithmization of legal thinking is still ahead of us. The way of creating and publishing legal acts is changing, both in the form of texts based on specialized software and new proposals - immediate implementation of the law in algorithmic codes, in a form understandable primarily by computer programs.

LegalTech tools are increasingly used in the communication of lawyers but also in court proceedings. Particularly this tendency has strengthened in the pandemic period. The level of use of electronic communication in legal proceedings varies. From quite low - sending correspondence online, through video hearings, to specialized online courts fully automated, exclusively online, based on algorithms and even automatic issuance of judgments. This is no longer science fiction, but real and functioning courts. In Europe we are facing a very serious discussion not only about electronic communication, electronic identity, electronic identification,

### *Summary of the book*

electronic form, but also about the way the judiciary works, the level of automation of the adjudication process and the participation of the human factor in the whole process, including lawyers.

LegalTech tools force lawyers to use an appropriate methodology for their implementation and supervision of algorithms. Disciplinary proceedings are already being conducted against lawyers for defective use of Legaltech tools in the office, defective data storage, defective electronic communication, etc. Data security, regardless of how it is stored (in the cloud or stationary in the organization), cyber security of devices used by lawyers, but also algorithms is becoming crucial.

In the near future we are facing further development of algorithms, proliferation of blockchain and smart contract, spread of machine learning and AI, automation of processes, and activities of lawyers both in law firms and in the broader justice system. Maybe a new type of courts (exclusively online and based on algorithms), and even to some extent the legal subjectivity of AI.

These are the problems we have to face not only in the future but already today. The revolution in the way the law and lawyers operate has already begun. It is time to recognize this and take appropriate action, both in terms of education, regulation, ethics, corporate rules, and the acquisition of new competencies by lawyers. The time of algorithms is coming. For this reason, the considerations presented in this book are intended to be useful in lawyers' continuing adventures with LegalTech tools. The discussion and suggestions contained herein are intended to further scholarly discourse on the use of technological tools in the operation of the justice system. We invite you to join the discussion.

*Dariusz Szostek, Mariusz Załucki*

## About the authors

1. **Dariusz Szostek** – he is a partner and founder of the Law Firm Szostek-Bar and Partners, of counsel in Maruta/Wachta, expert of the European Parliament Artificial Intelligence Observatory; Member of the European Law Institute in Vienna, member of the Programme Council of the IGF UN 2021, member of the Blockhaton EUipo Brussels, chairman of the Scientific Council of the Virtual Chair of Ethics and Law (a consortium of Polish universities and NASK), professor at the Faculty of Law and Administration at the University of Silesia, lecturer, author of several dozen publications (including monographs and foreign publications, including bestsellers, e.g. Cyber Law - New York, Tokyo, Sydney, Amsterdam, London edition), author of several books. co-author of IT and data security in a law firm (also editor), author of a monograph “Blockchain a prawo” 2018 (Warsaw) - English edition “Blockchain and Law” (Nomos, Germany 2019), co-author of monograph Smart contarc and Insurance (London, in print). Editor and co-author of “Internet and New Technologies Law. Perspectives and Challenges” (Nomos 2021).
2. **Mariusz Załucki** – full professor of law, head of the Institute of Private Law at the AFM Kraków University (Poland) A graduate of legal studies in Poland, he also learned about European economic and civil law at the University of Bielefeld in Germany and the University of Staffordshire in Stoke-on-Trent, England. He has worked as visiting professor at several foreign universities, e.g. University of Bristol (England), University of New South Wales in Sydney (Australia), Keele University (England), Staffordshire University (England), University of Las Palmas de Gran Canaria (Spain), University of Reggio Calabria Italy). He is the author of over 150 publications, scientific specialities: civil law, intellectual property law, private international law, protection and promotion of human rights. Since 2001, he is a member of the Bar Association in Rzeszów, he practises as an advocate. In 2021, he was recommended by the National Council of the Judiciary in Poland to become a judge in the Supreme Court of Poland. Editor and co-author of “ Internet and New Technologies Law. Perspectives and Challenges” (Nomos 2021).
3. **Michał Araszkiewicz** – he is an assistant professor (adiunkt) in the Department of Legal Theory at the Jagiellonian University in Kraków

## *About the authors*

and holds a PhD in legal theory. He is also a legal advisor, partner in *Araszkiewicz Cichon Araszkiewicz Law Firm* (acrlegal.pl). Michał Araszkiewicz has published extensively in the field of legal theory and in the area of AI and Law. He specializes in theories of legal reasoning and argumentation, legal interpretation, case-based reasoning as well as in normative aspects of Artificial Intelligence, including the right to explanation. He is currently a member of the Executive Committee of the International Association for Artificial Intelligence and Law (IAAIL) and of the Steering Committee of JURIX. He served as the President of the ARGDIAP association (argdiap.pl) – a NGO focused on the problems of argumentation, dialogue and persuasion. He has co-organized numerous scientific events including the JURIX 2014 (Conference Chair) and three consecutive editions of XAILA – The EXplainable and Responsible AI in Law workshops at JURIXes 2018-2020. In legal practice he specializes in the field of legal regulation of AI as well as in Intellectual Property, Data Protection and broadly understood Protection of Information.

4. **Gabriela Bar** - Attorney at Law, doctor of law, managing partner at *Szostek Bar and Partners*. Enthusiast of new technologies, with particular emphasis on Artificial Intelligence. Experienced expert in the field of electronic contracts, e-commerce, legal aspects of IT systems implementation and privacy protection. Member of the IEEE Legal Committee in the IEEE Global Initiative on Ethics of Autonomous and Intelligent Systems project; member of the New Technologies Law Association, Women in AI and AI4EU. Assistant profesor at the Opole University and Silesia University.
5. **Wilfried Bernhardt** – born in Lübeck (Germany), is a lawyer in Berlin, honorary professor for IT Law at the faculty of law of the University of Leipzig. He studied law in Augsburg and Kempten (Germany). CEO of the Bernhardt IT Management Consulting GmbH, Member of the board of the National eGovernment Competence Center and on the board of the German EDV-Gerichtstag. He is the author of numerous publications, in particular on issues relating to the use of information technology in administration and the judiciary.
6. **Katarzyna Biczysko-Pudełko** – assistant professor at the Institute of Legal Sciences at the University of Opole, associate of the Centre for Legal Problems of Technology and New Technologies at the University of Opole, lawyer.
7. **Maddalena Castellani** – certified lawyer since 2007, specialized in Copyright ad IPR Law (copyright, trademarks, design, know how, patents, software) and in International Corporate and Commercial

Law. She is partner of the Law Firm Triberti Castellani, established both in Milan and Verona. Since 2019 Member of the Anti-Counterfeiting Blockathon Forum set up by the European Commission and EUIPO. Professor of Law.

8. **Tomasz Chomicki** – graduate of the University of Technology and Agriculture in Bydgoszcz at the Faculty of Electronics and Telecommunications, The George Washington University - School of Business and specialist courses at the London Business School. Currently, he has been working at Samsung Electronics Polska for six years. In the corporation, he is responsible for business development and the creation of new strategic business partnerships, including the creation of innovative projects with public administration and the commercial sector, as well as public policy in the field of technical regulations. Technology Director and Member of the Council - ZIPSEE Digital Union - an organization in the RTV and IT industry; academic teacher and coordinator of the Samsung Electronics Polska - Warsaw School of Economics program; Chairman of the Digital Administration Committee at the Polish Chamber of Information Technology and Telecommunications; Vice-chairman of the Council for Telecommunications and Cybersecurity.
9. **Patryk Ciurak** - he is an academic teacher, an author and a project manager (holds the PSM I, PSPO I and SPS certificates). His scientific interests are focused on empirical analysis of changes in law and the use of statistical methods to describe phenomena occurring in legislation, as well as exploring the relationship between a text-written law and a computer code.
10. **Wojciech Cyrul** - LL.M, D.E.A. Chair in Legal Philosophy and Legal Ethic, Department of Law and Administration at the Jagiellonian University in Krakow. He studied law at the Jagiellonian Universities of Krakow, Katholieke Universiteit Brussels and Catholic University of Washington DC. He holds degrees in law (mag. iuris, PhD and habilitation) and in legal theory (LL.M. and D.E.A.). He is currently a professor at the Jagiellonian University in Cracow and a Member of the Executive Board of the European Academy of Legal Theory. Previously Associated Professor at the Katholieke Universiteit Brussel and at the University of Cardinal Wyszyński in Warsaw. He is an author of several dozen publications on legal theory and legal informatics. Research interests: Legal informatics, theory and philosophy of law, ICT law, theory of legislation.
11. **Maria Dymitruk** - attorney-at-law, researcher at the Faculty of Law, Administration and Economics of the University of Wrocław. Since

## *About the authors*

2014, at the Center for Research on Legal and Economic Problems of Electronic Communication, she conducts research on the use of artificial intelligence in law, e-justice issues and the impact of technology on law and justice. She is the author of scientific publications and a speaker at national and international scientific conferences, as well as the manager and contractor in national and international research projects. Chairwoman of the Committee for New Technologies and Digital Transformation of the District Chamber of Legal Advisers in Wrocław. Member of the Committee on New Technologies of the Federation of European Bars (Fédération des Barreaux d'Europe) and the International Association of Artificial Intelligence and Law (IAAIL).

12. **Ewa Fabian** - attorney-at-law associated with the Warsaw Bar Association of Advocates, researcher using empirical methods of analysis in the field of new technology, including digital accessibility. Alumni of the Warsaw University of Technology, international law firms and SCC Arbitration Institute in Stockholm. Expertise in litigation, arbitration, new technology law and intellectual property.
13. **Agnieszka Kubiak Cyrul** - associate professor (adiunkt) at the AFM Krakow University, Faculty of Law, Administration and International Relations, Chair of Civil Law. She has published in the field of civil law and consumer protection law.
14. **Tomasz Grzegory** – lawyer, professionally associated with start-ups. Currently at Google as Legal Director CEE, responsible for managing the company's legal risk in nineteen jurisdictions in Central and Eastern Europe. PhD student at the Institute of Legal Sciences of the Polish Academy of Sciences, lecturer at the Kozminski University and at the Institute of Economics of the Polish Academy of Sciences in Warsaw. In the past, *inter alia*, a long-term member of the Council of the Polish Chamber of Information Technology and Telecommunications, a member of the Council for Informatisation of the Małopolskie Voivodeship, legal expert and co-founder of the Legal Group - an expert body operating within IAB Polska. For over eighteen years he has been involved in projects related to shaping the law of new technologies.
15. **Iga Kurowska** - A doctor of law (*cum laude*) from Sorbonne Law School, where she previously obtained a Master's degree in international business law and graduated from a postgraduate studies in business. Her research topic was "Legal challenges of data-driven international M&As". Dr Kurowska has worked in prestigious law firms, advising clients on legal and business aspects of international corporate transactions, as well as in European institutions since 2014. After

founding and managing a French boutique law firm Verne Legal since 2018, she recently joined a leading corporate Spanish law firm Aktion Legal, as a Head of Innovation and Legaltech. She continues as a visiting professor at two universities in Paris and teaches a number of legaltech courses all over Europe. She participates frequently in conferences and publications and has set up a new independent educational platform and podcast – Legaltech Academy. Her legaltech startup Simplify Docs was acquired by an international publisher and legaltech provider in May 2021. She is an active member of legal technology initiatives in France, Poland and Spain, as well as a member of Plug-in foundation, being in charge of Ambassadors of Polish Innovation Awards (API).

16. **Małgorzata Kurowska** - Attorney-at-law, expert in managing comprehensive projects encompassing legal, organizational and IT issues. Counsel at Maruta Wachta Law Firm. She is responsible for the projects pertaining to trust services and electronic identification, as well as cybersecurity and personal data. Author of articles in She owns a CIPP/E certificate and is fluent in English and French, she also communicates fluently in German. She lectures at higher education institutions in the field of personal data protection and cybersecurity (Leon Kozminski University, Górnosląska Wyższa Szkoła Handlowa [Upper Silesian Academy of Economics]). She graduated from the Faculty of Law of the University of Warsaw and Poitiers University.
17. **Pierpaolo Marano** – a law professor at the Catholic University of Milan and the University of Latvia, Professor Marano holds a PhD in Banking law and regulation (University of Siena), and he is a scholar in residence at the University of Connecticut, School of law – Insurance Law Center, an Honorary Fellow at the University of Hong Kong – Asian Institute of International Financial Law, and an Affiliate Faculty at the Department of Insurance of the University of Malta. He is a lawyer practising in Milan as an of Counsel at the PwC TLS Avvocati & Commercialisti law firm, where he is counselling in the Department of Financial Services.
18. **Vytautas Nekrošius** – is a Lithuanian politician and civil legal scholar, PhD, Professor at the Faculty of Law of Vilnius University, the Faculty of Law's, since 2016 president of the Lithuania Lawyers Association (LLA).
19. **Robert Pajak** Currently holds the position of Senior Information Security Manager in Akamai's security department. He leads a team responsible for managing information security compliance/security governance requirements. He manages global projects demonstrating

## *About the authors*

how Akamai meets the highest standards in information security. Co-founder of the Affinity Conference. Previously held various cybersecurity and data protection roles - most notably Head of Security at Future Simple Inc. (Base - now ZenDesk) - a Silicon Valley-based company developing innovative software. Prior to joining Base, he was Head of Information Security for EMEA at Herbalife. For over 14 years he was also CSO at INTERIA.PL (and DPO at RMF Group) - responsible for security, compliance and privacy at one of Poland's largest portals. Founder or co-founder and member of audit committees of various Polish branches of organisations and associations dealing with security issues, in particular: OWASP/ISACA/ISSA. As part of his work for the INTERIA.PL portal, he also built and led the R&D team. Passionate about security and technology. Actively lectures at various universities and conferences - on widely understood aspects of information protection, compliance, and modern threats. Co-founder of postgraduate studies "Cyber Security Management" at Kozminski University. Cooperates as an expert with numerous companies and organisations in Poland and abroad dealing with information security in a wide sense.

20. **Przemysław Paul Polański** - lawyer and programmer, for many years acting as an IT department director, associate professor at the Kozminski University in Warsaw (*Akademia Leona Koźmińskiego*) at the Department of Quantitative Methods & Information Technology. Legal counsel at OIRP in Warsaw. Author of more than 70 publications on IT Law, including two monographs. Director of two research grants from the National Science Centre.
21. **Rafał Tomasz Prabucki** - A doctor of law. Professor assistant at the University of Silesia for the Multi-Agent Systems for Pervasive Artificial Intelligence for assisting Humans in Modular Production (MAS4AI project). Also graduate of engineer title from the Gdańsk University of Technology. Alumn LegalTech HIOP at the IE University in Madrid as part of the Tech4Law scholarship and the Lesław A. Paga foundation on the project of the National Days of Judicial Sciences. Fellow of the DeFi Talents scholarship at Frankfurt School of Finance & Management in Blockchain Center. Participant in hackathons and international conferences on the law of new technologies. Member of the steering committee of the Poland Youth Internet Governance Forum. Legal Project Manager of the Smart Human-Oriented Platform for Connected Factories (SHOP4CF project). Author of a number of publications in the field of new technologies and law.
22. **Janos Puskas** – Hungarian advocate dealing with regulatory investigations and litigation with a focus on legal and compliance issues

affecting the digital industry and online services. He specializes in new technologies law and the defense of related civil claims and regulatory disputes. He has represented his clients before the Hungarian Supreme Court in over twenty-five cases in the field of consumer protection, advertising law and other regulatory matters.

23. **Mauro Artura Rivera** – Professor of Law at the Universidad Iberoamericana (Mexico City) since 2016. He obtained his PhD at the Universidad Complutense de Madrid (Spain). He holds a Master in Parliamentary Law, Elections, and Legal Studies at the Universidad Complutense de Madrid. He obtained his Bachelor's degree in Law at the Universidad de Sonora (Hermosillo). Mauro Arturo Rivera is a member of the Mexican National System of Researchers (SNI level I).
24. **Thiago Santos Rocha** - PhD student in Constitutional Law at the University of Oviedo (Spain) in co-supervision with the Pontifical Catholic University of Rio Grande do Sul (Brazil). Researcher funded by the Vice-Rectorate of Research of the University of Oviedo (Spain), through the Plan for the Support and Promotion of Research (Project PAPI-20-PF-01). He has a master's degree in Law and Legal Science, specializing in Fundamental Rights, from the University of Lisbon (Portugal). He is an associate member of the Brazilian Basic Income Network, Basic Income Network Spain and the Association for Unconditional Basic Income Portugal. Researcher at UBIEXP - Basic Income Experiments, University of Minho (Portugal). In addition to academic production focused on the area of fundamental rights, he has experience in the area of Public Law, having integrated the permanent staff of professionals from entities such as PricewaterhouseCoopers (PWC), Ernst & Young (EY) and the National Confederation of Municipalities (CNM, Brazil), acting mainly in bidding processes and auditing projects, ruled by Brazilian legislation or by guidelines from international organizations such as IADB, IBRD and UNDP.
25. **Enrico Maria Scavone** – Legal counsel with experience of legal assistance to banks, investment firms, asset management companies, financial intermediaries and insurance companies clients, on all aspects of banking, financial services and insurance law and regulatory frameworks, also for their cross-border activities. Graduated in Law at Università commerciale Luigi Bocconi and currently Legal Senior Associate at PwC TLS Avvocati & Commercialisti law firm. He is the author of publications and articles in financial markets, banking and insurance law.
26. **Rafał Skibicki** - PhD student at the Center for Research on Legal and Economic Problems of Electronic Communication at the Faculty of

## About the authors

Law, Administration and Economics of the University of Wrocław, lawyer at Szostek\_Bar and Partners Legal Office. His interests are related to intellectual property law and the law of new technologies. Specialist in contract law, copyright and privacy protection. He participated in numerous projects regarding the implementation of legal instruments related to new technologies, resulting from the GDPR, the eIDAS regulation or the PSD2 directive. Speaker at international and national conferences, author of publications on the law of new technologies and IPR. Honorary member of the Science Club of Civilists at the University of Wrocław.

27. **Sylwester Szczepaniak** - Attorney-at law. Specialist of regulation aspect of developing and deployment of new technology in public sector. Assistant in The Institute of Law Studies of the Polish Academy of Sciences – ILS PAS. Former worker in Ministry of Digital Affairs. Coordinator the legislation process of bill of Act of Electronic Delivery.
28. **Kamil Szpyt** – PhD, Assistant Professor at the Chair of Civil Law of the Faculty of Law, Administration and International Relations of the AFM Krakow University. He is a lecturer at the Medical College of the University of Rzeszow and associate at the *Centre for the Law of Design, Fashion and Advertising*. Dr Szpyt is an attorney-at-law, partner in a law firm Dybała Janusz Szpyt i Partnerzy Kancelaria Radców Prawnych. Within the firm he leads the practice of Intellectual Property and New Technologies Law. He is an author of over thirty publications in the field of new technology law, intellectual property law, insurance law and civil law and a speaker at several dozen international and national scientific conferences. Dr Kamil Szpyt is a member of, among others, the Polish Artificial Intelligence Society and Games Research Association of Poland and a regular contributor (publicist) to "Gazeta Ubezpieczeniowa".
29. **Marek Świerczyński** – advocate, consultant of the Council of Europe in the field of electronic evidence and digitization of judiciary. Chairman of the team for the law applicable to artificial intelligence at the Virtual Department of Law and Ethics (consortium of Polish universities). Of counsel at Kieszkowska Rutkowska Kolasiński Law Firm and associate professor at the Institute of Legal Sciences of the UKSW. Graduate of the Faculty of Law and Administration at the Jagiellonian University. He teaches new technologies law at INP PAN, the Jagiellonian University, University of Warsaw, University of Economics in Krakow and Kozminski University. He is a permanent arbitrator at the Arbitration Court for Internet Domains and a mediator at

the UPRP/WIPO. Professor of Law at the Cardinal Stefan Wyszyński University of Warsaw.

30. **Michał Tabor** – computer scientist, graduate of the University Warsaw. He deals with the implementation of electronic signature and electronic identification solutions. Author of many solutions in the field of electronic identification and trust services functioning in Poland, in particular the author of the widely used mechanism for submitting tax returns and the Trusted Profile. CISSP certificate holder. Member of the ESI ETSI Technical Committee. Expert of the Polish Chamber of Information Technology and Telecommunications.
31. **Gabriela Witkorzak** – Experienced Commercial Lawyer (UK qualified solicitor) with a demonstrated history of working in the legal services industry. Skilled in Breach Of Contract, Negotiation, Community Engagement, Big Data, LegalTech, Data Protection, IT and EU Law. Strong sales professional graduated from Brunel University, BPP Law School and Akademia Leona Koźmińskiego.
32. **Jakub Wyczik** – Jakub Wyczik - PhD candidate at the Doctoral School at the University of Silesia in Katowice in the area of social sciences (legal sciences), conducting research in the field of IT law, with particular emphasis on the legal status of data. Laureate of the first prize in the 18th edition of the competition for the best scientific work on intellectual property, organized by the Polish Patent Office. He combines his research with professional practice as an in-house lawyer in a company belonging to the group of 10 largest providers of systems for advanced data analysis in Poland (Computerworld TOP200 Edition 2020), where he participates from the legal side in IT projects carried out in cooperation with leading global technology partners such as Microsoft or Cloudera.
33. **Michał Wódczak** – holds a DSc (habilitation) and a PhD (doctorate) in telecommunications, both from Poznań University of Technology, as well as an Executive MBA from Aalto University School of Business. He has authored three monographs in the area of autonomic intelligence systems, where the habilitation related one was published by Wiley, and the two others by Springer. Presently he holds the position of a Vice Chairman of the Communications Chapter of the Polish Section of IEEE, as well as acts as an Expert to the Legislative Committee of the Sector Council for Telecommunications and Cybersecurity. Previously he ran standardization activities as a Vice Chairman and Rapporteur of ETSI ISG AFI, the Industry Specification Group on Autonomic network engineering for the self-managing Future Internet, established under the auspices of European Telecommunications Stan-

## *About the authors*

dards Institute. He also served as an Executive Board Member of the Association of Polish Translators and Interpreters in Warsaw.

34. **Anna Zalesińska** – attorney at law, professionally associated with the Center for Competence and Computerization of the Judiciary (Court of Appeal in Wrocław). She participated as a researcher in numerous research projects concerning computerization of the justice system (national and international). Since starting doctoral studies, she has been involved in legislative work related to the drafting of provisions related to the computerization of proceedings before common courts. Member of the Analytical and Legal Team for the implementation of the system of registration of the course of court hearings in civil proceedings in common courts at the Department of Common Courts of the Ministry of Justice (2011–2015). She was the Project Manager of the Portal Orzeczeń in the Ministry of Justice (2013-2016) and the Deputy Project Manager in the Information Portal Project in the Ministry of Justice (2013-2016), as well as a member of the Working Group for the Electronic Inquiry Office established as part of the IT Steering Committee at the Ministry of Justice. Author of numerous scientific articles and participant of several dozen conferences on the computerization of public entities, academic lecturer.
35. **Tomasz Zalewski** – attorney-at-law, partner managing the Commercial practice at Bird & Bird law firm. Founder of the LegalTech Polska Foundation. Experienced expert in the field of contracts, intellectual property law, IT projects and public procurement. He has over 20 years of experience in legal advisory for business. He advises clients on projects related to digital business transformation. He has advised on numerous infrastructure and IT projects including comprehensive software implementations, both in the traditional model and in the cloud model. He advises on all aspects of public procurement law, including representing clients in procurement disputes before the National Appeals Chamber and before courts. He is an arbitrator at the Court of Arbitration of the Audiovisual Market at the Polish Chamber of Commerce of Polish Audiovisual Producers and an expert at the Council of the Polish Chamber of Information Technology and Telecommunications. Advises as an expert in the project "European Aid for Innovation".
36. **Mario Zanin** – lawyer with experience of legal assistance, both in and out of court, to banks, investment firms, asset management companies, financial intermediaries and insurance companies clients, on all aspects of banking, financial services and insurance law and regulatory frameworks, also for their cross-border activities. Graduated in

Law at the University of Milan and currently Legal Director at PwC TLS Avvocati & Commercialisti law firm. He regularly participates as a speaker at national conferences and meetings on several aspects of financial markets, banking and insurance law and is author of various publications and articles in financial markets, banking and insurance law.

37. **Zsolt Ződi** – PhD, lawyer, senior research fellow, National University of Public Service, Budapest, Hungary. His field of interest covers legal informatics and regulatory problems of information society. He is an author of two books, and more than 80 articles.
38. **Aleksandra Partyk** - Assistant Professor at the AFM Krakow University; Attorney-at-law; Managing Editor at “Studies in Law. Research Papers” („*Studia Prawnicze. Rozprawy i Materiały*”); Editor for international cases at “Annals of the Administration and Law” (“*Roczniki Administracji i Prawa*”); Permanently cooperates with Wolters Kluwer Polska; Author and co-author of monographs, articles concerning law; Speaker at numerous Polish and international Conferences.



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“—  
|

## Constitutional Bench Update

**Ashok Kumar Jain v. Union of India**

**Extension of reservations in the Lok  
Sabha and State Legislative  
Assemblies beyond 10 years**

—,|



“—  
**Bench:**  
**D.Y.Chandrachud J., M.R.Shah**  
**J., Krishna Murari J., Hima Kohli**  
**J., P.S.Narasimha J.**

**Case Admitted on:**  
**October 17, 2000 / February 26,**  
**2016**

**Last Date of Hearing:**  
**September 7, 2022**

**Next Date of Hearing:**  
**November 1, 2022**

—”

# Background:

“—

- The petitioner has filed a petition challenging the validity of the 79th Constitutional Amendment Act, 1999, which altered Article 334 of the Constitution to allow reservations to the Anglo-Indian community, Scheduled Castes, and Scheduled Tribes in the Lok Sabha and State Legislative Assemblies.
- The provision was initially supposed to operate for ten years. Nevertheless, further amendments extended the reservations for the SC/ST communities to 80 years and for the Anglo-Indian community to 70 years..

—”

“—

- The Petitioner contended that the aforementioned Amendment violated Right to Equality under Article 14 of the Constitution because it repeatedly extended restricted reservations, which undermined everyone's ability to have equal representation and also deprived them of their democratic rights.
- On 2nd September, 2003, the Division Bench of Supreme Court referred the matter to a 5-Judge Constitution Bench.

—”

# Issues under Consideration:

“—

- Does the extension of the reservation period for SC/STs and Anglo-Indians from 50 years to 60 years under the 79th Constitutional Amendment violate the Right to Equality?

—”

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“—

## Constitutional Bench Update

**Anoop Baranwal vs. Union of India**

**Appointments to Election  
Commission of India**



—”

Bench

**Justices K.M. Joseph,  
Ajay Rastogi, Aniruddha Bose,  
Hrishikesh Roy, C.T. Ravikumar**

**Case Admitted on  
February 25, 2020**

**Last Date of Hearing  
September 29, 2022**

**Next Date of Hearing  
November 17, 2022**

# Background

“—

**January 13, 2015:** Anoop Baranwal filed a PIL praying for issue of mandamus commanding the Respondent to make law for ensuring a fair, just and transparent process of selection by constituting a neutral and independent collegium/selection committee to recommend names for appointment of member of Election Commission.

Article 324 of the Constitution specifies that while the Chief Election Commissioner and Election Commissioners will be appointed by the President, this is subject to Parliamentary law (if such law exists). While this provision places an expectation on Parliament to draft a relevant law, it has not done so up until now.

—”

# Background

“—  
|

In the absence of such a law, the President has been making appointments as per the recommendations of the Prime Minister.

**January 23, 2018:** Supreme Court referred the matter to a Constitution Bench for an authoritative pronouncement.

—”

# Issues under Consideration

“—

- Does the current process for appointments violate equality guarantee under the Constitution?
- Does it violate separation of power principle if court issues directions/ guidelines for appointment process of election commissioners?

—”

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“—

## Constitutional Bench Update

**Animal Welfare Board of India  
v.  
Union of India**

**Jallikattu – Bull Taming Sport**



—”

“—  
**Bench**  
**Justices K.M. Joseph,**  
**Ajay Rastogi, Aniruddha Bose,**  
**Hrishikesh Roy, C.T. Ravikumar**

**Case Admitted on**  
**January 11, 2016**

**Last Date of Hearing**  
**September 29, 2022**

**Next Date of Hearing**  
**November 23, 2022**

—”

# Background

“—  
|

**2007:** Madras High Court banned the bull-taming sport of Jallikattu from Tamil Nadu.

**2009:** Tamil Nadu government, through the Tamil Nadu Regulation of Jallikattu Act, 2009 allowed the sport and laid down specific guidelines.

**2011:** Ministry of Environment, Forests and Climate Change (MoEF) prohibited the training and exhibition of bulls.

—”

# Background

“—

**May 2014:** Supreme Court in the case of Animal Welfare Board of India v. A. Nagaraja and Ors., MANU/SC/0426/2014 held that Jallikattu, Bullock-cart Race and such events per se violate Sections 3, 11(1)(a) and 11(1)(m)(ii) of Prevention of Cruelty to Animals Act, 1960. Consequently, Bulls cannot be used as performing animals, either for the Jallikattu events or Bullock-cart Races in Tamil Nadu, Maharashtra or elsewhere in India.

**2016:** Ministry of Environment, Forest and Climate Change issued circular excluding traditional customs, such as Jallikattu from the restriction on training and exhibiting animals.

—”

# Background

“—

**November 16, 2016:** Review Petition filed by State of Tamil Nadu against judgment in the case of Animal Welfare Board of India v. A. Nagaraja and Ors. MANU/SC/0426/2014 was dismissed.

Prevention of Cruelty to Animals (Tamil Nadu Amendment) Act, 2017 was passed which stated that the Prevention of Cruelty to Animals Act, 1960, would not apply to Jallikattu.

**February 2, 2018:** Division Bench of Supreme Court referred the matter to the Constitution Bench

—”

# Issues under Consideration

- “—
- Is the Tamil Nadu Amendment Act referable, in pith and substance, to Entry 17, List III of the Seventh Schedule to the Constitution of India, or does it further and perpetuate cruelty to animals; and can it, therefore, be said to be a measure of prevention of cruelty to animals? Is it colorable legislation which does not relate to any Entry in the State List or Entry 17 of the Concurrent List?
  - The Tamil Nadu Amendment Act states that its objective is to preserve the cultural heritage of the State of Tamil Nadu. Can the impugned Act be stated to be part of the cultural heritage of the people of the State of Tamil Nadu so as to receive the protection of Article 29 of the Constitution of India?
- ”

# Issues under Consideration

“—

- Is the Tamil Nadu Amendment Act, in pith and substance, to ensure the survival and well-being of the native breed of bulls? Is the Act, in pith and substance, relatable to Article 48 of the Constitution of India?
- Does the Tamil Nadu Amendment Act go contrary to Articles 51A(g) and 51A(h), and could it be said, therefore, to be unreasonable and violative of Articles 14 and 21 of the Constitution of India?

—”

# Issues under Consideration

- “—
- Is the impugned Tamil Nadu Amendment Act directly contrary to the judgment in Animal Welfare Board of India v. A. Nagaraja and Ors (MANU/SC/0426/2014), and the review judgment dated 16th November, 2016 in the aforesaid case, and whether the defects pointed out in the aforesaid two judgments could be said to have been overcome by the Tamil Nadu Legislature by enacting the impugned Tamil Nadu Amendment Act?
- ”

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Mihnea Tănăsescu

# UNDERSTANDING THE RIGHTS OF NATURE

A Critical Introduction



[transcript] New Ecology

Mihnea Tănasescu  
Understanding the Rights of Nature

**Mihnea Tănasescu**, born in 1984, is a political ecologist with a background in human ecology, philosophy, and political science. He has published widely on the political representation of other than human beings. He was a research fellow of the Research Foundation Flanders (FWO) and a visiting fellow at the University of Auckland, NZ (Law), and the New School for Social Research, USA (Politics).

Mihnea Tănăsescu

# **Understanding the Rights of Nature**

A Critical Introduction

[transcript]

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My deep gratitude goes to the many scholars and practitioners that have pushed incessantly to change the dominant frameworks of legal theory and practice. Naming them exhaustively is impossible, but much of their work is present in this book. Established paradigms have outlived their usefulness, and the work of these courageous people is pushing these further into oblivion. My implicit or explicit critique of their work is undertaken in a spirit of

## 8      Understanding the Rights of Nature

deep solidarity, and towards the further concerted erosion of the status quo.

# Chapter I: Introduction

---

Rights are ubiquitous in our world. In theory, if not always in practice, they belong to a growing number of subjects: humans have them, as well as inanimate objects (monuments and patrimonial goods), fictitious collective entities (corporations and states), and sometimes animals (usually the charismatic ones, though even then, not always). Rights provoke strong advocacy and inspire passionate struggle. Increasingly, for better or worse, they are seen to be an obligatory mechanism of emancipation. And lately, a new entity has come to be seen as a potential subject of rights: nature itself. Since the beginning of the 21<sup>st</sup> century, rivers, mountains, and whole landscapes have received rights and, with them, a new legal status.

The theory and practice of applying rights to nature usually goes by the catch-all phrase *the rights of nature*. This book is about them, and particularly about trying to understand where they come from and where they may lead. With the growing number of cases<sup>1</sup> of rights granted to nature comes a growing public awareness of this phenomenon, usually reflected in increasing media coverage of striking examples: the constitutional rights of nature in Ecuador, the Law of Mother Earth in Bolivia, the legal personality of Whanganui river in Aotearoa, New Zealand, or the rights of rivers in Colombia, India, and Bangladesh, to mention but a few.<sup>2</sup>

---

<sup>1</sup> I will use case in the colloquial sense, not the technical one used in jurisprudence. Where I do use the technical term, the context should make it obvious.

<sup>2</sup> Rights of nature proposals are currently being drafted in many different places, for example in Bangladesh, Mexico, Uganda, Australia, to name but

The underlying assumption is often that all of these cases are fundamentally similar – part of a nature rights movement – and that they are (at least in theory) a radical solution to environmental degradation.

But practice has not yet proven that these kinds of rights are a good mechanism of environmental protection. Instead, it has demonstrated that these rights are of various kinds, have appeared in different contexts, and embody tensions and contradictions that predate them. The variety of cases to date begs for critical examination, one that aims to understand these rights as dispassionately as possible. This is what this book tries to accomplish, by engaging in a critique of the theory and practice of rights for nature. This may also help their future.

The context within which a trend is placed matters greatly for how it may be understood. The rights of nature appear at a historical moment unlike any other, one where human and geological history become intertwined (Chakrabarty 2009). To be precise, they appear at the intersection of two events that are really part of a delicate unity: the intensification of human pressure on the environment and the expansion of liberalism in the guise of increasing numbers, and kinds, of rights. Crucially, this later expansion is largely inseparable from the concomitant history of colonialism and Indigenous<sup>3</sup> subjugation.

Let's start with the latter. Since at least the 18<sup>th</sup> century, European philosophy, political, and legal practice has undergone several massive shifts towards a human world conceived of essentially in terms of rights and obligations. This has become so dominant that it is hard to imagine just how revolutionary this has been. Indeed, the French and American revolutions are rightly seen as paradigmatic examples of human rights applied on the basis of membership in the human species alone, without any consideration of social

a few. In Europe, these are present in some form in Sweden, the UK, Spain, and the EU as such.

<sup>3</sup> In line with widely accepted international norms, Indigenous People will be capitalized. When referring to indigeneity in any other way but specific people, 'indigenous' will be used, as in 'Indigenous thought'.

class, gender, ethnicity, and so on. This, of course, was the theory. In practice, human rights have never been equally distributed and continue to be a highly unequal tool (Douzinas 2000).

Concomitantly with the rise of rights as not only a salient, but also an increasingly important, category, the Western world invented a mode of political economy defined by the perpetual expansion of capitalism. Political liberalism therefore became split between two mutually reinforcing poles: stressing the importance of individual rights and stressing the necessity for free movement of capital. The ideological explanation has been for quite some time that one is indispensable to the other. During the cold war the 'free world' made the argument that its freedom passed through both its upholding of individual rights and its economic liberalism. With the end of that bipolar world, in the early 1990s, the victory of liberalism was hastily announced. The proponent of the "end of history" thesis (Fukuyama 1989) has since changed his mind (to his great credit), but the ideology that unites individual rights with economic liberalism has endured.

I cannot do justice to this long and complex history, and that is not what I am setting out to do. Others have done a superb job already (among others, Charbonnier 2020, Malm 2016, Mitchell 2011). What I do want to point out is that the rights of nature are best understood in the context of this double movement of rights expansion and intensification of human pressure on the environment through capital flows. In *Carbon Democracy*, Timothy Mitchell shows how the exploitation of coal reserves and the creation of a workforce able to exploit it was inseparable from political revolutions that secured rights for workers (that were, because of the material properties of coal, in a position to interrupt capital flows). On the other hand, Andreas Malm demonstrates, in *Fossil Capital*, how the transition to fossil fuels was elaborately designed precisely in order to control labor and concentrate it in places and around schedules that suited capital accumulation and expansion. Later on, the availability of artificially cheap energy became inseparable from a series of social transformations, including the creation of consumer cultures able to absorb excess production.

The political economic transformation of the past centuries has been, ecologically speaking, a train wreck long in the making. Usually though, the story of capitalist expansion is told as a separate story from that of the liberal expansion of rights. It is more helpful to instead look at the connections, and one way to see them clearly is by exploring briefly the way in which the contemporary dominance of a globalized economy works on the basis of an increased number of rights, selectively applied. One of the ways to see this connection comes, perhaps surprisingly, from chemistry. In 2000, Paul Crutzen, a leading geochemist, and biologist Eugene Stoermer, proposed that the planet had entered a new geological era, one termed the Anthropocene. This would replace the Holocene, the era that corresponded with the mild climate that is usually credited to have been instrumental in the development of civilizations in the past 12000 years or so.

The Anthropocene, in geochemical terms, simply means that future geologists will be able to discern a layer of human-made materials at the top crust of the Earth. Therefore, they would be entitled to conclude that the boundary between Holocene layers and the new materials was the boundary between two different times, marked by different geological processes (Waters et al 2016). In other words, Crutzen and Stoermer suggested that human activity had become a form of geological activity in terms of its transformational potential, on par with volcanic eruptions and tectonic movements (also see Crutzen 2002, 2006, Zalasiewicz et al 2011). Officially, the geological community has not yet adopted the term as fact. This notwithstanding, it has had a tremendous influence, because it captures a qualitatively different time, not just a geologically different one.

Climate change is but the most visible, and most discussed, of Anthropocene problems. But it is not the only one. Biodiversity loss, land use changes, fresh-water use, the nitrogen cycle – all of these are equally important processes that have been formidably altered by human activity. Critical scholars have rightly pointed out that the idea of an Anthropocene focuses too much on ‘humanity’ having influenced ‘the planet’, when instead what is truer is that a select number of people, and the processes of accumulation that they have

set in motion, have altered the planet for everyone. Jason Moore, for example, has therefore proposed the Capitalocene as an alternative name (Moore 2017, 2018). I have proposed the term Ecocene (Tănasescu 2022) as an alternative that focuses on the political importance of ecological processes themselves. Beyond the terminological discussion, it is important to see that the era of human geological influence has come into being as both a radically unequal process (most CO<sub>2</sub> emissions are highly concentrated in some places, for example), and on the basis of a culture of expanding rights.

Some of the scholars responsible for introducing the Anthropocene have also been very active in trying to understand when it began (Zalasiewicz et al 2016). There are several candidates, usually placed around the industrial revolution, though others have implied that the Holocene itself was always already the Anthropocene, as humans have modified environments for a long time indeed (Ellis et al 2021). The most useful and, in a sense, obvious date for the beginning of the new era is 1945. Two things are put in motion at that time that will come to be overly important for the ways in which the planet is modified. On the one hand, 1945 inaugurates the atomic era, with explosions and tests that have left a clear mark on the upper crust of the Earth. On the other hand, the end of World War II ushered in the era of the Great Acceleration: a time in history where a select number of societies (mostly Western, but increasingly not so) started producing and consuming stuff at an exponentially growing rate, all predicated on the availability of fossil energy.

Graphs showing the settling in of the Great Acceleration are striking: for a great number of things, there is a J shaped curve from the end of the second world war until today, both in terms of its production and consumption (energy, consumer goods, food stuff – particularly chicken, fertilizers, cement, plastics, and so on). During the same time though, the liberal heritage of rights, with foundations in earlier revolutions against monarchy, really came into its own. The period of the Great Acceleration is also the period of the Universal Declaration of Human Rights. But the exponential increase in churning Earth's stuff is not some natural process that humans cannot but obey. Instead, it has been a deliberate program of political economy that has managed to put together two seem-

ingly disparate movements: one towards increasing exploitation of resources and labor (both in the form of increasing extraction of raw materials and of their processing for consumption) and one towards increasing human liberty.

This is the genius of the current system of globalized, intense exploitation: it doesn't merely tolerate the expansion of rights discourses; it uses it to its advantage, even though the indefinite production of stuff exemplified most strikingly in the doctrine of infinite economic growth cannot but exploit human resources as much as natural ones. The way in which this hegemonic system of production/consumption accomplishes this feat is through the power of the nation state to selectively apply rights in a way that matches with the interests of global capital expansion. This collusion between the *national* state and capitalist expansion is not a recent invention, but there from the beginning of nations themselves (Sharma 2020). Without it, much of the structure on which the Great Acceleration depends would collapse.

The fact that the correct (one may even say utopian) application of rights would be existentially threatening to global capitalism does not mean that rights are *the* tool of emancipation. In fact, their having become the go-to tool of emancipatory politics has so far helped capitalist expansion and the indefinite production that characterizes it. This is an argument that I will weave throughout the book. I wanted to start the discussion of rights for nature by setting it in an appropriate context, one where it is almost never set, partly because of the naïve belief that rights are a good in themselves.

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This book has a simple goal: it aims to introduce the idea of rights for nature from a critical perspective. Recognizing that times of great uncertainty can elicit unwarranted enthusiasm for universal solutions, I cannot present the rights of nature as an inherent cure for contemporary and future problems. Instead, I opt to present it critically, which means that I want to spend some time understanding where this idea comes from, and what it can be applied to with reasonable expectations of success. I am also interested in thinking

about what ‘success’ may mean, what it may look like in practice. In other words, this is not the book of a believer, though I like to think that it would be good for believers as well.

It will become clear throughout that the guiding question of this book – what the rights of nature mean – does not have a single answer. Instead, the argument will spend some time developing the multiple answers demanded by a critical perspective. It is not a matter of competing answers, as if one could find, if only enough effort were spent, the correct one. Instead, the rights of nature have both multiple histories and multiple meanings, all coexisting and mutually determining the continuing evolution of ideas and practices. It is this multiplicity that is most interesting, and the best route towards some level of understanding.

Fortunately, there are already enough cases of rights granted to nature to be able to present the multiplicity of theory and practice. Showcasing this multiplicity is not an end in itself, but has two very clear goals. On the one hand, it is meant to counter what I call “rights of nature orthodoxy”, a view of these rights as inherently positive constructions (or, at worst, benign) that are going to save ‘the environment’ from rapacious ‘humans’. I will show that this is at best an unfounded belief, and at worst an actively dangerous one. Its propagation risks derailing the evolution of rights for nature towards a diversity of views that can tackle a diversity of situations.

On the other hand, my goal is to empower practitioners, general readers, as well as future scholars by presenting some critical tools that can help in the necessarily long-term and patient work of building alternative ways of living (which will themselves be multiple). Critical scholarship has already provided a series of insights that remain mostly ignored by many advocates invested in defining a mainstream. My argument is not that rights for nature are unhelpful or dangerous, but rather that we need to be much more reflective in how and why they are used. In this, it helps to be clear about the different intellectual genealogies present in different cases, and how these influence outcomes irrespective of the desires of their proponents. It also helps to be clear as to why different versions of these rights may be deployed, and by who.

I think it's helpful to start by giving the conclusions away. At this point they may not convince, but that is not the idea behind presenting them up front. Rather, I wish to clearly delineate the structure of the critical engagement with the rights of nature, such that often-repeated tropes about them are exorcised before we begin. Together, the following propositions are indispensable for thinking about the rights of nature:

1. *The rights of nature are both theoretically and practically possible.* They make theoretical sense and, largely because of this, they have been adopted in different places. It is important to realize right away that the claim that rights cannot be predicated of nature is both theoretically and practically untrue; they can, they have, and they will continue to be predicated. It is pointless to argue that the rights of nature are nonsense.
2. *The rights of nature are not a monolith.* Despite the often-repeated claim that the rights of nature constitute a movement, there has been very little reflection on what the movement is made of, and what it means for the expansion of these rights to be thought of as a movement. In many cases, they have taken the form of an elite proposition in search of a grassroots, and not the other way around. Rights of nature legislations have appeared in different places and in radically different ways. There has been international diffusion of this idea, to be sure, but this does not mean that all cases can be subsumed under a unifying label propagated by a broad movement. The internal diversity of the idea, and of its practice, deserves being foregrounded, as it is a valuable asset going forward.
3. *The most useful frame for understanding the rights of nature is political, not legal.* One cannot understand what the rights of nature are *doing* without thinking about them in terms of power relations. All too often, strictly legal interpretations forget that legal norms are as good as their implementation, which necessarily passes through political power. This may be true in general, but in the particular case of rights for nature it is extremely important. Specifically, the question of who has the power to represent a nature with rights is central to understanding their potential.

This does not mean that local legal contexts do not matter; they matter greatly! But what ultimately gives the rights of nature practical purchase is the political process that leads up to them, and that makes or breaks their implementation.

4. *The rights of nature are not primarily about nature.* This may seem counterintuitive, but it follows from proposition 3 above. The rights of nature are neither a universal solution to environmental harm, nor uniquely placed to solve such harm. In fact, they are not primarily about the environment at all, but about creating new relations through which environmental concerns may be differently expressed. What ‘environmental concerns’ look like is entirely dependent on the power configuration that births them.
5. *How rights of nature laws/provisions/regulations are drafted matters a lot!* This follows from proposition 4. I will attend to some of the differences and variations in legal texts so far and show how these variations are not just legal minutiae but crucial for understanding. What on the face of it look like similar cases will end up, after attending to the details, to be wildly different. These differences matter.

Let us begin.



## **Chapter II: Rights Meet Nature**

### A Brief History

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Origin stories are important. On the face of it, they reveal where something comes from. But that is not their main function; instead, they embed concepts and events within a narrative that gives them an overarching meaning, and therefore a particular direction. Origin stories manipulate how we view the thing under discussion, attempting thus to control how it may evolve.

The rights of nature are no exception to this. It makes sense to start their investigation with their history, but immediately a problem arises: which history? Is it the case that they only have one history, as more or less all commentators so far have implied? And if only one, which one? How can that be decided? Is a history synonymous with the *earliest* appearance of something, or with the form that most endures? These are questions that cannot be immediately answered. I raise them in order to begin this investigation grounded in the lucidity of the choices ahead. By recounting the history of rights for nature, I cannot claim to be recounting the only veridical history. Instead, I am necessarily selecting among predecessors in order to make a greater point.

Slowly, a standard history of rights of nature has become orthodoxy. I am well placed to know this particular history, as I have contributed to making it orthodoxy (Tănăsescu 2016). After recounting it, I want to turn to other versions that will inevitably complicate a simple origin story, adding to the layers that current theory and practice cannot but inherit. What I want to show is that they have multiple and competing histories, and what we choose to highlight has to be interpreted as a wider move of signification, and not

simply as recounting the historical truth. After presenting multiple versions of their genesis, I will turn to the question of whether or not granting rights to nature was, in some sense, and despite all possible histories, inevitable. The chapter will therefore end with an investigation of the seemingly fateful collision of rights with nature.

## Cristopher Stone and Legal Standing

The standard version of the history of rights of nature starts with the work of legal scholar Cristopher Stone. In a 1972 article titled *Should Trees Have Standing? - Toward Legal Rights for Natural Objects* (Stone 1972), Stone explicitly argued that the environment could enjoy legal rights.<sup>1</sup> He developed this line of thinking further in his 2010 book *Should Trees Have Standing? Law, Morality and the Environment*. Stone's arguments are still extremely influential, so it makes sense to pause and look at them closely.

What occasioned Stone's thinking was a lawsuit, brought by the Sierra Club.<sup>2</sup> In *Sierra Club v Morton*, "the U.S. Forest Service had granted a permit to Walt Disney Enterprises, Inc. to 'develop' Mineral King Valley, a wilderness area in California's Sierra Nevada Mountains, by the construction of a \$35 million complex of motels, restaurants, and recreational facilities. The Sierra Club, maintaining that the project would adversely affect the area's aesthetic and ecological balance, brought suit for an injunction" (Stone 2010: xiii). However, the Ninth Circuit ruled that the Sierra Club did not have

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1 Any claim to an "earliest" version of something – here, the rights of nature – should be treated with care. Chances are that, if one looks more closely, one finds predecessor that only vary by degree from the supposed origin of an idea. For example, Nash (1989, p.127) quotes a 1964 essay by Clarence Morris that specifically dealt with "nature's legal rights". Surely, there were predecessors for that as well! The point is that nothing can be settled by finding the earliest version; historical and intellectual threads are living and themselves respond to present tugging and wrangling.

2 One of the most influential environmental organizations in the United States of America. See <https://www.sierraclub.org>

legal standing to bring the suit. An appeal arrived in front of the Supreme Court, which ended up agreeing with the Ninth Circuit, though Justice Douglas penned a now famous dissent based on Stone's legal argumentation.

Stone's basic argument was simple: Sierra Club did not sue on behalf of Mineral King Valley because they were interested in protecting their own aesthetic interests; they were interested in protecting the integrity of the place itself! However, the US doctrine of legal standing did not allow them to sue because they could not show that they would be directly impacted by the proposed construction. There was no place in US law for suing on behalf of an environment *itself*, irrespective of damage to the person suing. To have standing, then, means to have the right to bring a lawsuit in front of a judge, because you are considered an injured party. Why not, then, allow standing to apply directly to the natural entities that the Sierra Club was trying to protect?<sup>3</sup>

Stone shows convincingly that organizations like the Sierra Club have had to retort to all sorts of subterfuges in order to gain legal standing (things like claiming 'aesthetic injury'). It would be much simpler if the law legitimized their motives to begin with, by granting standing to the natural entities themselves. The dissent that Justice Douglas wrote was based on Stone's paper and argued that "public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation" (quoted in Stone, 2010: xiv). In his work, Stone was careful to show that this is much less radical than it first appears. In fact, there are many non-human and even non-animate entities that do enjoy legal standing, for example ships and corporations. These last ones are of particular interest,

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3 It is important to realize that the doctrine of standing is not the same everywhere. Stone was specifically reacting to the US version of standing, whereas in other jurisdictions – say, Finland or New Zealand – individuals or groups not directly affected can still sue on behalf of an environment, claiming that they are defending the common good or interest (Kurki 2019). This is an important contextual element in understanding the genesis of the standing argument in rights of nature advocacy.

and I will come back to them throughout the book. For now, it suffices to show that the particular history of rights of nature rooted in Stone's work starts with a concern for achieving legal standing. This concern makes sense for the legal system of the United States but is obviated by public interest environmental legal standing in other jurisdictions around the world.

There is no problem with conferring legal standing on anything at all. The only limiting factor, as it were, is what people empowered to confer such standing consider deserving of it, for pragmatic reasons. In order to make this case, it helps to show that having legal standing comes with the creation of a legal personality: whoever or whatever has legal standing becomes, because of that, a 'person' in front of the law. Legal personality and legal standing are a package; you cannot have one without the other.

According to several influential legal scholars (Naffine 2003, 2009, 2011 Grear 2013), legal personality is granted by the law in a highly fluid and malleable fashion. This means that a legal person is that entity that the law declares to be a legal person; it's that simple. The interesting question is *why* certain entities are deemed, by the law, to enjoy legal personality, and others are not. And that is precisely the terrain on which the rights of nature develop. Both in terms of advocacy and theory, rights of nature advocates have insisted for a long time that there are no valid *a priori* reasons to use the construct of legal personality for some entities, but not for nature.

For Stone, as well as for many of his followers, the question of legal standing for nature is intrinsically tied to its moral standing: nature should have legal standing because it is morally worthy of such. This argument is borrowed from the sister discourse of animal rights, where the moral status of an animal is deemed one of the most important features for determining its legal status. The conflation of legal and moral personality leads to the belief that the world is experiencing, to paraphrase Peter Singer (1973), a growing circle of moral concern.<sup>4</sup> In Stone's language, "there is something of

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<sup>4</sup> Peter Singer is the most visible contemporary advocate of this position, but the idea of an expanding circle of ethical concern is much older than his work,

a seamless web involved: there will be resistance to giving the thing ‘rights’ until it can be seen and valued for itself; yet, it is hard to see it and value it for itself until we can bring ourselves to give it ‘rights’ — which is almost inevitably going to sound inconceivable to a large group of people” (Stone 1972: 456).

This makes it seem as if moral and legal personality are related in a vectored fashion: if something has moral standing, then it is apt for getting legal standing; conversely, granting legal standing should soften the moral imagination of an increasing number of people. As comforting as this thought may be, it is not supported by legal practice, nor by the way in which moral considerations tend to work. This is not to say that some entities that are morally considerable do not receive legal status on that account. Nor is it to say that the law has no bearing on how morality develops. But it is to say that there is no automatic relationship between the two.

The easiest way to see this is to think about the countless entities that enjoy legal standing without also enjoying, on that account, moral standing. Retrieving the examples of ships and corporations, it seems clear that neither of these two enjoy moral standing just because they have the legal kind. Conversely, many cultures extend moral standing to ancestors and spirits, but without this translating into any kind of legal status akin to the Western concept of ‘legal person’. The point is that, though the two kinds of standing are entangled within the rights of nature from the beginning of their history, this entanglement itself should be actively questioned rather than simply assumed. It is just not the case that extending legal rights to the environment is uniquely a response to this latter’s moral standing, nor that it would automatically lead to moral improvement.

There will be ample opportunity later on to engage this point further. Now, I want to point out that in the history of rights of nature that starts with Stone, the main concern seems to be with the notion of legal standing, which is often interpreted to respond to a kind of moral status that the law has previously failed to recognize. But this association between legal and moral standing is neither

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going back at least to the philosophy of Jeremy Bentham (one of the major influences on Singer’s work).

central, nor unique, to Stone. In fact, his work is that of a pragmatist, interested in reaching towards whatever conceptual tools are at hand that may solve a perceived problem. Though Stone certainly speaks about legal and moral standing in analogous ways, he does not develop the connection to great length, nor does he seem – on my reading – to be primarily interested in it. Though the pragmatist orientation is pronounced in his work, this does not mean that it is equally pronounced in rights of nature scholarship more broadly, even that which claims Stone as a fundamental inspiration. In fact, the moral-legal standing equivocation that Stone inherits wholesale and neither questions nor makes central became a persistent strand within the history of the rights of nature, so much so that we find it, in much starker terms, if we switch the origin story altogether.

### **Godofredo Stutzin, Thomas Berry, and the Theology of Rights**

Around the same time that Stone was writing his famous legal article, Godofredo Stutzin was putting the bases of environmental advocacy in Chile. The son of German immigrants, Stutzin was a lawyer with a deep and abiding love for all things natural. Writing in Spanish, his work travelled much less than that of Stone, simply because English became the dominant language of liberal ideology in the 20<sup>th</sup> century. But the fact remains that, as early as 1973,<sup>5</sup> Stutzin penned articles calling for the rights of nature. His arguments were like Stone's but also contained a different emphasis that continues to haunt<sup>6</sup> rights of nature theory and practice today.

It may be no surprise that the history of rights for nature in the Southern parts of the American continent is much more consciously influenced by Stutzin, though references to Stone still abound. A big

<sup>5</sup> See Stutzin (1984) recounting the history of his own argumentation, as well as Simon (2019: 310).

<sup>6</sup> Haunt because it is largely unconscious, as very few people actually cite Stutzin. For example, Stutzin's kind of rights of nature are very well exemplified by Boyd (2017), who doesn't cite him at all.

part of that influence is seen through the argument that these rights represent an ecocentric turn in the history of law. Stutzin himself saw them as responding to what he called an “ecological imperative”. He argued that granting nature rights logically “implies overcoming the anthropocentric bias of law” (in Estupiñán Achury et al 2019: 41). This apparently simple formulation has had far-reaching consequences for the way in which rights of nature are understood, and therefore also for the way in which legal provisions are written. The implication of Stutzin’s argument (a fundamental shift towards ecocentrism) is that it is through granting nature rights that environmental problems can be fixed.

“Every day it becomes more obvious”, he wrote, “that if we want sustainable and long-lasting solutions to the ecological problems we have created, we cannot continue ignoring the existence of a nature with its own interests”<sup>7</sup> (Stutzin 1984: 97). This means that nature’s rights are formulated as *recognized*, not invented or granted by humans. The role of the human here is not of creating a legal mechanism, but rather of using legal mechanisms to translate what is already the case. For Stutzin, as well as for his followers, the moral standing of nature obviously demands legal standing, the two being inseparable. Furthermore, once the law catches up with the supposedly obvious fact of nature’s moral standing, ecological problems can be solved, *because of* this alignment of the law with moral sensibility. This belief is succinctly summarized in the subtitle of an influential book on the rights of nature (Boyd 2017): “a legal revolution that could save the world”.

This general outline of advocacy and theory is a very durable and potent one. I would even argue that Stutzin’s influence on the rights of nature, though much less acknowledged than Stone’s, has so far been more potent. It has, to be sure, had a great influence on one of the first codifications of these rights, in Ecuador’s 2008 constitution (see Chapter 3 for an extended discussion). Whereas for Stone granting rights to nature was mostly about the pragmatism of legal standing, for Stutzin it was about righting a wrong. The concept of right itself approaches here the older idea of natural right, that

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7 Own translation.

is to say the correct form of something, and its correct treatment, as dictated by nature itself. Whereas for Stone legal standing pragmatically led to formatting nature as legal personality, for Stutzin it is the literal personality of nature that demands we recognize its rights (notice how, in the quote above, Stutzin refers to nature's *interests*).

The idea of legal personality, as I have argued above, goes together with that of standing, but it also brings its own flavor to the discussion. Stutzin's insistence on the imbrication of legal and moral standing accomplishes a similar imbrication of legal and moral personality. The legal person, in strictly legal terms, is a fiction that can be granted to many kinds of entities inasmuch as the law deems it necessary (O'Donnell 2021, Naffine 2017). But the very terms *legal person* or *personality* already point towards the moral traces that are etched within this legal concept (Gear 2013, Naffine 2003, 2011). Stutzin doesn't speak of the possibility of formatting nature as a legal *entity*, but rather of the – to him – obvious personal qualities of nature that demand a recognition of its rights.<sup>8</sup>

The kind of argumentation that Stutzin employs found many hires, not least in a spiritualist tradition that theologizes the recognition of nature's inherent value through the concept of rights. The most influential early proponent of a specifically *ecotheological* take on nature's potential rights was Thomas Berry, though he was himself building on a long tradition that theologized the idea of rights, rooted in the concept of natural right. In his turn, Berry decisively influenced the work of Cormac Cullinan, which became – through his book *Wild Law* (2011) – an important foundation for rights of nature scholarship and practice. Thomas Berry was a cultural historian and theologian that focused much of his work on the idea

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<sup>8</sup> In legal theory, there is another salient distinction between legal *subject* and legal *person*, with the subject encompassing, potentially, a more agnostic view of the entity thus created. For the purposes of this book, I will use legal *person*, as I think it reflects better its use in rights of nature so far, and contrast it with legal *entity*, which is also supported by some extant cases. See Tănăsescu (2020).

that the way in which the world is narrated by different cultures is changing, and he wanted to participate creatively in this change by offering a new kind of story.

The story that Berry advanced is best exemplified by the title of his last book, *The Great Work* (2011). This, the culmination of his activity, reunited ideas that he had presented throughout a series of earlier publications as well as teaching and public engagement. For my purposes here, several elements of Berry's account of the Universe are relevant, especially inasmuch as they cut a channel for the rights of nature to travel through that becomes increasingly moralist.

The first thing that deserves pointing out is that Berry's story is a grand narrative of *the Universe*. His interest in grand narratives follows directly from theology, which is quite obviously interested in the greatest possible level of explanation for observable phenomena.<sup>9</sup> Wishing to reconcile Christian theology with modern science, particularly cosmology and ecology, he focused on a grand narrative that explained the way in which the Universe – the greatest possible unit – came into being and evolved. To his credit, Berry took on board scientific theories, like evolution, and worked theology around them, rather than the other way around (just like his great influence, Teilhard de Chardin). So, instead of a theological universe that arranged things according to God's plan, Berry argued for an evolutionary universe created by God precisely so as to be self-generating (also see Robinson 1991).

The focus on the great totality was broken down through what Berry called the twelve principles. It is beyond my scope to go through all of them, but some are extremely useful for getting across an accurate picture of the kind of conceptions that, through Berry and Cullinan, made their way into the rights of nature. The most important aspect to discuss is succinctly summed up in

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<sup>9</sup> To be fair, there are theological interpretations of ecology that do not focus on the great totality. For example, Berry's namesake, Wendell Berry, has focused much of his impressive body of work on the specificity of place, rather than the planetary whole, though he is also decidedly Christian in his approach.

Berry's second principle, namely that the universe is a unity. This principle of unity is a way of reconciling the theological unity of creation (one creator and one creation) with the interrelatedness that ecology had been uncovering since its 19<sup>th</sup> century beginnings. The fact of interrelatedness is made to sit comfortably within the theological idea of unity by interpreting the universe as a vast community. The argument is that, given that everything is related to everything else, everything must be a participant in the great community of being (in the Great Work).

However, this is not some form of post-humanism, a radically egalitarian distribution of agency among beings (a la Bruno Latour). Because of human's privileged role within creation, it is only through human consciousness that the great community the universe is thought to be, comes to know itself. This places humans in a responsible position, as *guardians* of the great mystery. The amalgamation of the ideas of unity and community, together with the privileging of human consciousness, leads towards a picture of the world that is both hierarchical (in the theological tradition of the Great Chain of Being; see Descola 2013, 2014) and, by its own account, ecocentric. Berry complains that previous law had been anthropocentric, only valuing nature inasmuch as it served human needs. He therefore proposes ecocentric conceptions, that is, ones that would value nature for its own sake. But the theological underpinnings of his argument render the whole ecocentric – anthropocentric distinction meaningless, as it is ultimately the responsibility of humans to uphold the order of creation by refashioning their law to fit with the interrelatedness of a universal community.

The conception of ecology that Berry's work is based on is that of the early 20<sup>th</sup> century, where the greatest figure was Eugene Odum, who significantly advanced the idea of ecosystem coined by Arthur Tansley. Already in the 1970s though, precisely when Berry started his work, Odum's ecosystem ecology came under sustained attack, first in the work of Drury and Nisbet (1973), who argued that the ecosystem is a sociological import into ecology, mimicking the sociological idea of community but without a factual basis in what ecologists observed. For Drury and Nisbet, there was no such thing as a 'natural community', except as a fiction of the sociologically (or

theologically, as Berry shows) biased mind. What the ecologist observed was an endless series of variations and interactions among animals and plants, with alliances in constant flux (Drury 1998). The critique of the ecosystem concept has been very influential, in ecology, but much less so in popular understandings of this science, which continue to use the concept as if it corresponded to some naturally ordained state of things.

Berry's idea of community mimics the idea of an ecosystem in early 20<sup>th</sup> century ecology. It is an interpretation of the fact of interrelation that selectively picks ecological concepts such that they can cohere with theological commitments. But this leaves Berry's concepts condemned to a level of abstraction that cannot differentiate between genuinely different situations. If all is unity and totality, then it is only at the greatest level of analysis that law, for example, can intervene. And this is precisely how his work has been made useful for law by Cormac Cullinan.

In *Wild Law*, Cullinan extracts from Berry several different nature rights that he argues are the fundamental ones – derived, as it were, from Berry's ontology (or rather, theology). These are the right to exist, to have a habitat, and to evolve as part of the earth community. The parallels with human rights discourse are striking. Recall, for example, that Thomas Jefferson's fundamental rights were to life, liberty, and the pursuit of happiness (also see discussion of Nash below). For a legal orientation that claims to be ecocentric, the kinds of rights proposed seem to be direct imports from anthropocentric conceptions. I will explore this point in more detail below. What I want to point out here is that Cullinan's rights, as direct hires of Berry's theology, are predicated at the level of the totality and presuppose the existence of such a thing as an Earth Community. This thinking has had a profound influence on several cases of rights for nature so far. But practice has also been more diverse than theory and therefore has offered ways of thinking about rights that do not have to be grounded in ecotheology (see Chapter 4). It is only through the kind of political framework that I am proposing here that we can even see the difference.

The history of the rights of nature that goes from Stutzin to Berry to Cullinan is one that is quite different from the most popular

version of these rights as emanating from Stone's work. Stone was first and foremost a pragmatist, and his work does not give much sustained attention to the concept of nature as totality as opposed to locality, or to the kinds of things that standing could apply to. For Stone, standing can apply to anything, and if a great number of people find it necessary to speak on behalf of environments, the law can accommodate that.<sup>10</sup> However, the ecotheological history that I have briefly sketched doesn't seem to be primarily interested in the pragmatism of given situations, but rather in advancing a framework that subsumes any given situation under the Great Work, the totality that imposes, as if on its own, a series of 'fundamental rights' that have to be *recognized* (as opposed to granted). Cullinan uses the expression Great Jurisprudence to describe his framework, in an obvious reference to Berry.<sup>11</sup> This way of thinking is moralistic because it implies that anyone that does not share the fundamentally theological assumptions underlining it is not only wrong, but fails to grasp a universal *moral* truth.

In another relatively early work on the concept of rights for nature (*The Rights of Nature. A History of Environmental Ethics*, 1989), Rod-erick Nash analyzed how the idea of rights for nature emerged in the English-speaking world out of the earlier conceptions of natural right that were successively modified through the human rights revolutions (abolitionism and women's rights first and foremost), theories of animal rights, and eventually the rights of nature itself. What is extremely interesting for my purposes here is how Nash, though himself subscribing to an 'expanding circle of moral concern' view, nonetheless shows the fine webbing that holds together apparently disparate thinkers and traditions around the idea that rights are a *recognition* of something that is already there, and that this recognition can be expanded without limits (to eventually encompass everything).

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<sup>10</sup> In many jurisdictions it already does, without appealing to legal personality or rights at all (see Kurki 2019).

<sup>11</sup> It may be worth pointing out that theological thinking does not present itself as a framework, but rather as a revelation of the truth (which leads to recognized, not granted, rights).

Nash also shows how theology was never far away from the earliest environmental concerns, nor from the very influential debate about the inherent value of nature. The passage from the 19<sup>th</sup> to the 20<sup>th</sup> century was a particularly fruitful period for the merging of ecology with value theories and theology. John Muir, for example, the mythical father of US national parks, was explicit in deriving the values that he saw as inhering in the natural world from the ‘fact’ of creation. The same Muir was a founding member of the Sierra Club that would eventually animate Stone’s thinking. The particular history of the development of environmental ethics that Nash recounts draws on a variety of sources and inspirations (not only theology, to be sure), but stays firmly within dualistic conceptions of the universe. Even the idea of ecocentrism, reflected through movements such as deep ecology and often claimed by rights of nature theory and practice, does nothing to challenge binary thinking: the ‘center’ is simply moved from one entity (the human) to another (nature). This obsession with centrism<sup>12</sup> is indeed a feature of much Anglo-American environmental ethics, and one decidedly important for the rights of nature.

There will be more opportunities to parse through the various consequences of this strand of rights, as well as ponder the possibility of de-moralizing the rights of nature so as to allow for a diversity of views to take hold. But before we get there, I want to focus a bit more closely on several other elements of this history that are extremely important. First and foremost, I need to attend to the concept of nature itself.

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12 Not all environmental ethics and philosophy develops in this centric-biased way. For example, much French literature on these topics shies away from centrism. See Serres (1995), Latour (2004), Descola (2013), to mention but the most influential ones. Even more importantly, many philosophies labelled as ‘indigenous’ offer much richer conceptual tapestries through which to relate to the environment. One of the more important questions of this book is to what extent the concept of rights forces one towards the centrism of Anglo-American thought, and therefore away from relational thinking and surprising legal possibilities. For an excellent argument for relationality in law, see Macpherson (2021). Also see Tănăsescu (2021).

## The Concept of Nature

The concept of nature is a baffling one, being simultaneously obvious and incredibly elusive. The obviousness comes solely from within a particular modern tradition of philosophizing that relegates nature to everything that is not culture. Perhaps the most succinct and coherent concept of nature within that tradition comes from Marxism, where nature is simply that which labor encounters (and which, therefore, it does not itself make; again, the background of human 'cultural' activity; Wark 2015). The elusiveness arises as soon as one thinks further about the distinction nature/culture, and realizes that there is no exact border to be found, but rather porosity all the way through. Anthropology compounds the problem further, having decisively shown that 'nature' is a culturally specific concept, and not at all the universal that modernity wants it to be (Descola 2013, De Castro 1996, 2014, 2019, Skafish 2016a, De la Cadena 2015, de la Bellacasa 2017).

The debate on the meaning of nature is important and vast, and I cannot survey it adequately or contribute to it in any meaningful way. But I do want to point out the cultural rootedness of the concept of nature. Second, I want to show that, based on the history sketched out so far, there are two very different ideas of nature at play within the rights of nature. Let us see what these are and the importance of their difference.

Godofredo Stutzin, in the 1984 version of his article, refers to Stone's minimalist conception of the rights of nature as dealing only with standing, but adds that in principle this can be applied to nature as such. We saw that in the work of Berry and his followers, we are always speaking about Nature (capital N), that is to say the totality, everything there is, and so on. According to Berry, this kind of Nature would not be modern at all, because it is not conceived of as mere background to human activity, which would be qualitatively different. Instead, Nature is *the* all-encompassing itself, and therefore human activity is definitionally natural. This poses a problem that is unresolved in this strand of rights for nature, namely the simultaneous use of the concept of nature as both a logical back-

ground and a kind of proxy for the good. This surreptitious moral use had already been anticipated by John Stuart Mill, whose essay *On Nature* demonstrates the incoherence of using the idea of nature as a proxy for the good.

Very briefly, Mill argues that the word nature is used to mean both what is so by its own design (and therefore is necessarily so), and what is *properly* so, therefore shifting into a moral register. However, there is no logical connection between the two. If anything, there is an inherent contradiction in using nature as both that which is so and that which *should* be so. In other words, the meaning of the word nature shifts when going from ontology (what is) to morals (what should be). On an even more basic level, Mill argues that if something is so by nature, it needs no encouragement to be so; conversely, if something is not so by nature, it needs no prohibition. In Tănăsescu (2016), I argued that Mill's argument (also see Antony 2000) implies that the supposed inherence of rights in the subject of rights (whether humans or 'nature') can be of no ethical significance. In other words, saying that rights are recognized confuses the ethical significance of rights (as proclamations) with the idea of an already moral nature. In fact, if rights were already part of nature, they would need no recognizing, just like the laws of physics operate whether they are recognized or not.

Mill's argument is, in my view, still very important to recall. But it's also worth pointing out that Nature conceived of as Totality is also hopelessly large, in such a way as to not admit of relationships that are situated at lower levels of abstraction. This is why, when Berry and his followers speak about Nature they also speak about the disturbing relationship that Humanity has had with it. Entertaining the idea that there might be such a thing as a relationship between two categories this big is an artefact of the concept of nature as Totality. No single individual, or particularly situated group (whether human or non-human) can ever enter into relationship with Nature but only, it would seem, with particular parts of its manifestations. This reliance on totality is extremely important to recognize, because it is one of the main bridges between rights of Nature and the neoliberal expansion of a particular model of development predicated on the existence of a universal Human with

universal rights (also see Chapter 6). In actual fact, the human that stands for Humanity is consistently of particular socio-economic backgrounds inextricably linked with a removal from actual environments that is the modern abstraction par excellence.

Continuing the earlier parallel with the concept of ecosystem, here we see how any particular environment is immediately formatted as derivative, as somehow subservient to the Great Totality that gives it the laws of its functioning (which, as I've already pointed out, both include and exclude humans, in an incoherent way). It would be as if, in ecology, the ecosystem concept would have led to speaking of the Ecosystem as the ultimate reality, and any particular ecosystem simply as a reflection of it. This is in fact what happened to much Odum-inspired ecology, as it postulated a natural equilibrium that natural communities supposedly tended towards, something that is yet to be observed as a verifiable and stable fact of nature.

The science of ecology has moved from a mid-century preoccupation with balance to a current focus on “disturbance” as the normal state of nature, a concept that is much better suited to an era of anthropogenic changes than the idea of an inherent equilibrium. However, the theoretical rights of nature strand I am exploring here has consistently latched onto the earlier ecological science, translating its idea of balance into a norm of harmony (Kotzé and Calzadilla 2017, Calzadilla and Kotzé 2018): inasmuch as Nature is understood to be in some form of (now disturbed) balance, then the appropriate answer is to strive towards harmony between Humans and Nature (achievable through recognizing its rights).

Just like with the doctrine of human rights, which postulates a universal Human (see Douzinas 2000) as a general repository of fundamental rights, so this particular strand of rights postulates Nature as the origin of a set of fundamental rights, which must be extremely general. On the other hand, we can also think about a concept of nature as immediate environment, what David Abram talks about as an ‘environing world’ (Abram 2012; also see Tănăsescu 2022). This nature is very specific and highly textured, and it also changes through time without necessarily being derivative of a greater work. Māori, for example, perceive “the universe as a Pro-

cess" (Kawharu 2010, 225). Nature as place, in other words, cannot admit of totalizing concepts but is instead focused on understanding how life is possible *here*, in this locality, under these changing conditions, with these participants. Nature as totality has no politics, only theology; nature as place is nothing but politics. Not incidentally, nature as place is also extremely well formulated in various indigenous philosophies<sup>13</sup> (for example, see Watts 2013), a point that I will come back to throughout.<sup>14</sup>

In the theoretical history of the rights of nature, Totality rules. However, in practice, nature as place has come to leave its mark within what its rights may mean. These issues are best explored through practical examples of rights for nature (see next chapter). Now, I want to attend to one last element that needs a bit of attention before moving on: the concept of rights.

- 13 Usually, indigenous systems of thought are variously referred to as 'beliefs', 'cosmovisions', 'cultures', and so on. This is done even by people, and legal texts, that are very inclusive. I find this terminology to be inadequate, because it draws a sharp line between what *we* have – proper systematic thinking, and what *they* have – beliefs and visions. José Gregorio Diaz Mirabal, coordinator of the Congress of Indigenous Organizations of the Amazon Basin (COICA), was quoted by Politico to have said, apropos international conventions, that Indigenous People are invited "to present our traditions, songs and dances". This is certainly not what communities around the world want; there is plenty of multicultural sensibility already. Instead of repeating the dominant terminology, I will refer to Indigenous thinking as either that – thinking, or as philosophy, the highest form of thought of 'our' culture. I see no reason why systematic thinking everywhere and anywhere should not be recognized as philosophy.
- 14 Interestingly, O'Donnell (2018) shows how law itself formats the idea of nature in different ways, but which all go substantially towards great levels of generality and, in part, reproduce dualisms. Nature is repeatedly understood by law as either the background of human activity, or as a thing to be protected, or – as is the case in the present discussion – as a legal person. But in all these instances the textures of places are absent, as are the relations that these textures inspire and sustain.

## The Concepts of Rights and Legal Personality

The idea of granting rights to nature cannot be properly examined unless we also take stock of the concept of rights. As with nature before, I cannot possibly present a comprehensive overview of this concept, one of the most important ones in the Western philosophical cannon. However, besides pointing readers to masterful treatments of the subject, I want to simply pause and take stock of several different elements of rights that are crucial for this examination.

What, at its most basic, is a right? Following Wesley Newcomb Hohfeld (1917), still the most influential legal theorist on the matter, a right is a kind of enforceable claim. To what? That depends on the right, but basically to something that is owed to the rights holder, as a matter of justice. This is what Hohfeld calls claim-rights, and indeed the rights of nature are of this kind. Rights, under this account, are always correlated with duties, but the duty and the right need not coincide in the same holder. So, if a non-human holds a right, the correlative duty is on the human to treat the right-holding non-human in a particular kind of way. The possessor of such rights has a verifiable claim to be owed something, and therefore someone else has a duty in respect to the rights holder.

In *Environment, Political Representation, and the Challenge of Rights*, I developed in much more detail the relationship between rights and claims. There, I argued that what we think is owed to some entity is reflected in the kinds of rights that legal processes confer upon them. The mediation between the general form of a universal subject of rights and the specific rights conferred is accomplished through the idea of legal personality, which is a legal fiction that bridges universality and concreteness (2016, p.60). However, the idea of legal personality has both moral and legal components that, as I have already intimated, are often mixed together. Morally speaking, a legal person is a subject; legally speaking, a legal person is a place holder for the capacity to enforce rights. As Hartney put it, “whatever legal authorities say is a legal right, is a legal right, whether this agrees with what philosophers would say about moral rights” (in Tănasescu 2016).

It is no surprise then that legal rights and legal personality go together. Kurki (2019) demonstrates that the legal person is defined by jurists as the holder of legal rights. He himself disagrees with this, what he calls the orthodox view of legal personality, but the point remains that in both legal theory and practice, rights and legal personality most often travel together. They certainly do in rights of nature theory and practice, as I will show in detail when discussing the cases of Ecuador and New Zealand (see Chapters 3 and 4).

Though having enforceable claims recognized by a legal authority seems to be, strictly speaking, a matter of legal proclamation, what philosophers have to say about who or what deserves rights is still of interest.<sup>15</sup> In legal philosophy, there have been two dominant (and competing) ways of accounting for why something may be eligible for rights. One way of accounting has been through “will theories”, that is to say theories that demand the possession of full autonomy in order to be eligible for rights. The paradigmatic case here is a mature adult human in full possession of his capacities (the maleness of this paradigmatic figure has gone unquestioned for centuries). The most philosophically influential will theory is Immanuel Kant’s attribution of full personhood to those capable of rationally setting their own moral law (see Kurki 2019, p.22). This basically eliminates most, if not all, non-humans from rights. In its most extreme versions, it also eliminates humans that, for some reason or another, are not considered fully rational.

Another basis for assigning rights and legal personhood has been explored by “interest theories”. These do not focus on the capacity for autonomous decision but rather on the idea of interest, namely on whether the entity in question can have its own interests. This kind of thinking has been greatly influenced by Jeremy Bentham, the father of moral utilitarianism, who famously said vis-à-vis the moral consideration of animals that the question is not whether they can reason, but whether they can suffer. Interest theories therefore rely on stretching inherited conceptions

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<sup>15</sup> I cannot possibly do justice here to a long and important debate. The interested reader should especially consult Kurki’s work on legal personhood, as well as Campbell (2011).

of interest, which can now be made to apply, in principle, to many different things (from ecosystems to corporations)

The relevant will versus interest debates are interesting in and of themselves, but for the purposes of rights for nature it suffices to simply point out that nature as such does not seem to fit easily within either way of arguing for rights, and therefore borrows liberally from both. Place-based nature may fare better, though advocates also argue that landscapes, for example, are sentient and have interests or exhibit self-determination. Whether rights advocates acknowledge the pedigree of their preferred concept or not makes little difference because these kinds of debates are baked into the concept of rights and accompany it no matter what. It stands to reason then that advocates would use any portrayal of nature that may fit will or interest theories of rights. And this is exactly what happened.

Already in the 1970s, when the contemporary rights of nature idea started its multiple paths, the Earth was starting to be thought of, within Western philosophy and science, as a vast organism. The most famous elaboration of this is James Lovelock's concept of Gaia, which simply states that the planet we inhabit is a self-regulating organism. Whatever Lovelock himself meant is one thing.<sup>16</sup> Quite another is the way in which the figure of Gaia was immediately appropriated by the rights of nature to mean that the Earth is *one living totality*, which precisely accords both with the history of liberal rights and with the theological strand that I briefly described earlier. All of a sudden, it seemed as if science itself was lending a helping hand by characterizing the planet in organic terms that accorded with liberal rights.

With the figure of Gaia, the supposed expanding circle of moral concern seems to have come to its logical end. Moral theorists had argued for centuries that humanity has progressively expanded its moral circle by including more and more kinds of beings. The usual

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<sup>16</sup> The concept of Gaia is much more interesting than most of its popular appropriations so far. For one of the best discussions of Lovelock's idea, see Bruno Latour's *Facing Gaia* (2017). For a contemporary development of the concept of Gaia that is decidedly anti-theological, see Stengers (2015).

story starts with an image of humans only being concerned with their immediate family, then with the tribe, the village, the clan, and so on up to, now, the Earth. Whether law drives morality, or the other way around, has never really been decided: does law follow mores, or mores follow laws? Both have been argued by radical rights proponents (from Locke to Bentham to Salt and on to contemporary rights of nature and animal rights advocates – Peter Singer and Tom Reagan the most famous of them). The idea is not to settle, once and for all, on the correct causation. Rather, it is important to keep in mind the constitutive ambiguity of moral and legal conceptions of right and their reliance on a moral evolutionism that is part and parcel of important rights of nature strands today.

This moral evolutionism has also meant that radical advocates of rights expansions have drawn stark parallels between every level of the supposed expansion of concern. All rights struggles are supposed to be part of the same great circle, so women's rights, abolitionism, animal rights and now the rights of nature are all part of the same story, made to cohere by the idea of moral evolution itself, which relies on a stark distinction between thing (and therefore rightless) and subject (and therefore worthy of rights). Rights expansion would therefore be the passage of more and more things into subjects. So, the argument goes, slaves were things before the moral law made them persons, just like nature is a resource unless the moral law makes it a moral/legal person.<sup>17</sup>

From within a liberal tradition, the kind of moral evolutionary story sketched above seems almost obvious. However, there is not much evidence for it. The idea that narrow-circle humans only cared about their immediate family parallels Hobbes' idea of the state of nature, both of which are based on figments of imagination that are necessary for the idea of moral progress to function at all. Anthropology, for instance, has not unproblematically shown that the circle of concern starts small. If anything, the opposite might be

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<sup>17</sup> This argument is not particularly popular with minority rights activists, that see in it traces of their animalization, often used to deny them rights. Also see Tănăsescu (2016) for a detailed discussion of the thing/property versus person/subject distinction.

true: many a-modern societies predicate the moral universe on relations with the enveloping world *before* even those with their own family. We will see examples of this when we discuss Māori philosophies that are crucial for understanding the legal arrangements for nature in New Zealand. The point I want to make now is that the history of rights for nature as part of a rights expansion has no basis in empirical study, but is itself an inheritance of a way of arguing about morality and the law that is quintessentially Western and quintessentially part of a liberal tradition.

This does not mean that Indigenous Peoples, for example, have had nothing to do with different instances of rights for nature.<sup>18</sup> But exactly how indigenous philosophies interact with rights for nature is a matter for careful analysis, precisely so as to safeguard the radical potential of such philosophies against the hegemonic drive that rights are steeped in. This is extremely important, which is why it will feature throughout the rest of the argument. I now turn to setting the basis for further analyzing the indigenous relation to rights, both in general and specifically for nature.

### Liberal Rights and Indigenous Histories

As may have become clear by now, rights for nature only superficially challenge the liberal history of rights. They are not only continuous with this history, but rather can only be properly understood by placing them within the liberal milieu of rights extensions. As Roderick Nash showed (1989), the rights of nature are understood by their proponents to be part and parcel of the rights revolutions that have decisively altered how we understand radical politics today. Campbell (2011) argued, not without reason, that contemporary political struggles are only taken seriously if they are couched in the language of rights. This itself attests to the power that rights discourses wield over the political imagination.

Miriam Tola (2018, 34) makes the same point by relying on the work of Gayatri Spivak (1999), where she argues that “rights are that

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<sup>18</sup> See O'Donnell et al (2020) for a careful discussion of multiple kinds of involvement.

which we cannot not want". However, she also points out that this instrument that cannot be unwanted also comes with an extensive state apparatus that it relies on for enforcement, and therefore with a certain way of understanding the relationship between the subject of rights and the state that grants them. In the case of the Ecuadorian constitution (see Chapter 3) this is as clear as can be, as we are dealing with a document so enamored with rights that it recognizes a plethora of them, impossible to uphold simultaneously, but together working to entrench the ultimately arbitrary power of the state (also see Tănasescu 2016).

What I have called the moral evolutionism of liberal rights has also been theorized in terms of the existence of different rights generations. Karel Vasak (1984) proposed that the first-generation human rights has had to do with political and civil claims. The second targeted economic, social, and cultural rights; while the third has been termed by Morgan-Foster (2005) solidarity rights and encompasses everything that did not fit in the first two generations. Many critical scholars (see for example Douzinas 2000) have pointed out how the expansion of human rights discourses has chocked out other ways of conceiving of radical emancipation while being quite easily incorporated within liberal and capitalist status quo. Largely because of the association between liberalism and economic neoliberalism in the second part of the 20<sup>th</sup> century (and therefore the relentless pursuit of a particular kind of "development"), rights discourses have flourished, as neoliberal regimes have learned to both accept them and thrive on their infringement (also see Tzouvala 2020).

Slavery is a good example. Though it is no longer legal anywhere, in absolute numbers there have never been more people toiling under conditions of slavery than today (Bales et al 2009). It may seem paradoxical that in an era defined by the expansion of human rights, slavery would flourish. But it does so not just despite human rights, but also in part because all claims for emancipation are forced through rights language, which poses no fundamental challenges to the mechanisms generating a need for slave labor to begin with. Instead of an expanding circle of moral concern, we instead can witness a shifting pattern of exploitation. It is not the case that

more and more people – to stick with human rights for the moment – have and enjoy full rights; it instead seems to be the case that the geography of rights and rightlessness shifts according to the needs of the global market. Rightlessness accompanies the search for ever-cheaper labor, while rightfulness extends to more and more domains of life that de facto require the perpetuation of conditions of domination (for example, things like consumer rights).

In the specific case of the rights of nature, scholars have already started to point out how they further legitimize rights discourses without any guarantee that this will actually translate into more substantive human or nature rights. Rawson and Mansfield (2018), for example, cunningly reverse the expression rights of nature in proposing that they in fact accomplish the *naturalization of rights*. It is as if the expanding circle narrative that is so central to the morality of non-human rights has become a self-fulfilling prophecy, where all efforts are put into expanding this one way of understanding relations (as claims) to every possible kind of subject. And it is on account of the expansion of moral claims to nature as such that a tenuous connection between rights for nature and indigenous philosophies is so often claimed.

It has become commonplace to present the rights of nature as either directly emanating from, or else closely approximating, indigenous philosophical and legal traditions. There is nothing within the various histories that I have so far surveyed that would warrant this claim. Why, then, is it so often made? There are, as I see it, three possible explanations: ignorance of indigenous philosophies, an unreflexive colonial inheritance, and enthusiastic belief in the power of rights discourse. These three reasons are mutually reinforcing: a superficial engagement with indigenous thought is already made possible by the still-influential inheritance of colonial ways of understanding indigeneity, and the omnipresence of rights discourses in modernity helps to further assimilate indigenous philosophies to Western ones. Nandita Sharma (2020) shows in detail how the colonial history that straddles the passage from imperial power to na-

tion building has used rights *against* colonized populations.<sup>19</sup> This does not simply mean that rights were withheld, but quite the opposite: rights were used to divide and conquer and to cement an enduring association between indigeneity and living close to nature.

For example, she shows how many colonial powers took it upon themselves to protect Indigenous populations by granting selective rights to particular lands, fundamentally because colonists thought of Indigenous Peoples as “people of the land”. In contrast, the category of “migrant” worked to displace people and throw them within global labor fluxes that appropriated their work while denying them the ability to belong to any place (they were not Indigenous). It is striking just how much this history endures today, when we still make stark distinctions between native people, understood to belong *by nature* to a particular place, and migrants who are essentially rightless precisely because of their being thought of as unplaceable. These kinds of distinctions between rightful belonging to a place and rightless migration have always underlined colonial enterprise and have crucially outlived it in post-colonial nations as well. Modern nation states have continued to play a fundamental role in the definition of indigeneity as somehow related to the quest for rights (Niezen 2003, 11-12). The possibility of multiple belonging, or of relating to the land outside of the institution of ownership, or of welcoming strangers as kin, are all gone. The irony is that many of these possibilities are closer to indigenous philosophies than rights can ever be.

As I have argued previously, the concept of Nature as totality is often used as a bridge between the rights of nature and Indigenous People. But that kind of concept of nature has nothing indigenous about it. In fact, indigenous philosophies are routinely steeped within very particular environments that people relate to in genealogical ways. This is to say that many indigenous philosophies, though there are of course many differences between them, think

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19 The same has been shown for the sister concept of legal personality, which was selectively used to punish slaves for their actions while denying their autonomy. See Bourke (2011).

about people as being derivative of specific places that are alive in ways that *are not analogous to personhood*. Vanessa Watts (2013) calls this “Place-Thought”, that is to say a system of organizing life that is not separable from the particular place of its thinking.<sup>20</sup> Nature (or Earth) as Mother, the cliché often attributed to indigenous thought, is nothing but the obsession with totality dressed up as indigeneity.<sup>21</sup> Nature as totality is featureless and abstract, the exact opposite of place-thought.

This point is supported by a vast amount of literature by and on indigenous philosophies. To take another prominent example: Marisol de la Cadena, in her book *Earth Beings* (2015), patiently develops the intimate relationship between particular places and particular communities, while pointing out consistently how these relationships are not at all analogous to Humanity – Nature relations, nor are they reliant on an idea of personhood at all. What she calls Earth Beings are not approximations of Mother Earth, but kinds of creatures that act in *their* specific way and which enter into very precise relationships with surrounding communities (which, themselves, are not mere collections of individuals). In other words, there is a vast repository of living knowledge about different ways of inhabiting lands that shares little of the fundamental assumptions of liberal modernity.

It must be extremely frustrating for Indigenous thinkers and activists to constantly see their work appropriated in Western context in fundamentally the same way. As Indigenous thinkers, writers,

- 20 If we manage to stop thinking about indigeneity in ethnic terms (the inheritance of colonialism), and instead think about it as the cultivation of a certain kind of relationship with the land, we also start seeing, in the very centers of colonial modernity, strands of thinking that are particularly careful to emplacement. Wendell Berry, for example, directly acknowledges, in strikingly ‘indigenous’ tones, his thinking as being occasioned by his particular places, and therefore not being universal or total.
- 21 I do not mean to say that there is no conceptualization of nature as mother in Indigenous philosophies. For example, the Māori concept of Papatūānuku is explicitly feminine.

and critical anthropologists have shown repeatedly, there is a veritable well of radical political and legal conceptions available in a-modern contexts. Yet the only way in which Western philosophers and activists seem to be able to take stock of it is by positing personhood for Nature and reading rights into it! The pragmatic (though surely, on a personal level, often unintentional) reason for this is, as I have argued above, that personhood and rights are not fundamentally threatening to dominant modes of organizing social, political, and economic life. Thinking genealogically with landscapes that make the person look insignificant – now that is something truly revolutionary.

If we consider the tremendous momentum of the rights revolutions that have accompanied the growth of liberalism until today, it may seem almost inevitable that, eventually, rights would be predicated of nature. But inevitability does not mean predestination. What I want to draw attention to is the power of a discourse to cannibalize competing ones and to accommodate itself within wider power struggles. The consumer capitalism that has been uprooting worlds for the past century, with much earlier and deeper roots (see Moore 2017, 2018, Malm 2016), has learned to live with rights, while at the same time itself depending on their continuous infringement. Whether advocates like it or not, the rights of nature based on the history recounted here cannot but participate in this same world.

The history that I have presented so far is necessarily abbreviated and selective. However, it contains the main elements that have influenced rights of nature discourses so far. As the argument turns towards actual rights for nature, it will become easier to see how the elements presented here show up in practice. But this is not simply a matter of theory applying to practice. Rather, thinking and doing are always intertwined, one making the other possible. In turning to rights of nature laws and provisions, it will become clear how thinking occasioned the doing, but also how practice offers new ways of thinking, avenues that theory on its own could not have anticipated. Unsurprisingly, it is there that the actual contribution of Indigenous People is to be found, in the subtle resistance

to rights and the equally subtle infiltration of truly novel ways of thinking about law, as well as the environing world.

The story of the rights of nature is being written, and will continue to be written for the foreseeable future. But the directions that it can evolve in are largely dependent on how theorists and practitioners reckon with the inheritance that seeps through the idea of rights for nature. I am myself committed to critiquing these rights such that they do not foreclose evolving in ways that cannot be currently anticipated. I am also committed to taking the rights of nature to task for unreflectively repeating histories of oppression. Lastly, I think it is prudent to always acknowledge one's fundamental ignorance and to let one's practice evolve in relationship with an enduringly mysterious environing world. Closely attending to practice means seeing one's ideas play out in the world. But it also means changing one's mind, as the uncertainty of the world generates new ideas.

## **Chapter III: From Theory to Practice<sup>1</sup>**

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Whereas the idea of giving nature rights started being systematically developed in the second part of the 20<sup>th</sup> century, its practice only really began in the 21<sup>st</sup>. So far, right provisions have appeared in different jurisdictions and at different legal levels, from municipal ordinances all the way to state constitutions themselves (arguably, the highest level of law). Currently, there are many different proposals being considered in yet more jurisdictions and at varying legal levels,<sup>2</sup> so I cannot hope to be exhaustive. Rather, I want to look at a representative sample of diverse rights for nature, such that we can begin to appreciate the diversity of practice and see how it makes new directions possible.

### **Municipal Ordinances**

It may come as no surprise that the first deployment of rights of nature theory in practice occurred in the United States, a very impor-

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<sup>1</sup> Some parts of this chapter draw on a previously published article: Rights of Nature, Legal Personality, and Indigenous Philosophies, *Transnational Environmental Law*.

<sup>2</sup> For a continuously updated list of cases, see <https://www.therightsofnature.org/map-of-rights-of-nature>. However, it is important to keep in mind that not all cases are the same, nor are they all unproblematically part of a “rights of nature movement”. For a selective list of books on the rights of nature, see <https://www.therightsofnature.org/related-books/>. It is worth noting that these kinds of lists are not exhaustive, but largely focus on reinforcing the ecotheological strain of rights that is becoming orthodoxy.

tant node within their history. In 2006, Tamaqua Borough, Pennsylvania, adopted a municipal ordinance that granted rights to nature, understood as the area of the municipality. Sections 7.6, 7.7, and 12.2 of this ordinance bear obvious connections with the work of Christopher Stone, as they foreground the issue of standing as vitally important. But equally important is the background that led to this historic ordinance, which would repeat itself in dozens of other municipalities across the US.

The Tamaqua ordinance number 612 was specifically designed to oppose particular actions by corporations within the municipal area. The general area of the state of Pennsylvania where Tamaqua is located has for a long time been connected with resource exploitation, mostly mining. However, around the turn of this century, Tamaqua was facing a new threat in the form of the disposal of toxic sludge. Inasmuch as corporate actors would file all of the right paperwork, the disposal of the sludge could not be stopped. The argument that environmental regulation (in the US specifically, but not only) simply tells corporate actors how to best pollute had been a foundational one for the creation of the Community Legal Environmental Defense Fund (CELDF), a legal advocacy organization based in Pennsylvania that has advised on all similar municipal ordinances in the US so far, including the Tamaqua one.

CELDF has very consciously formed the rights of nature on the basis of the theory of Christopher Stone (resulting in a focus on legal standing), as well as the ecotheology of Berry and Cullinan (resulting in the idea of Nature as community). They have also been instrumental in presenting these rights as fundamentally countering the power of corporations, even though the instrument that they are trying to use – legal personality – is precisely the same instrument that corporations are using to wield their own legal power<sup>3</sup>

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3 See Ciepley (2013) for more on the particularities of corporate personhood. CELDF are explicit in positioning the rights of nature as instruments against corporate personhood (also see Margil 2014 for an elaboration of their position). However, the basic instrument that corporations use – legal personality – is exactly the same in the case of rights for nature. This also means that, in some cases (see Chapters 4 and 6), the corporate person is the clos-

(see Chapter 5). It is important to recognize the outsized influence of CELDF on these particular municipal cases, as well as the way in which rights for nature are framed as evidently opposed to corporate power.

The Tamaqua ordinance originates in this ethos, so the relevant section (7.6) begins by specifically making it unlawful for “any corporation or its directors, officers, owners, or managers to interfere with the existence and flourishing of natural communities and ecosystems”. The ordinance then goes on to repeatedly establish standing for both the municipal area (in itself), as well as for any resident of the borough to act as representative of the area’s rights. This is summed up in declaring that “Borough residents, natural communities, and ecosystems shall be considered to be ‘persons’ for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems”.

The link between legal personality, rights, and standing is fully visible here. Lastly, the ordinance also grants all residents of the Borough “a fundamental and inalienable right to a healthy environment”. This kind of third generation human right very often accompanies rights of nature, the assumption being that they are mutually reinforcing: where nature has rights, people’s right to a good environment (however that may be defined) stands a better chance of being respected. However, rights of nature and *to* nature can also be in tension, especially inasmuch as it remains unclear just what rights nature may have in any given case, and which human groups have the power to determine the content of nature’s rights as well as the content of human rights to nature. This first practical appearance of rights for nature raises more questions than it answers, but through the advocacy of CELDF it became a very important blueprint for later ordinances, and indeed for the first constitutional rights of nature in history (see next section).

Among the many questions raised by this formulation of rights for nature there are two that I find particularly important. First,

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est analogy to the personhood of nature. Whether this works with or against corporate power is an open question and certainly not decided by the instrument of rights (or legal personality) as such.

the ordinance clearly wants to establish a kind of nature's right to restoration, which in principle is understandable and laudable. However, this kind of right starts to show the limitations of the underlying concept of nature as an *ecosystem*, that is to say a *community* that is naturally in *balance*. This idea of Nature, which we started to explore in the previous chapter, forces restoration to be done according to a baseline, that is to say to a standard that is fixed by human observation of an environment at a particular time. In the case of the ordinance under discussion here, the municipal law states that restoration should be done for the benefit of the "natural community" by reverting said community to a pre-disturbance state.

Two fundamental issues complicate the idea of baseline restoration considerably. In the context of climate change, reverting to a baseline may prove impossible. This, in a more general way, has always been the case, because natural processes are by definition dynamic; they therefore change all the time. With the added dynamism injected into natural processes by a hefty amount of extra atmospheric CO<sub>2</sub>, baseline restoration becomes not much more than a wish. In addition, there is no clear way of choosing a baseline. Given that this concept is fundamentally historical (that is, it requires going back in time to choose a preferred state), there are no pre-determined criteria for choosing one particular moment in history over another. Imagine, then, that an old coal pit, abandoned many decades ago, has become an oasis for local birds. Would this particular place, if affected by the actions of a corporate actor presently, have to be reverted to being an abandoned coal pit, or to some other pre-mining state? If the latter, then which state? Before or after the colonial enclosure of land that created the current Borough 'locals'?

The second question raised by this ordinance is that of the relationship between local people and local nature. There seems to be an operating assumption of locals being friendly to the natural environment, which is the only way of accounting for the granting of standing to residents. But what if a shareholder of a corporation invested in toxic sludge becomes a resident of the Borough? According to the law, there would be nothing to stop her from acting on

behalf of nature, and arguing, for example, that a certain amount of sewage sludge, on account of its chemical composition, is to the benefit of the natural community. The corporation itself, as a legal person, could become resident of the Borough, in which case the situation would become even more complicated.

I point these issues out to give an idea of the complexities that are raised when the conceptual apparatus that we saw in the last chapter is simply applied to a case, as if said case had a duty to conform to the theory. As things stand, corporate actors have not had to become local residents in order to dismantle these kinds of laws from within. The level of the law – municipal – has made these but unenforceable. Macpherson (2021a) shows how these laws have been consistently opposed, and sometimes struck down, in court. Courts have taken the view that these kinds of municipal ordinances are unconstitutional, on various grounds. Some scholars (Fitz-Henry 2018) argue that the whole point of these municipal ordinances is to contest the terrain of legal personality, by showing that if corporations can be legal persons, so can nature. That may be so, but that doesn't solve the moral/legal conundrums we have already started to explore, nor the problem with the vague formulations, at municipal level, that seem to not be able to pass into higher levels of the law. Neither does it offer a convincing case for how the rights of nature could be environmentally beneficial.

The recipe first developed in Tamaqua was applied by CELDF in dozens of different communities across the US.<sup>4</sup> The basic conceptual apparatus remains largely unchanged throughout them. Chapters 5 and 6 will interrogate this apparatus much closer, especially paying attention to the concept of nature and the kinds of rights that it is assigned. This way of thinking rights of nature has become very influential, particularly in cases that focus on *rights*, and in particular on what could be called existence rights (Macpherson 2021), namely the claim that an ecosystem has to continue in a particular form. The most ambitious, and so far influential, of these cases

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<sup>4</sup> See <https://celdf.org/community-rights/> for updated cases of community ordinances in the United States.

has been the 2008 constitution of Ecuador, the first in the world to recognize such rights.

## Constitutional Rights for Nature in Ecuador

In the context of a leftist and populist government, spearheaded by Rafael Correa, Ecuador rewrote its constitution (for the 20th time in its history) and adopted a new founding text in 2008. The writing of the new constitution was accomplished through the establishment of a Constitutional Assembly, tasked with drafting the document through a series of remarkably participative consultations. The seat of the Assembly was in the city of Montecristi, and for most of its work it was led by Ecuadorian academic, economist, and politician Alberto Acosta.

I detailed the precise working of the rights of nature through the Constitutional Assembly in Tăñăescu (2013, 2016). There is no need to recall all of the details here. Instead, I want to pick out, as before, the constitutive elements of the constitutional rights of nature in this case. But in order to do so, it is important to establish the particular intellectual genealogy that led to including them in the constitution in the first place. After all, this is the first time it has ever happened, and it is therefore important to try to understand why they appeared in this form at this particular historical conjunction.

One of the keys to understanding this historical moment is to grasp the role of the Assembly president, Alberto Acosta.<sup>5</sup> Throughout his career, Acosta went from more or less mainstream economist to a pioneer of environmental thinking in Ecuador. Since the Assembly was called into existence, Acosta has published influential pieces on the necessity to grant rights to nature in order to achieve true environmental protection. In this, he collaborated closely with Eduardo Gudynas, a Uruguayan prolific proponent of

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<sup>5</sup> Acosta started his term as Assembly president, but did not finish it. He resigned in protest as what he saw as political interference, but this was after the passage of the rights of nature was assured.

'biocentrism', and Esperanza Martinez, the leader of one of the most influential Ecuadorian environmental NGOs, Acción Ecológica. Together, they have also been instrumental in proposing and supporting campaigns for ending oil exploitation in the Amazon region of Ecuador (for example Acosta et al 2009), as well as instituting a new regime of development around the concept of Sumak Kawsay, or "good living".<sup>6</sup> His role as a power broker in the Constitutional Assembly is crucial for understanding the genesis of rights for nature in Ecuador.

Through the figure of Acosta, several histories we have seen in the previous chapter coalesced and mixed with new, specifically Ecuadorian, elements in order to create a version of rights of nature that has become, arguably, the most influential to date. Though Acosta himself (Acosta 2010) has claimed that he was not familiar with previous work on rights of nature, other sources (Kauffman and Martin 2017a,b) claim that, through personal relationships he was acquainted with the work of Stone as well as that of Jörg Leimbacher. Leimbacher was a Swiss jurist that wrote a 1988 book on rights for nature, *Die Rechte der Natur*, a decidedly early contribution to the field.

However that kind of personal influence may have developed, two things are certain. First, in strictly conceptual terms Acosta's idea of rights of nature closely grafts unto some of the influential predecessors discussed in the previous chapter, particularly those of the ecotheological strand. Second, whatever he might have been familiar with before the Assembly, it is certain that through presiding over the Assembly and afterwards, he came into close contact with several influential activists for rights that were steeped in the same ecotheological tradition. The most important of these was CELDF.

This organization, together with Fundación Pachamama (whose co-founder, Bill Twist, introduced Acosta to CELDF), played a very

<sup>6</sup> Also codified in the 2008 Constitution, which recognizes the Quechua principle of Sumak Kawsay, translated in Spanish as *buen vivir* (living well). This principle is supposed to give a framework to the whole constitution and is based on a model of well-being that is not driven by economic indicators only. See Kowii (2009), Acosta (2013).

important role in drafting the constitutional articles dealing with rights of nature. Farith Simon (2019) went as far as claiming that CELDF themselves drafted the constitutional provisions. Certainly, there are obvious congruences between the organization's work with municipal ordinances and the articles enshrining rights for nature in Ecuador's constitution. The similarities between the Ecuadorian provisions and the US municipal ordinances do not stem from an underlying unity that these kinds of rights have, but rather from the direct influence of the same people and the same intellectual sources in all of these cases. Ecuador, no less than the municipal ordinances, is a direct inheritor of the strand of rights that heavily draws on the ecotheology of Nature as a Subject to be recognized by law. Here are the Ecuadorian constitutional provisions:

**Art. 71.** Nature, or Pachamama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

All persons, communities, peoples and nations can demand public authorities enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

**Art. 72.** Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.

In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

**Art. 73.** The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the de-

struction of ecosystems and the permanent alteration of natural cycles.

The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.

**Art. 74.** Persons, communities, peoples, and nationalities shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good living.

Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.

Exactly as in the case of Tamaqua Borough, much care is taken to codify rights in terms of Berry's fundamental right to existence, as well as to specifically address the issue of standing that was so central to Christopher Stone. Whereas in the case of Tamaqua being specific about standing was made necessary by the level of the law, in a constitutional formulation this is not the case. Given that the constitution is the highest law of the land, standing is automatically given to whatever legal personality the document inaugurates. So, focusing explicitly on standing is strictly speaking redundant, but it shows very well the particular intellectual genealogy that plays out in practice. As in the case of the municipal ordinances, standing is codified in the largest possible sense. Whereas in the municipal case standing applied to any resident, here it applies to any person whatsoever, even regardless of nationality.<sup>7</sup> Besides this issue, the duality of rights *for* (Art. 72) and *to* (Art. 74) nature is also present. Finally, the issue of restoration appears as a fundamental right, though none of the problems explored in the earlier section are resolved.

The dominance of rights as *the* tools of emancipation is undeniable in the Ecuadorian constitution writ large. The radically participatory process that the Constitutional Assembly had set up for

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<sup>7</sup> In Tăñăescu (2016) I developed at much greater length the discussion of the universality of standing, as well as documenting in detail the political process within the Constitutional Assembly. The reader interested in the Ecuadorian case specifically should also consult that work.

drafting the new document was somehow corralled into rights language at every turn. There are, importantly, many indigenous rights to their own territories and traditions. The panoply of rights (including, among others, to “healthy, sufficient and nutritious food; preferably produced locally and in accord with various identities and cultural traditions”; art.12, 13) cannot but reinforce the power of the state, which is ultimately tasked with upholding them. The Constitution seems to think that there can be no conflict between different kinds of rights, and simply states that if such conflicts arise, they will be dealt with appropriately (art. 85/2). Exactly how this may be done remains an open question, but that the state will be the primary mover in resolving such conflicts is very likely, to say the least.

The power of the state, and the role that rights play in safeguarding it, is nowhere clearer than in the relegation of mineral rights to the state itself (as well as the right to control energy production, water and biodiversity; art. 313). This apparently post-extractivist document allocates the rights that can make a difference to the project of modern development and its inherent depredations to a state deeply committed to resource extraction. Indigenous Nationalities, which otherwise receive rights to their territories, have no veto power over extractive activities in their own lands, and therefore have no effective property rights at all (arguably the paradigmatic rights of the liberal order). On a smaller scale, the tension between different kinds of rights and their role in unequal power distributions is also visible in the rights of nature provisions themselves, where these rights are presented as inherently compatible with people’s rights to nature. There are many cases one can imagine where there is no such compatibility, but the point is that treating these rights as inherently friendly towards each other allows state power to become the ultimate arbiter, and therefore to use the rights of nature selectively.

As I and others have already argued (for example Rawson and Mansfield 2018), the rights of nature in Ecuador were forged through a particular power constellation that reunited elite actors from the governmental and NGO worlds. Though many of these actors have consistently claimed that the rights of nature are part of a global movement, the case of Ecuador seems rather an elite-

driven project that, for contingent historical reasons, was successful. That being said, the Ecuadorian case and its particular power constellation also contributed to developing the rights of nature in ways that were previously absent. In particular, the participation of the organized Indigenous movements (especially CONAIE, the largest Indigenous organization in the country) within the Assembly, as key partners in Correa's government, left a deep mark on the constitution, as well as on the now-orthodox interpretation of rights of nature as of indigenous inspiration.

Despite the well-documented Indigenous involvement in the Constitutional Assembly, the power brokers behind the rights of nature provisions remained white settler elites. It is this group that interpreted Pachamama as a kind of Gaia, as the community that Berry and Stutzin assumed the natural world to be. For particular Indigenous People, it is often territories, *with particular names*, that feature as abodes, friends, relatives, kin in the struggle and joy that is life. As I have argued elsewhere (Tănăsescu 2020, but also see Macpherson 2021), indigenous philosophies are primarily *relational*, that is to say that they do not recognize intrinsic values as such, but rather focus on the development of situated relationships with natural beings that are always in flux. This is also why indigenous philosophies are not, by and large, ecocentric: they do not posit a nature that is prior to its relationships, nor do they see the inherent value of nature as opposed to the use humans may make of it.

Much of what gives purchase to the idea of the rights of nature being indigenous in some sense is the notion of harmony, in a double sense: on the one hand, harmony as obtaining between Indigenous People and nature (a colonial conceptual inheritance), and harmony as inhering in nature itself (an inheritance from the early days of ecology and its uptake into ecotheology). On both of these counts, the idea of harmony is misleading. First, it is not the case that Indigenous People are inherently in harmony with nature. This of course does not mean that they are inherently destructive of nature, but it does mean that they have diverse histories which do not, definitionally, exclude a variety of relationships with the natural world. To substantiate this point, it suffices to recall that, according to the overwhelming evidence that we currently have, the great

megafauna extinction at the end of the last ice age occurred when all human groups, from the vantage of contemporary modernity, were 'indigenous'.

Second, the idea of nature as inherently balanced is not obviously of indigenous origins. It is true that many Indigenous People refer to their environment as in balance, but this claim is open to diverse interpretations. One can interpret it as meaning that these groups share an Odum-like idea of ecosystems as striving towards balance. But it can also be interpreted in culturally specific ways as indicating a particular kind of relationship with the land, where the idea of balance is a heuristic for making sense of human and natural actions alike. The idea of balance interpreted thus refers to the reciprocity of relationships between natural and human actors. What is in balance is *the economy of exchange*, not the *form* of the environment itself (which is how western philosophy and science interprets balance). The form of the environment is forever changing, and this is reflected in much indigenous mythology quite explicitly: the world is that which has transformed many times over and continues to transform. The idea of balance is a way of indicating how humans are to participate in the perpetual transformations *that they do not lead*, in such a way as to secure their continued subsistence.

Though in much rights of nature literature harmony and balance are treated as synonymous, there is yet another way of thinking about harmony that may indeed resonate with some indigenous conceptions. Harmony, in its musical sense, is the idea that sounds can fit together in ways that are pleasant to listen to, that seem to cohere as if they belonged in that particular formation. Similarly, Andean indigenous philosophies, for example, do employ the idea that humans can be in harmony with their surroundings, in the sense of fitting well, or belonging to each other. But this sense of harmony is as dynamic as the natural world itself, and periods of disharmony are as natural as periods of coherence, inasmuch as human groups must continuously adapt to an often temperamental and forever dynamic nature. In the Western appropriation of harmony, the dynamism of the indigenous world is often lost and replaced by the ecological idea of balance, or by the colonial inheritance of an inherently benign population.

The idea of balance does not sit well within the baseline-driven restoration that rights of nature in this form propose because it is not about the outlines (for example, species composition) of a territory and its precise makeup, but rather about the endurance and perpetuation of particular kinds of exchanges and relationships across kinds of beings.<sup>8</sup> An indigenous-inspired restoration would therefore aim at restoring the kinds of generative and reciprocal relationships that are the basis of many indigenous cultures, rather than the form of a particular environment (this is exactly what Tāmati Kruger, Tūhoe leader, advocates for in the case of Te Urewera; see next Chapter). It remains an open question what the precise legal formulation of this ethos may be, but it is far from obvious that giving rights to nature is it. In fact, the ecotheological version of nature's rights doesn't quite seem up to the task of facilitating Indigenous legal autonomy. Instead, we may be better served by thinking about how to allow those already existing legal traditions to gain more power and to introduce ideas that may have nothing to do with personhood, or rights, at all.

As it may have become clear, despite the claims of many rights advocates, these laws cannot be primarily about 'nature', but rather about who has power over what and in what form (see Chapters 6 and 7). Now, I want to continue painting the picture of the most important cases of rights of nature so far, such that we may move away from the dominance of ecotheology and towards new possibilities.

## The Law of Mother Earth, Bolivia

Not long after the Ecuadorian case, Bolivia followed suit by adopting a national law granting rights to nature, the 2010 Law of Mother Earth (*Ley de Derechos de la Madre Tierra*). As in the case of Ecuador before, the Bolivian law draws heavily on the dominant history already explored, as well as bringing new elements to the table. In particular, the Bolivian law takes the splicing of rights for nature

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<sup>8</sup> I discuss this at large in *Ecocene Politics* (2022). This idea is also given purchase by De Castro's concept of multinaturalism (2019, 2014b).

and indigeneity a step further and is therefore a very good one to analyze in order to attempt to parse out the very complicated relationship between Indigenous groups and state law in general, as well as rights in particular.

The Bolivian law, adopted in December 2010, starts with a long preamble that establishes its general context and the definition of Mother Earth as an interconnected whole comprising all living systems and beings, understood as inextricably linked and complementary. In terms of the analytical tools already developed, this is clearly a capital letter concept of Nature, at the highest level of abstraction. It also clearly reflects the idea that Nature is in balance, here expressed through the concept of complementarity. I want to stress again that this is *not* an ecological concept of nature. In ecology, extinctions and what are called ‘disturbances’ are commonplace (see Chapter 2). In fact, the vast majority of everything that has ever lived has already gone extinct. This doesn’t let people off the hook for their share of responsibility, but it does suggest that Nature is not the only concept available. Instead, when we see this concept we have to ask what it is *doing*, instead of assuming that it is an accurate description of a ‘deeper’ way of understanding the world.

The Bolivian law, which goes on to grant the same right to restoration that we saw earlier, is distinctive in two ways. First, it refers to Mother Earth, clearly introducing the issue of gender within rights of nature in a way that is merely implied elsewhere. Second, it connects indigenous thinking to the figure of Mother Earth. These two issues need to be tackled together.

Unlike rights of nature in Ecuador that did not enjoy the support of then president, Rafael Correa, the rights in Bolivia were widely and loudly promoted by then president, Evo Morales, himself a member of the Aymara Indigenous community. His own identity as Indigenous leader, besides national president, already did much to cement a close identification of Bolivian rights of nature with indigenous views. In speeches, Morales routinely referred to Mother Earth and Pachamama, the Andean deity, as synonymous and drew explicit parallels between the two, as if the idea of Mother Earth was the unproblematic translation of Pachamama.

When taking a closer look at the law itself, the first thing to notice is that the term Pachamama does not appear at all. This is very different from Ecuador, where Pachamama appears as a clear synonym of Nature in the constitutional text. But in the Bolivian case, the law only speaks about Mother Earth, and simply mentions, once, that this figure is sacred in the ‘cosmovision’ of Indigenous People. If looked at in its context, the law can be – and has been – interpreted to have given rights to Pachamama, just like in Ecuador. But this is not supported by the legal text itself.

Why does this matter? Because paying attention to *how* indigenous thought is used in rights of nature laws is important in understanding *why* it is used, and how that may affect Indigenous communities themselves, as well as various environments. It matters, in other words, because close attention can demystify claims that may end up working against Indigenous self-determination, as well as against various environments. In the case of Bolivia in particular, the figure of Pachamama is presented as a mother figure, and therefore first and foremost a stereotypically nurturing female (see Tola 2018 for a critique). The association between Pachamama and motherhood was further supported by the proposal submitted by Morales to the UN to pass a Universal Declaration of the Rights of Mother Earth, modeled on the Universal Declaration of Human Rights. This proposal had behind it many of the same power brokers we saw in Ecuador.

It may be that the identification of an Andean deity with a gendered concept of Nature is supported by indigenous philosophies themselves. Or it may be that this particular association is strategic for all involved, whether for Indigenous organizations themselves or for NGOs or other actors in the transnational network of rights of nature. In order to be able to ascertain this, I need to take a closer look at the concept of Pachamama, as well as how the concept of Nature attempts to translate a vision that sits very uncomfortably within the dominant laws of the state.

## Pachamama as Female Nature

There are two ways of accounting for differences between culturally specific ways of understanding the world. The first sees these differences as ones of degree, that is to say that there are different views on the *same* world. This is the dominant, Western way of understanding cultural differences, and one that informed colonialism deeply, from the practice of religious conversion to the imposition of legal orders that had nothing to do with indigenous concepts. The other way of understanding difference is as difference of *kind*, that is to say that there are fundamentally different *worlds* that are being perceived, and not just views on the same world. Incidentally, this is the view that most Indigenous communities have themselves supported through centuries of colonialism, insisting that Western men failed to *see* certain features of a world that is fundamentally different from the Western one.

What does it mean for there to be multiple worlds? First of all, it means that the beings that populate worlds are fundamentally different. In the Western understanding of world, this is only populated by beings whose sentience is decided upon through scientific methods of controlled observation. In the Andean world, there are many kinds of beings that, through the scientific method, people could not even begin to detect. Marisol de la Cadena speaks, for example, of Earth Beings, entities that to westerners look like 'landscape features' but that, to Indigenous locals, are active and sentient in their own right.

The point is not to decide which view is right, but to recognize that we are really speaking about qualitatively different worlds. In the same breath, it becomes important to recognize that the cultural underpinning of colonialism is precisely the project of replacing one world for another, so that the claim of a single world accepting of different views can finally prevail (multiculturalism replacing multinaturalism). As Moana Jackson (1992) argues, "the history of colonization [...] is a story of the imposition of philosophical construct as much as it is a tale of economic and military oppression" (2).

One of the theorists that has done most to make the case for the existence of qualitatively different worlds is Brazilian anthropologist Eduardo Viveiros de Castro. However, much of the anthropological corpus can be read precisely as a record of misunderstanding the nature of the ontological difference between different groups of people. De Castro speaks about *equivocation*, which de la Cadena (2015) understands as “not [...] a simple failure to understand. Rather it is ‘a failure to understand that understandings are *necessarily* not the same, and that they *are not related* to imaginary ways of ‘seeing the world’ *but to the real worlds that are being seen*.’” This is exactly what I referred to above as a difference of kind. She continues: “as a mode of communication, equivocations emerge when different perspectival positions – views *from* different worlds, rather than perspectives about the same world – use the same word to refer to things that are not the same” (110).

The supposed equivalence between Nature and Pachamama can be seen exactly as this kind of equivocation, a supposed equivalence of perspective about a fundamentally similar world, when in fact they convey radically different worlds. Nature, as I have explored throughout, is quintessentially modernist and, surely despite the best intentions of many advocates, cannot help but perpetuate colonial relations aimed at cultural erasure. It is ironic that many rights of nature advocates contrast Nature with the idea of resource, as if the first recognizes something special while the latter does nothing but flatten the world. In fact, these two notions share exactly the same structure, as they work at the same level of abstraction. There is no such thing as Nature in itself, just as there is no such thing as ‘a resource’. There are many different things that are flattened and smashed together by the dominant idea of ‘resource’ (there are always infinite variations in woods, coal, oil, gas, kinds of foods, whatever may be the case). The idea of Nature is a radical oversimplification of worlds (just like resource is a radical oversimplification of affordances), which are always so complex and fundamentally mysterious as to resist – for careful cultures – being simplified within

one single concept.<sup>9</sup> And there are many different worlds that are flattened and smashed together by the idea of Nature.

This is because Nature is a concept that can only arise out of cultures seeking universality, and hence justifications for their right to rule over everything. This kind of colonial thrust cannot be undone by using the same conceptual apparatus that is fundamental in propelling it! Nature is a globalist, universalist, totalizing concept that has nothing to do with any particular place. It has no features as such, which is why it can only be associated with vague and stereotypical features that unfailingly reproduce state power. It is in this sense that the supposed femininity of Nature arises. There is nothing obviously ‘female’ about ‘Nature’, and many indigenous cultures – Andean ones included – have a much more nuanced view of gendered pairings, as some places are perceived as female while others as male,<sup>10</sup> while others still as both. But Nature as One unifying concept has to choose, and it chooses for whatever helps state power most.

The figure of Mother Earth feeds on, and into, the stereotypical portrayal of femininity as nurturing and caring. Whether or not this conforms to the character of the natural world is a moot point, but the issue of caring deserves some discussion. The natural world is and has always been (to the vast majority of cultures everywhere) a capricious one. Even if it was conceived as feminine in some sense, and in some cases, it was a feminine that could kill as well as bring forth life. The capriciousness of nature is seen in the destructive events that, from the point of view of creatures, seem to come from nowhere and interrupt life as it had previously existed. This is why Isabelle Stengers (2015) calls the current era of concern with natural processes an “intrusion”, that is to say something that invades with no regard for anyone’s will. But she does not speak about the intrusion of Nature, but rather of Gaia, a mythical figure that, precisely because of its divinity, could do whatever it pleases with human life.

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<sup>9</sup> If we want a theological argument for this, we can look at Wendell Berry’s work.

<sup>10</sup> In Māori mythology, for example, Ranginui is the sky *father*. See Salmond (2017).

Nature in this sense is not caring, but rather powerful enough to be indifferent. Human matters are none of its concern, which is precisely why it has to be appeased, because of its tremendous power and the arbitrariness with which it wields it. Natural processes intrude, and this is a truth that us moderns have afforded, temporarily, to forget. The whole project of modernity can be seen as an absurd plan to escape natural constraints, which for a while seemed to work. It at least worked to such an extent that it allowed moderns to disregard the capriciousness of the surrounding world, an awesome force that they shut out through different kinds of insurance: abundance, control, inventiveness of technique. But Gaia, sooner or later, intrudes, and the current era is precisely that time when moderns can no longer afford their illusions.

This is why some may think of nature as revengeful, which at least has the benefit of recognising natural violence and avoiding motherly abstractions. Revenge itself may not be, in the final analysis, a better way of conceiving the enveloping world, largely because indifference manages to account for more of its facets. It is hard to believe that whole species would be wiped out because of nature taking revenge, particularly because the image of the revengeful goddess seems to be accompanied by an idealisation of animal life: the goddess takes revenge on humans for having fallen from animal grace. Perhaps it is because of the successful erasure of cultural memory that moderns have started entertaining the idea that nature can be imagined as Mother Earth.

Is nature nurturing? In a sense, yes; it is the precondition of life. But this is banal, tautological: Nature (the interrelated processes of life) is the basis of life. Inasmuch as there is no life outside of 'nature', this version of nurturing is not very helpful. Instead, it may seem nurturing in that it offers things that many life forms find useful. But its capriciousness interrupts the gift, which can be withheld at any moment: going from abundance to scarcity, favourable to unfavourable conditions, life to death. This is but the condition of life as such.

'Mother Earth' does not describe a reality, whether ecological or cultural, but repeats unconscious modern tropes in a way that is ul-

timately unthreatening to wider power relations that are still predicated on overcoming natural limitations to life.

As Tola (2018) shows carefully, the idea that nature is female works well with the idea of resource exploitation, because resources are exactly what the femininity of nature produces. And these resources then stand to be appropriated by the state as 'gifts of nature'. This is very ironic, especially if we consider that all of the legal documents surveyed in this chapter frame the rights of nature as intrinsically opposed to resource exploitation. The intentions of many activists involved in these legal texts are of course anti-extractivist! But the conceptual apparatus that they rely on, with roots explored in the previous chapter, hampers their efforts. This is not merely a theoretical argument. It remains the case, empirically, that both Ecuador and Bolivia have expanded their extractive industries considerably since passing rights of nature laws (see Chapter 6). The law itself, especially formulated in the way that we have seen so far, is mostly impotent in the face of state power. Rights for nature are first and foremost politics, and the concepts they use are key in understanding how they inscribe themselves in already existing power struggles.

The idea of Pachamama is a kind of touristification of Andean thinking. It is important to recognize that there are many Andean worlds and that the choice of indigenous terms already favors certain dominant communities (like the Aymara and the Quechua) over others. But even in its generalized form (that is, the form specifically crafted to resemble the universality of Nature), Pachamama is not a deity in the Christian sense, nor is it equivalent (another view) to Nature. Instead, Pachamama reunites many different terms (in different Andean languages) that more or less refer to the spirit that animates life, the suchness of being that is indescribable yet crucial for there to be anything at all. Many communities that live in intricately close relationships with their places recognize the basic fact that humans are not responsible for life processes, but rather are beneficiaries of these. Life processes themselves transcend human powers and make humans subordinate and, in a very real sense, dependent on their gifts. But the expression of the spirit of life, as it were, is apprehended through local things and situations.

Indigenous conceptions tend to reflect the observable phenomenon that life communities differ greatly according to location. To suppose that they all express the same ‘life spirit’ is precisely to assimilate these views to a universalist Nature that a-modern societies do not tend to recognize. The life spirit that animates the beings of Māori, Sami, or Aymara only looks the same from the perspective of a modernist mind that already presupposes the existence of underlying sameness (*one world*).

De la Cadena (2015), in discussing Aymara thought in modern Peru, does not speak of Pachamama, but rather of *pukara*, which she characterizes (taking care to note that it is still an epistemic translation, and not her personal practice) as “a source of life, a condition for the relational entanglement that is the world of *ayllu*” (108). The concept of *ayllu*, a crucial one for the communities she worked with, designates the ensemble of beings that makes a place and through which *pukara* can be expressed. This concept, though crucial for Andean thought, is completely absent from rights of nature, because it is fundamentally local. You cannot have a universal declaration of the rights of *ayllu*, though it is through the recognition of *ayllu* authority that radically different legal and political orders may become possible.

De la Cadena is very careful to show the crucial misalignment between the expansion of the modern state (in this case, in Peru) and *ayllu*. Even when leftist politicians, like in the case of the agrarian reforms in the mid-20<sup>th</sup> century in Peru, adopt the concept, they mean something else, precisely because of their ontological universalism. Nobody is more acutely aware of these misalignments, and of their immediate consequences, than Indigenous People themselves. The question then arises: why have Indigenous organizations in both Ecuador and Bolivia supported the idea of granting rights to nature?

The most important thing to keep in mind in answering this question is that Indigenous communities are not timeless, changeless groupings. This is how they have been imagined throughout colonial history. We have seen that Sharma (2020) argues that the idea that Indigenous People naturally belong to certain places was instrumental in the development of the nation state and in extend-

ing the state's power and control over all national territories (Indigenous reservations included). Not incidentally, rights discourses were important in the spread of national power from the beginning. Already in the 19<sup>th</sup> century, Western advocates for indigenous rights argued that Indigenous People needed to be protected by the state by being given rights to their particular places, from which they could not deviate. This was a mechanism of enclosure much more than a mechanism of granting meaningful recognition of the special, place-based relationships that often obtained between Indigenous People and places.

Historically, Indigenous People have moved about, like all human populations have, for millennia. The progress of colonialism and modernity has fixed the survivors in place, while making it almost impossible to realize the wealth of a-modern experiences and conceptions that have completely disappeared. In other words, Indigenous People today have been in the direct firing line of state power for centuries and are therefore very well versed in dealing with this power that always threatens their survival and that has routinely relegated them to what the state perceived as marginal lands. From an indigenous perspective, this is the background on which nature's rights appear. It is not as if in 2006 with the passage of the Tamaqua Borough ordinance, something was born in the world that finally gave Indigenous People tools to fight the state. Instead, the rights of nature are one of the latest expansions of state power into indigenous worlds, one that is much better in many ways than other alternatives, but one that does nothing to fundamentally challenge the power of the state (the one, in the final analysis, responsible for upholding rights).

With the exception of isolated tribes in the Amazon rainforest that have *chosen* not to engage with the modern world, all other Indigenous communities have been tasked for centuries with mastering a fine dance with the state, a dance that their survival depends on. From a modernist perspective, rights of nature seen as indigenous tradition made state law have accomplished a historic task. From an indigenous perspective, these rights are the next episode in a long series of nation-state capture of indigenous practice and thought. The Indigenous leaders involved in this capture under-

stand that their apparent acquiescence to the terms of the state merely prepares the ground for the next round of conflict, for new demands that are made possible by the laying of another layer to the fundamentally conflictual history of Indigenous-state relations.

## From Nature to Places, from Rights to Representation

If the point of the rights of nature is to move beyond modernist law, then the concept of nature might be an even bigger problem than the concept of rights. But the rights of nature are not limited to the history and practice so far explored. This modernist, universalist strand of rights has been quite successful so far, but it is not alone. There are other cases that have started to show radically new possibilities, not least because they are anchored in specific places as opposed to relying on the concept of Nature. Though on the face of it municipal ordinances in the US are of this kind, this is not so. Tamaqua Borough is simply a stand-in for Nature, but because the law is a municipal ordinance, it had to be 'reduced' to the area of the municipality. The municipality has no features at all, it is modernist flat space defined in an administrative way ('the municipality') and in relation to another administrative unit ('the resident').

Instead, there are a growing number of cases of rights for nature given to beings with their own names and specific features. Key among these have been a series of rivers, which is not surprising given how sentient they have appeared to many different cultures throughout history. Whanganui river in Aotearoa New Zealand is perhaps the most famous of these, but legal personality arrangements have also been proposed in relation to Ganga and Yamuna rivers in India, Atrato river in Colombia, and all rivers in Bangladesh. Besides these, Lake Eerie in the United States has had a short stint as a legal person,<sup>11</sup> while discussions are ongoing for legal personality arrangements for a Lagoon in Spain, a wetland in

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<sup>11</sup> The rights of Lake Eerie were quickly struck down by higher courts (Macpherson 2021a).

Florida, and aquatic ecosystems as such in Europe, to name but the latest ones.

As I have shown in the case of Tamaqua, it is not enough to specify the name of a place in order to propose legal alternatives that make a decisive break with modernist conceptions. In other words, it is very much possible to have ecotheological rights for nature applied to particular places. What makes the situation analytically difficult is that a staggering number of conceptual combinations are theoretically and practically possible. As I will show later, when discussing the case of the Indian and Colombian rivers, many elements encountered so far are applied to those places as well. There we can witness a combination of apparently contradictory movements: totality thinking applied to particular places. The key to understanding this apparent contradiction is to see legal personality arrangements and rights of nature as always political moves that apportion power in different ways.

Besides the way in which nature is understood and legally codified, equally important is who has the power to represent it, and why. This issue is at the heart of all rights of nature; it is where the theoretical rubber hits the very practical road. In Tănăsescu (2016), I developed this aspect of rights of nature as being about who has the right to represent a nature with rights, and I still think it is a fruitful way of thinking about these rights as mechanisms of representation for newly created legal and political entities. The issue of representation is crucial precisely because of the conceptual tangles that I have so far tried to make clear: Who has the right to speak on behalf of Ecuador's nature has everything to do with the kinds of things that can be accomplished.

Similarly, granting rights to a specific entity (as opposed to nature as such) may continue reproducing power inequities inasmuch as the law remains vague as to who has the power to represent the newly created legal entity. In some cases, the representatives are specified, but the reasons for choosing them, as opposed to others, are opaque. If the rights of nature are always about who has the power to speak, then we must always ask for the reasons a certain group may be preferred over another (also see Tănăsescu 2021). It also matters how the law allows for a change in representatives if

certain goals are not achieved. Finally, the issue of representation is the most promising one for accommodating legal pluralism, namely the meeting, on equal terms, of indigenous and western legal conceptions.

The ecotheological strand of rights unites the totality of Nature with that of Rights. Practice has started to show that these can be separated by applying rights to distinct places. But the most interesting and promising alternative is a complete divorce from totalities as such by focusing on legal status and representative arrangements instead of rights and general nature. There are several cases that exemplify most successfully the way in which a territory is related to its inhabitants, and the potential of thinking locally together with groups that are privileged in representing new legal entities. This is the case of Te Urewera, the home of Tūhoe in Aotearoa New Zealand and the first case of rights for nature in that country. Let us examine it in detail.



## Chapter IV: Diversity of Practice<sup>1</sup>

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Both in theory and in practice, a dominant, orthodox view of the rights of nature has developed. I have shown how it has been built through the advocacy of a transnational policy network, drawing on an ecotheological tradition steeped in liberal rights advocacy. The coherence of a potential movement for rights of nature is, however, questioned by the appearance of cases that diverge significantly from the conceptual contours explored thus far. Several cases in Aotearoa<sup>2</sup> New Zealand are markedly different from the ones already seen, also in the sense that they do not share the same intellectual history. It is worth looking at these carefully. I want to start with what I find to be the most extraordinary case of rights of nature so far, namely the passage of Te Urewera<sup>3</sup> from a national park to the status of self-owning legal entity.

The 2014 law that accomplished this passage deserves detailed examination, for several reasons. Despite the fact that Te Urewera precedes the Whanganui river Act (2017), the latter has become

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1 This chapter draws in part on a previously published article: Rights of Nature, Legal Personality, and Indigenous Philosophies, *Transnational Environmental Law*.

2 Māori name for New Zealand.

3 This is the name of a part of the North Island that is home to Tūhoe, a Māori group that has had the most conflictual history with the settler state. Until well into the 20<sup>th</sup> century, lands were confiscated and Tūhoe leaders and political activists persecuted. Today, this part of New Zealand is still seen as a mysterious place. Te Urewera is a vast area of mountainous forested landscapes, often shrouded in mist. Tūhoe call themselves the children of the mist.

much more famous internationally. This is perhaps because rivers exert a certain pull on the imagination, whereas Te Urewera is only significant to outsiders if one digs a bit deeper, as that name on its own doesn't say much to people not already familiar with it. Its relative obscurity notwithstanding, this case is radical in the way in which it departs from rights orthodoxy in practice, and the way in which it builds a hybrid legal order with consistent and, as we will see, decisive Tūhoe participation. Te Urewera exposes latent possibilities that were simply not visible in other cases, and it does so precisely because it thinks everything anew. It's worth following that journey.

## Te Urewera: Adventures in Ontology

The most important contextual background for understanding the legal personality of Te Urewera are the Treaty negotiations between Māori groups and the New Zealand government. As Sanders (2018) explains, 'the grant of legal personality to Te Urewera and the Whanganui river took place as part of the Treaty of Waitangi settlement process, through which the Crown acknowledges breaches of its obligations to Māori under the 1840 agreement'. To understand the importance of the Treaty settlement process, it is necessary to briefly reflect on the history of New Zealand's colonization.

The first significant contact between Europeans and Māori dates back to 1769,<sup>4</sup> when the *Endeavour*, captained by James Cook, landed on the eastern shores of the North Island. Seventy years and many missionaries and settlers later, the British Crown and many (but not all) Māori chiefs signed the 1840 Treaty of Waitangi, the most important document in New Zealand's history (Jones 2016). After the signing in Waitangi, the Treaty was taken across the island for additional signatures. Tūhoe, the inhabitants of Te Urewera, have

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<sup>4</sup> Technically the first known contact with Europeans was 13 December 1642, when Abel Tasman sailed past New Zealand. However, this encounter did not lead to landing or settlement, which did not occur until Cook's arrival.

never signed,<sup>5</sup> though this does not mean that they, and their land, were not affected by this monumental event.

Indeed, starting in the 1860s, a period of aggressive colonization began, with land purchases and confiscations greatly expanding the settler populations. Demography shifted from Māori majority to Māori minority in little more than 50 years. The Māori population 'dropped from around [200,000] in 1840 to [40,000] in 1900. Epidemics of influenza, measles, diphtheria, and tuberculosis, as well as ill-health caused by changes in diet and living conditions, all affected the population. Other deaths, of course, occurred in battle with the colonizer ...' (Jackson 1992, 2). Te Urewera remained the last bastion of Māori *tikanga*,<sup>6</sup> as it was only in 1865 that the Crown 'confiscated much of [Tūhoe's] most productive land'.<sup>7</sup> Between 1865 and 1871 there was a war between the Crown and Tūhoe in Te Urewera which, by the Crown's own admission, devastated Māori groups through starvation, executions, and further appropriation of lands (O'Malley 2014, Finlayson 2014).

The Treaty of Waitangi was signed in two language versions, a Māori and an English one. The history of the difference between these two is extremely important and has been amply debated. One of the most contentious concepts for the purposes of the present discussion is that of *tino rangatiratanga*. Jones (2016, 54) explains that the term varies in meaning from 'self-government' to 'sovereignty' or 'full authority'. The Waitangi Tribunal has argued that 'no one

<sup>5</sup> Ngai Tūhoe Deed of Settlement Summary (June 4, 2013). Also see Binney (2009).

<sup>6</sup> Meaning law, way or custom. In legal discussions, the term is used to denote Māori law, that is to say legal custom of Māori origins and application. Much in the discussion of legal personality for nature centers around the idea that this construct represents a hybridization of *tikanga* Māori and Crown law. The word is composed of *tika*, meaning right or correct, and *nga*, which is the plural definitive article in te reo, the Māori language. *Tikanga* therefore indicates the right way of doing things, which brings it into much closer communication with the European tradition of natural law and natural rights than with the modern tradition of liberal individual rights.

<sup>7</sup> Deed of Settlement Summary.

single English concept effectively captures the full meaning of the term' in part because, unlike sovereignty in English, it has spiritual connotations as well as implications of dominion over particular territories (Jones 2016, 56). In the Māori version, Article two of the Treaty of Waitangi guarantees the chiefs *tino rangatiratanga*. This term already opens up towards the vast and rich Māori *tikanga* that was slowly forced into the molds of state law.

Recent scholarship on the Treaty as well as recent judicial decisions have more or less settled on the opinion that, at the time of signing, the chiefs did not cede their sovereign ability to direct the life of the community or ownership of their lands (Sanders 2018, Jackson 1992). In the English version of Article One of the Treaty, 'sovereignty' was ceded to the Crown, while in the Māori version it was *kawanatanga*, or 'governorship' (Erueti 2017, 717). English colonists and their successive governments increasingly acted as if the Treaty of Waitangi had transferred sovereignty of Aotearoa to the Crown, while Māori chiefs operated under the understanding that they had retained *tino rangatiratanga*. Tūhoe have been remarkably consistent throughout this history in affirming *mana motuhake*, a term very close in meaning to *tino rangatiratanga*. As Higgins (2018, 130) explains, 'distinctions between *mana motuhake* and *tino rangatiratanga* are contextual rather than categorical, but while they have much in common, *mana motuhake* more strongly emphasizes independence from state and Crown and implies a measure of defiance'. This is not surprising given the especially conflictual history between Tūhoe and the Crown.

Throughout the 19<sup>th</sup> century, Tūhoe defiance was also expressed through the sheltering of other Māori people that were fleeing persecution elsewhere (Binney 2009), such that 'Richard Boast describes Te Urewera as the last "major bastion of Māori de-facto autonomy"' Higgins (2018, 130). This autonomy was officially recognized in law when, in 1896, 'the Urewera District Native Reserve Act provided for local Tūhoe self-government over a 656,000-acre Reserve, and for decisions about the use of land to be made collectively and according to Tūhoe custom. The Act guaranteed the protection of Tūhoe lands, which could not be sold without Tūhoe consent and then only to the Crown' (Finlayson 2014).

The Act was never implemented, though it set a unique precedent in recognizing Tūhoe's authority in Te Urewera. 'Perhaps the most remarkable aspect of [the Act] was its intention to give effect to tino rangatiratanga or mana motuhake' (Jones 2014). Despite this intention, the early 20<sup>th</sup> century saw blatant disregard for the Act, with 'the government simply... buying land interests directly from individuals, in direct contravention of its own laws' (O'Malley 2014). As if to catch up with the reality on the ground, in 1922 the government repealed the Urewera District Native Reserve Act, putting an end to this early period of experimentation in plural sovereignty. Further shrinkage of Tūhoe land ensued, which led to massive emigration from the area. In 1954, Te Urewera became a national park, which seemed to seal its fate as a settler fantasy of nature forever stolen from within an intricate human-nature genealogy.

It is significant to note the clear role of the national park designation in appropriating lands from Tūhoe authority. This was not a fluke of history or a unique event. Rather, nature conservation under the model of the national park has functioned as a system of enclosure and extension of state power since its inception in the United States (see Duffy et al 2019, Büscher et al 2012, Büscher and Fletcher 2020, Tănăsescu and Constantinescu 2020, Constantinescu and Tănăsescu 2018), where it was applied to native territories before being exported throughout the world together with colonial power. In the 20<sup>th</sup> century, nature conservation gave a new life to policies of territorial enclosure by providing the moral justification of environmental benefits. As Macpherson (2021b) recalls, Te Urewera "was declared a national park" and "a jewel in the national conservation estate", without consultation with Tūhoe nor recognition that they had any special interest in the land".

This history of drowning out *tikanga* in favor of state law was most significantly affected by the Treaty of Waitangi Act of 1975, which inaugurated the Waitangi Tribunal, 'a standing commission of inquiry established to inquire into Māori claims that laws, policies, acts or omissions of the Crown are or were inconsistent with the principles of the Treaty of Waitangi' (Sanders 2018, 208). The Tribunal only has powers of recommendation, though this has not rendered it powerless. Indeed, 'the tribunal began to have an in-

fluence on public policy, despite its lack of powers to compel the government to take notice of its recommendations' (Belgrave 2013). As Belgrave continues, 'it was partly in recognition of this success that in 1985 the fourth Labour Government extended the tribunal's jurisdiction back to 1840, with far-reaching consequences that were only dimly understood at the time'. This set in motion the contemporary era of negotiations between the government and Māori *iwi* and *hapū* for breaches of the Treaty.<sup>8</sup>

The grant of legal personality to diverse landscapes in New Zealand should therefore be understood in the post-1985 context of Treaty settlements. It is this historical period that elevates the Treaty of Waitangi to the most significant document in Māori – Crown relations. Before 1985, the Treaty of Waitangi had no particular legal status or force. As Belgrave notes, 'until the creation of the Waitangi Tribunal, no court or commission of inquiry had needed to define what was actually agreed to at Waitangi' (Belgrave 2013). The idea that Māori-Crown relations are defined by the differences in translation briefly summarized above is itself a late 20<sup>th</sup> century narrative that accords well with the contemporary period of Treaty settlements. It also shows that the Treaty, in the 19<sup>th</sup> century, 'could not be pinned down to a single interpretation for its European participants, let alone among the more than 500 rangatira representing diverse Māori communities' (Belgrave 2013).

Tūhoe claims to Te Urewera, like *Whanganui iwi* claims to the Whanganui river, can be interpreted as complex negotiations about who owns the land, or more precisely about who has ultimate authority in governing the lands. The idea of legal personality provides a provisional solution to this question. Unlike in the cases explored in the previous chapter, we are here starting to see a specific context of contestation that, for largely pragmatic reasons, settles on the idea of legal personality as a possible negotiation tool. The issue of rights, as well as the idea of Nature, are much less prominent than the issues of ownership and authority (Sanders 2018, Macpherson 2019, 2021).

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8 Names for Indigenous Māori descent groups. *Iwi* denotes a larger group than *hapū*.

The history of Treaty negotiations might suggest that Māori descent groups feature as fully equal participants in a process of negotiation. However, such Treaty negotiations always take place against a backdrop of state power to impose the general framework for discussion. Higgins makes the point that Treaty negotiations force Māori to come together in ways that are not based on Māori custom. She argues that ‘the process that is placed upon iwi to create “mandated large natural groupings” by the Office of Treaty Settlements’ is itself an imposed framework (Higgins 2019, 132). She continues: ‘...the settlement systems are not determined by Māori and often contravene *tikanga Māori*, or any “customary system of authority”’. This has the potential to create tensions within Māori communities, as *tikanga* systems of membership might or might not correspond with official requirements for commencing negotiations. In the case of Te Urewera, it was Te Kotahi a Tūhoe that received the mandate to negotiate with the Crown for Treaty settlements.<sup>9</sup>

Negotiations between Tūhoe representatives and the Crown began in 2005. For Tūhoe, the return of Te Urewera under their authority was non-negotiable, although it was far from clear at the outset what this return might look like. The government, in turn, feared that ‘negotiating Te Urewera and mana motuhake would lead to Tūhoe creating a separate nation and closing borders and access to Te Urewera, which was still a National Park at the time. This sensationalism led to the Prime Minister removing Te Urewera from the negotiation table at the eleventh hour before the signing of the Agreement in Principle between the Crown and Tūhoe’ (Higgins 2019, 135). This led to the halting of negotiations in 2010, because for Tūhoe ‘Te Urewera and mana motuhake are inextricably linked’. The refusal to negotiate further on the part of Tāmati Kruger, Tūhoe chief negotiator and senior leader of Te Kotahi a Tūhoe, forced the

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<sup>9</sup> Echoing Higgins’ point about the tensions that might be created by the requirement of a unified *iwi*, Binney recalls the internal struggles between *hapū* regarding who was the rightful representative of Te Urewera in negotiations with the Crown. See J. Binney, *Stories Without End: Essays 1975–2010* (Bridget Williams Books, 2010), pp. 364–5.

government back to the table and eventually resulted in the government granting legal entity status to Te Urewera.

Te Urewera Act 2014 establishes Te Urewera as a *legal entity*, a term used fairly consistently throughout the document. As I argued in Chapter 2, the idea of a legal person mixes moral and legal conceptions in ways that are not always helpful. Here, the idea of a legal entity offers a way out of the moral/legal confusion promoted by legal persons.<sup>10</sup> Te Urewera is not a person, first and foremost in Māori views. Rather, the legal compromise reached through negotiation institutes a new entity, a term that allows for a lot of openness as to how to conceive of what has been inaugurated. That being said, the text of Te Urewera Act also sometimes uses the two terms synonymously. For example, Section 11.1 declares that ‘Te Urewera is a legal entity, and has all the rights, powers, duties, and liabilities of a legal person’. This reflects the undertheorized nature of the difference between legal entities and persons.

Section 11.2 mandates that the aforementioned rights, powers and duties must be exercised on behalf of Te Urewera by Te Urewera Board, therefore designating a specific representative for the legal entity. Constructing Te Urewera as an entity can therefore be interpreted as a way of being transparent about the artificiality of the construction itself, thereby allowing the Board ample discretion regarding how to represent Te Urewera and its specific life-form. Unlike the cases we saw previously, here the issue of standing is decided in a very specific way, i.e. by vesting it in the Board. I will come back to the significance of this.

The construction of Te Urewera as a legal entity in the context of the Treaty negotiations is a compromise that avoids vesting land ownership either in Tūhoe or the government. It also avoids vesting full political authority in either party and instead opts for the construction of a Board that would be the *de facto* and *de jure* governor of Te Urewera, while the owner is Te Urewera itself. Indeed, Section 17 states that the board was ‘created in order to act on behalf of, and to “provide governance” to Te Urewera. Subsequent sec-

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<sup>10</sup> See Tănăsescu (2020) for a detailed discussion of this point, in relation to both Te Urewera and the Ecuadorian constitution.

tions explicitly allow the Board to govern according to Tūhoe principles.<sup>11</sup> Tūhoe leaders have used the space opened up by the difference between ‘providing governance’ and ‘Tūhoe principles’: instead of opting for a conventional governance regime where people manage nature, Tūhoe ontology subverts the requirement of governance by recognizing natural entities themselves as capable of self-governance. This space of innovation is granted explicit approval by the law’s designation of Te Urewera as an entity and therefore not modelled on pre-existing governance arrangements.

As Macpherson (2021b) points out, Te Urewera Act has precedents in New Zealand history inasmuch as it is similar to co-management agreements that the Crown had reached in the past with other *iwi*. However, the legal entity status is a clear departure, and one that comes out of Tūhoe insistence on negotiating common values on which the new arrangement could be based. Equally important is the fact that Tūhoe activism in this case cut its own path, adapted to specific historical and environmental conditions. The point of this arrangement, unlike other co-management ones, is to foreground the issues of ownership and authority, which are directly related to historical Tūhoe grievances.

In this context of ontological mixing between the Crown and Tūhoe, the rules for appointing Board members and the internal rules of decision making become very important for understanding how legal recognition might work in practice. Also important is the appointment panel, which consists of the trustees of Tūhoe Te Uru Taumatua,<sup>12</sup> the Minister of Conservation and the Minister of Treaty Negotiations. In the first three years of functioning, the Board is composed of four representatives for both the Crown and Tūhoe. After the first three years of functioning, this changes to six

<sup>11</sup> 18.2 and 18.3.

<sup>12</sup> The seven trustees are available here: <https://www.ngaituhoe.iwi.nz/governance>.

members appointed by Tūhoe and three by the Ministers.<sup>13</sup> The appointment panel can remove previously appointed Board members.

Section 31 establishes that ‘Board members must promote unanimous or consensus decision making, as the context requires’. Sections 33 and onwards lay down the various decision rules. If a decision cannot be reached by consensus and must be put to a vote, it must be carried by an 80% majority of those present and at least two members who were appointed by the Ministers. Section 40 declares that ‘financially speaking and for tax purposes, Te Urewera and the Board are the same person’.

These kinds of details are important because it is only through them that the novelty of this arrangement can be recognized. It is also through the particularities of the case that we can start to see that here we are really talking about a new *political* arrangement, over and beyond the legal innovation. The very point of the legal innovation is to create ongoing debates about a new and underdefined actor. The lack of precise definition is the point, and taken together with the obligation to govern in constant dialogue among parties (natural ones included) it forces a constant reassessment of all actors. In this sense, Te Urewera act offers the possibility of understanding all parties involved in novel ways, because it does not set the idea of personhood as a model to be emulated. Instead, it focuses on the governance arrangement that realigns power relations away from Crown dominance and towards an as yet unknown future.

According to the 2014 Act, the Board is tasked with drafting and following a management plan, *Te Kawa o Te Urewera*.<sup>14</sup> The language that characterizes future management plans in the Te Urewera Act falls squarely within a Western legal and managerial tradition dominated by outcomes, targets, and so on. As Carwyn Jones (2016) points out, Māori terms are heavily used in the preamble and

<sup>13</sup> At the time of this writing, the second Board had commenced its term. In addition to Board members, the Te Urewera Act 2014 appoints a Tūhoe chairman in perpetuity.

<sup>14</sup> Hereafter *Te Kawa*. Available at <https://www.ngaituhoe.iwi.nz/te-kawa-o-te-urewera>.

historical parts of the documents (the symbolic ones), while there is “a general paucity of Māori language within the operational provisions of these instruments”. This experience was very similar to the ones of Ecuador and Bolivia, where indigenous notions are heavily used in the preamble and overall the symbolic parts of the text.

However, the Board brilliantly subverts state power through the management plan itself. Crucially, this kind of subversion was already made possible by the careful and long-term parsing out of power relations, something that was not explicitly done in Ecuador and Bolivia. It is, after all, the law itself that allows full freedom of drafting a plan, which opens up spaces of authority that can further consolidate Tūhoe control. One purpose of the management plan, as explained by the law, is ‘to set objectives and policies for Te Urewera’. Te Kawa was drafted with strong input from Tāmati Kruger, a chief negotiator and senior leader of Te Kotahi a Tūhoe, as well as Board member and chairman of Tūhoe Te Uru Taumatua, who had been instrumental in negotiating the 2014 Act with the Crown. He turned the conventional framing of the relation between nature and management on its head by stating that ‘Te Kawa is about the management of people for the benefit of the land – it is not about land management’.

Even though the 2014 Act stays broadly within the apparatus of the State, Tūhoe managed to create a space where their authority could become fuller. They did this in several ways. First, and perhaps most importantly, through the direct linking of Te Urewera to a designated representative, namely the Board. Unlike in the other cases we saw so far, here there was no assumption of rights doing their work by themselves, as it were. Tūhoe were acutely aware of the need to have their own relationship to the land recognized as primary. This leads Macpherson (2021b) to conclude that Te Urewera act, if seen from the anthropocentric – ecocentric distinction, is squarely within the first camp. She argues, correctly in my view, that Te Urewera can be just as well seen as an indigenous rights case, rather than a rights of nature case that follows the theoretical history explored earlier. This means that Te Urewera shows a path for the rights of nature that goes through careful political arrange-

ments and dismisses altogether the notion that the law can, or even has to be, ecocentric.

Second, the concept of legal entity, hitched to the representative power that Tūhoe secured for themselves, allows them broad margins in defining how the land will be governed. These margins had to be secured precisely because the terms of the negotiation themselves were imposed by the settler state. In other words, Tūhoe could only sediment their authority in Te Urewera through a legal mechanism that would allow them to define what authority may mean in practice. All of the detailed provisions of the act set up an infrastructure for the deployment of authority, guided by shared values. But the actual content of Tūhoe government is to be decided in practice, partly because it is through practice that it *can* be defined. This is a powerful rejection of totality thinking.

Lastly, Te Kawa steers clear of the issue of rights altogether. Te Urewera will have some rights because of its legal entity status (Macpherson 2019), but what these may be is nowhere defined. This way, the historical baggage that comes with the concept of rights is cut out altogether. Instead, the management plan focuses on reciprocity with the land and the responsibility people have towards it (Tănăsescu 2022). Though rights have become hegemonic to the point of saturation, this arrangement shows how to side-step their totalizing power and propose alternatives that may as well, in the long run, erode some of that power.

The issue of nature conservation is mostly vested in the Board and therefore left open. When it was a national park, Te Urewera was managed by the Department of Conservation which, under the current arrangement, lost control of its former ‘crown jewel’. In fact, there is nothing particularly ‘environmental’ about the construction of Te Urewera as a legal entity. Macpherson (2021b) points out that the powers given to the Board include those of creating bylaws and “to authorize certain activities that are otherwise prohibited under conservation laws, including the taking, cutting or destroying of indigenous lands and the hunting of indigenous animals”.

This is because Tūhoe, like many other Indigenous Nations elsewhere, relate to the environment through a mode of paying attention to it that is reproduced through use. The Tūhoe concept of

management is *mana me mauri*, that is to say the “sensitive perception of spiritual and living force in a place” (Macpherson 2021b). But this kind of perception can only occur with repeated interactions that partly, and importantly, center on *using* existing resources. The conservation ethic, which relegated Indigenous People to noble guardians of nature, is again revealed as an imposition.

The provisions of Te Urewera Act were not primarily motivated by environmental concerns, but rather by power relations. The rights of nature appeared as a pragmatic way of solving a dispute, and it was used creatively to this end. As far as the state is concerned, the settlement reached with Tūhoe is final. However, given the history of colonial relations, there is no reason to believe that this is in fact so. The new legal provisions in Te Urewera are but the next stage in a centuries-old dispute over how to govern, and who has the right to do so. It remains to be seen how this history of Crown – Tūhoe interactions will develop under the new conditions inaugurated by the Act.

To be clear, Te Urewera Act is not a piece of legislation that recognizes Tūhoe self-determination as such. Settler states would sooner accept self-owning land than Indigenous owned one, which would threaten the very definition of a state as wielding homogenous power over a homogenous territory. The self-ownership of Te Urewera also comes very close to corporate personhood, which further makes it available for integration within already existing legal infrastructures.

The exact way in which authority will be exercised by the board is unclear, for several reasons. First, Te Urewera is not one thing, but rather a contested space *within* Tūhoe communities. From afar, it looks as if Tūhoe are a homogenous and united group, but inasmuch as Indigenous agency and multiplicity is truly recognized, it stands to reason that there are internal politics as well. Second, the concession of authority by the Crown is partial because some areas are still designated ‘wilderness areas’, signaling the unwillingness of the state to fully let go of its history of conservation. Though the management of such areas needs to be done in consultation with the board, this is not really full recognition of Indigenous autonomy.

Lastly, the board is tasked with undertaking measures that have everything to do with how the state conducts its business of governing. In particular, it is tasked with giving permits for a multitude of activities, some of which come under traditional use. The representative of Te Urewera is therefore tasked with bureaucratizing its functioning, an aspect that may well lead to frustration and contestation within Tūhoe communities.

This notwithstanding, new ground for more Tūhoe autonomy is being prepared, particularly through Te Kawa, the management plan. To even call this document a 'management plan' is deceiving, as that name comes with a particular concept of targets, top-down assessments, human control, and so on, which the law in fact mandates. It also comes with the idea of guardianship, which has been ubiquitous in the coverage of the New Zealand cases. However, the Board is *not* the guardian of Te Urewera, but its representative. Te Kawa makes sure that this point is immediately clear by announcing its intention to manage people, not the land.

The Western idea of guardianship is not the only concept Te Kawa rejects. Indeed, the concept of Nature that we saw earlier is also rejected for the radically emplaced Te Urewera, which is characterized as a special *marae*, that is to say a community house where vital issues are discussed and ancestors met (see Kawharu 2010). Te Kawa states that Te Urewera has its own way of being and further disrupts the colonial making of Indigenous People as inherent guardians by proposing that the character of Te Urewera needs to be constantly rediscovered, as Tūhoe need to themselves reinvent their own traditions. The latest Annual Plan available (2020–2021) announces quite boldly that Tūhoe are out of practice in their own ancestral ways, precisely because of colonialism. They therefore need to relearn ways of being that are free from the colonial inheritance touching everyone and everything. The process of relearning is always a part of the cultural hygiene of a people: constant reiteration and gradual change is the way in which traditions are perpetually reinvented.

The issue of rights is nowhere present in Te Kawa. Instead, it is all about the responsibility that people have to relearn ways of being in the world that are true to the particularities of a place. All of this

does not mean that Te Urewera is a model to follow everywhere; drawing that conclusion would bring us right back to the universalist discourse of rights of nature that I find so problematic. The difference between Te Urewera Act and Te Kawa lends support to Jones' argument that the Act does not sufficiently recognize Tūhoe tikanga. If it did, there would be no need for such a major departure, in the management plan, from many of its provisions.

This notwithstanding, Te Urewera shows a way of using legal entity status as a potential tool of empowerment, while acknowledging its limitations. It also shows how the rights of nature are not automatically about 'the environment' and that they need not be fixated on rights or a general concept of Nature. Rights can be a useful tool, given certain contexts, but the context is everything. Even in New Zealand, where countless Treaty settlement claims have been lodged, only a small number of them settled on rights of nature as a partial solution. I want to now turn to another one of those.

## **Whanganui River and its Human Face**

In 2017, Te Awa Tupua Act was signed into law. The claims settlement history that was recounted in the previous section also largely applies to this case, though of course the particular interactions between Whanganui iwi and the Crown were different than those between Tūhoe and the Crown. That being said, the 2017 legislation offering legal recognition to Whanganui river came out of the same process of claims settlement. Throughout the history of colonization, Whanganui iwi had also been remarkably consistent in claiming that Crown activities in the river contravened iwi authority, which they had never given up.

Te Awa Tupua<sup>15</sup> is defined by the act in line with Māori ontology as an "indivisible and living whole, comprising the Whanganui river from the mountains to the sea, incorporating all its physical and metaphysical elements" (Art.12). Of course, the separation between physical and metaphysical is itself a settler way of understanding

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15 This is the name of the river in Te Reo Māori, the Māori language.

Māori thought, a by now instinctive attempt to save the idea that there is but one world with different views on it. For Māori, however, Te Awa is an ancestor, a powerful being whose separation into riverbed, water, tributaries, and so on, they have always opposed.

The Act affords Te Awa the status of “legal person”, potentially wading straight into the legal/moral thicket already explored. Crucially, it also designates one representative for Te Awa, namely Te Pou Tupua, the equivalent of Te Urewera’s Board, here described as the “human face” of the river. Predictably, international coverage of this case has both assimilated it to rights of nature elsewhere, as if it was part of the same seamless history, and presented Whanganui iwi as the guardians of the river. Neither of these claims are true. This legislation shows once again the diversity of ways of thinking about the role of the law in human emplacement.

Let’s take a closer look, for instance, at the issue of guardianship. I suspect that its persistence has to do with the ecotheological history that specifically theorizes human’s highest role in nature as one of guardianship (Chapter 2). This also corresponds to the neat idea of an expanding circle of moral concern: when humans are finally the conscious guardians of nature, the circle would have expanded all the way. The idea of guardianship construed thus also works very well with the formatting of Indigenous People as belonging, by nature, to a specific place. There is a seeming paradox here: on the one hand, human history is seen as a continuous expansion of moral concern, while those that supposedly are already acting as guardians (the Indigenous) are precisely the people that are not modern and therefore supposedly steeped in pre-expansion morality.

The paradox is resolved by realizing, as I have previously argued, that this image of the Indigenous as natural guardians is a Western construction. Once again, this does not mean that Indigenous Peoples are inherently destructive. It simply means that no human group is naturally benign, unless it is denied its own history and agency by more powerful human groups. In order to dispel some of the fog created by this contradictory idea of guardianship and its association with expanding moral consciousness, it helps to at-

tend more closely to how Māori thinking, in this case, construed ‘guardianship’.

Anne Salmond, Aotearoa New Zealand’s foremost anthropologist, recounts how Māori thought conceives of guardians as *taniwha*, that is to say local spirits, usually in the form of animals that take care of a particular place and are a gauge of its well-being. The Māori term usually translated as guardian is *kaitiaki*, whereas *kaitiakitanga* translates as guardianship. As the Waitangi Tribunal Freshwater stage two report explains, “traditionally, there were certain creatures, taniwha or birds, which were kaitiaki and ‘invested with the spirits of ancestors or closely related to remote ancestors by whakapapa [genealogy]’” (p.118). The report continues by mentioning the important detail that “the observation of those kaitiaki by the people revealed whether ‘all is well in the world or whether some action is needed’”. People, then, are *observers* of kaitiaki, not themselves guardians of a place. Human beings exist as such only inasmuch as they are members of genealogical networks (*whakapapa*) that transmit certain responsibilities from generation to generation. And one such responsibility is that of careful observation of a place, in order to respect its *mauri* (life-force) and *hau* (spirit or vitality).

Māori tradition is as changeable as any other, but it is important to set out the broad conceptual outline of a completely different world, not just another ‘cultural’ point of view on the same material world. For Māori, places are not dumb matter, but are charged with ancestral power that has its own logic within which human beings have to fit themselves. When the vitality of a place is affected, then humans can intervene in ways that try to uphold the power of non-human kaitiaki. What this may mean in practice is entirely context-dependent, but part of that context, for the last centuries, has been the need for Māori to translate their concepts into Western language. Despite the adoption of the concept of legal personality, for example, it is nonetheless remarkable how consistent the resistance to the Western concept of guardianship has been.

Equally consistent has been Māori insistence on the need to *use* the environment in specific kinds of ways while not using it in others. In the case of water, for example, Māori tradition forbids the

discharge of any waste into water bodies, or the fusing of initially separate waterways (though it also considers ‘a river’ to be formed by the whole catchment). It similarly relegates different activities (swimming, washing, drinking) to different areas of the river, such that the *mauri* of the river, and therefore the strength of its *kaitiaki*, are not affected. But Māori rules dictating interactions with, in this case, a river, are there in order to propagate a certain indefinite use of water. And whereas humans have the power to destroy through incorrect action, they do not have the same power to restore, precisely because they were not guardians to begin with, but mere users.

In the case of Whanganui river, Te Pou Tupua is defined as its human face, its representative perhaps, precisely because it cannot be, under Māori ontology, its guardian. “The purpose of Te Pou Tupua”, the law states, “is to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua” (Art. 18.2). It is important to stress that the idea of a human face is a compromise as well, an ontological hybrid, but one that veers closer to Māori ontology than the idea of guardianship does. Schedule 8 of the Act, for example, explicitly recognizes the existence of specific place-based relations between *hapū* and at least 240 rapids (*ripo*) that exist along the river. “Each ripo”, the document states, “is inhabited by a kaitiaki (spiritual guardian), which is particular to each hapū”. Notice that the word guardian is only ever used in relation to non-human kaitiaki. Also of great significance is the fact that the law, precisely under Māori influence, finds it necessary to locate itself at an ontological level that is quite uncomfortable for it: the level of places within the river network and the level of the privileged relationships that hold between people and these places.

The role of people is therefore one of *collective responsibility* “for maintaining the mauri of the ripo and, in so doing, the collective mauri of Te Awa Tupua” (p.88). This maintenance, which is a collective responsibility, is achieved by paying close attention to the non-human guardians of various places, because it is the “kaitiaki of the ripo [that] provide insight, guidance, and premonition in relation to matters affecting the Whanganui river, its resources and life in general”. The issue of paying attention surfaces here as well as in

Te Urewera, particularly in its management plan that gave voice to Tūhoe ontology more fully than the Act itself. The idea of attention underlines that, in relational ways of thinking (as opposed to the modern binary ones), one is always already grounded in *some* place. To know that place is to use it in certain kinds of ways that are legitimated by one's ability to pay attention to natural cycles and their changeable rhythms.

These parts of the legislation, which are clearly highly influenced by Māori legal and philosophical traditions, do not shy away from using the concept of resource, partly because use, unlike in the ecotheological history I have explored, is not frowned upon as such. In fact, the particularities of each place are in part known through the varied uses that they make possible. "Each ripo has unique physical characteristics and is valued accordingly". Part of the valuation is given by the traditions that put those characteristics to human use, for example by adapting fishing techniques to each place. That kind of place-based knowledge has survived, and this legislation attempts to bring those 'informal' legal traditions into codified versions that would allow for a more autonomous interaction with the settler state that is there to stay.

Because this agreement, like in the case of Te Urewera before, was based on the particularities of the New Zealand context, legal personality appears in a form that the earlier theory of rights for nature could not have predicted nor facilitated. Here, legal personality is not primarily concerned with rights, nor with inserting itself within binary oppositions of the thing/property or nature/resource kind. All of the oppositions we explored earlier are simply sidestepped, and legal personality is made to do something that theory did not yet know it could do. The legal personality of Te Awa Tupua attempts to solve a problem of authority over particular lands, and it is precisely its highly open nature (it has no particular content) that allows for the ontological and legal hybridization on display.

This is best seen through the political apparatus that the law mandates such that the human face of the river (Te Pou Tupua) can do its work of speaking on behalf of Te Awa Tupua. It is there, in the details of those arrangements, that the truly revolutionary nature of

the New Zealand cases is most visible. The 2017 law does not simply grant standing to Te Pou Tupua and leave it at that. Instead, it inaugurates a highly complex and entirely novel arrangement that ensures that the human face of the river speaks in democratic fashion and acts deliberatively. This is another example of hybridization at work. Neither Māori tradition nor the settler one were particularly preoccupied in the past with democratic principles. But under present conditions, the only legitimate way in which Te Pou Tupua can act is in highly consultative fashion. The apparatus that makes that possible, however, had to be invented.

For example, Te Pou Tupua is to perform “landowner functions” on behalf of Te Awa Tupua (19.1(d)). This, as in the case of Te Urewera, means that the river owns itself, but that the landlord is yet another element, namely its human face. The appointment rules for who can be member of Te Pou Tupua (20) further make it clear that this is an unprecedented figure, and especially a new kind of political figure fit for a settler world whose right to be there in the first place cannot be effectively questioned. By law, Te Pou Tupua has to encompass both Crown and Iwi representatives, in effect claiming the right to represent the river as a shared duty for old rivals.

This is not all. Te Pou Tupua cannot simply decide what is in the best interest of the river, even though it is itself a deliberative institution. Instead, the law mandates that it relies on Te Karewao, meaning a group of advice providers, and Te Kōpuka (29ff), meaning “a permanent joint committee” (33.1). The purpose of all of these different institutions is to safeguard the well-being of Te Awa Tupua. To do this, Te Kōpuka has the specific function of drafting Te Heke Ngahuru (a long-term strategy or plan for the river; its purpose is spelled out in 35). Finally, there are four principles (Tupua Te Kawa, 13a-d) that the strategy drafted by Te Kōpuka and implemented by Te Pou Tupua with the advice of Te Karewao is to be based on. These principles affirm the inalienable relationship between all aspects of the river (creatively, geomorphological, spiritual, and so on).

This arrangement seems very complicated, and it is. The joint committee, for example, may consist of no more than 17 members, and each must be appointed according to certain rules. Everything, including who counts as iwi and hapū, is highly regulated. All in all,

this amounts to a new governance framework that is not at all about rights, nor about Nature, nor about guardianship, but about ways of carving out political power in relation to beings that have until now only been part of Māori worlds. The membership of Te Kōpuka is the most telling, as it reunites all actors with some sort of interest in the river, from tourism to resource extraction to the operator of the hydroelectric powerplant already in operation. Nature conservation appears as just another interest, with one representative only. The life of the river in the 21<sup>st</sup> century, clearly, cannot be thought of in the dualist terms of the settler tradition, nor in Māori terms alone. This Act, together with Te Urewera, are the most detailed and painstaking hybrid arrangement to make use of legal personality to date.

Whether the framework set up in this case will work, and what that may even mean, is to be seen in the long duration of history. Māori know this and do not seem to be under pressure to 'deliver' immediate results, precisely because what may count as a good outcome is entirely up to the durability of the deliberative process inaugurated through the Act. The temporal dimension of the case is very significant, because it is itself based on the rhythms of the surrounding world. It would be absurd to mandate that within a matter of months a centennial history, and the infinitely longer lifetime of the river, would be brought into line by a piece of legislation. Paying close attention to the *time* of the environment imposes a long duration to the legislative apparatus itself. Te Urewera follows the same temporal patience. In its online communication, the board is very careful to stress that results will be seen in time, because the time of the land is what dictates relationships with it.

There is no denying the difficulty of the framework involved in this case and the highly ambiguous nature of what success may mean. From the point of view of the rights of nature, I think that these cases can already be counted as successes, if nothing else because they reveal possibilities inherent in legal personality that were simply absent in the theory. They also demystify the relationship between rights and indigeneity in ways that are extremely helpful going forward. Finally, they show how ontological hybridization may happen without dictating either why it must happen or its precise

content. In other words, Te Urewera and Te Awa Tupua show how far the law can be pushed and how to bridge the unavoidable generality of Western law with the place-based philosophical traditions that, despite centuries of violent colonialism, still endure.

## **Chapter V: The Perils of Totality**

### A Short Foray into Modernist Thought

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So far, I have analyzed two different kinds of cases of rights of nature. On the one hand, I discussed cases that have explicitly drawn from a theoretical tradition steeped in what I have called ecotheology. On the other hand, I have also presented two cases (Te Urewera and Te Awa Tupua) that have used the concept of legal personality in radically different ways. These are very important for future rights theory, as they have revealed previously hidden potential and inaugurated a different theoretical course, away from ecotheology. These two kinds of cases – ecotheological rights of existence and legal personality arrangements – are not, however, the only ones. In this chapter I want to look at several other instances, with the benefit of having the aforementioned cases in the background.

I will examine the legal personality of several different rivers and several different places, as well as the push to pass international rights for nature laws in one form or another. These cases combine elements of the ones explored so far, showing both the limits of typologies and the fluidity of nature's rights in practice. Atrato river in Colombia, the Amazon rainforest, two rivers in India, all rivers in Bangladesh, and a potential UN declaration of the Rights of Mother Earth are at different judicial levels, reached through different mechanisms, and in many other ways completely different from each other. These differences are important. But equally important is to recognize a certain intellectual inheritance that con-

nects them.<sup>1</sup> Through mechanisms of policy diffusion (the formal and informal passing of policy ideas from one place to another), all of these cases inherit parts of ecotheology that combine in different ways with the kind of place-based thinking on display in Aotearoa New Zealand. They share many of the same intellectual assumptions seen in Ecuador and Bolivia, and therefore the same potential problems, even though they seem to be concerned with places.

The concepts of nature, rights, and guardianship are important junctures between rights of nature theory and practice. Another such conceptual connector is what I call ‘totality’. We have seen it already at work in the ecotheological concept of Nature, as well as of ‘humanity’. Totality, and the insistence on it, is a potent marker of modernist thinking, namely the kind of thought originating in Western Europe at the time of the Enlightenment that considers itself to be universal and therefore applicable everywhere and to everyone. It is the kind of thought that thinks in terms of “humanity” versus “nature”, and that looks for essential qualities abstracted from any lived experience (also see Debaise 2017, Tănasescu 2022). It is the thought that sees current ecological problems as the result of humanity going astray, instead of very specific forms of power gaining momentum because of the benefit to certain groups at the expense of others.

The reliance on totality is insidious precisely because modernity has all but saturated the landscape of thought and practice (Chakrabarty 2009b, 2018). Virtually no-one is opposed to “modern development”, just as no-one can be opposed to rights. What I want to argue is that one of the reasons why rights are unopposable (or, to say it differently, hegemonic) is the same as why modern development appears unstoppable. Simply stated, moderns (mostly everyone today) have been trained to think in universal abstractions, and they do so even when supposedly opposing modern ills (like environmental destruction). The cases I will survey here exemplify the subversive power of totality. They also show why, in rights of nature theory and practice, we need much more than ecotheology in order

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<sup>1</sup> This inheritance is not limited to philosophical concepts, but also to conceptions of law.

to overcome modernist ecological predicaments and to be able to propose alternatives that are truly different.

One of the motivating questions of this analysis is whether the law can use mechanisms that are intrinsic parts of colonial enclosure and environmental destruction in order to oppose such deprivations. These mechanisms are legal personality, rights, and – to an equally great extent – universality and totality. I don't propose to answer this question once and for all; that pretense would be absurd. But keeping the question central to the expansion of rights is crucial for the intellectual and moral development of this growing trend.

## Many Landscapes, Some Places<sup>2</sup>

### Atrato

Atrato river, in the department of Chocó, Colombia, became a legal person in 2016.<sup>3</sup> This grant of legal personality to a particular place was neither a municipal ordinance, nor a constitutional one

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- 2 The following sections discuss cases in Colombia and India for which I undertook no independent field work. For the other cases discussed in this book, I did independent field work in the languages of the relevant countries. The language barrier, especially in the Indian case, should not be underestimated. Though I do not claim to have the final word on any cases, I think that more errors of interpretation may arise in the following sections, where I rely primarily on secondary sources by authors that may also not have had the opportunity to do independent research in the relevant languages. I have done my best to consult Colombian and Indian authors first and foremost, but I think that it is still necessary to contextualize my own research of these cases. In the Colombian case, I have consulted official documents in the original language.
- 3 The decision was only made public in May 2017. See Macpherson and Clavijo Ospina (2020). "Person" here translates the term "sujeto", which can also be translated as "subject". For the purposes of the argument, I treat both as synonymous.

(in the sense of being included in the constitution of the state), nor a national law, nor the result of claim settlement processes. Whereas until now I juxtaposed an ecotheological rights tradition to the place-based one, this case combines elements of both in surprising ways. In particular, it differs in how the idea of legal personality was reached.

Atrato river became a legal person out of judicial pronouncement. This means that the legal personality of Atrato was not reached as part of a more or less explicit political process. This does not mean that it doesn't have potentially enormous political consequences, but it is important to note that there is a whole class of cases under development (including the Ganga and Yamuna rivers, in India) that appear entirely out of judicial decisions (O'Donnell 2018). Judges, for reasons I will explore, have decided in these cases that the best way to protect the rivers (or places) under discussion was by proclaiming them to be legal persons.

The Colombian Constitutional Court recognized Atrato river as a subject of rights in 2016, while the Colombian Supreme Court did the same for the Colombian Amazon rainforest in 2018. Both of these cases demonstrate, as Calzadilla (2019, 3) argues, that "rights of nature/ecosystems can be recognized by both legislative and judicial channels". Though in the case of rights of nature theory strictly speaking this possibility was not explicitly formulated, it does nonetheless conform to the theoretical view of legal personality as something that is simply declared by a competent authority. Why that may be done, and to what end, remain questions to be explored. But *that* it can be done is beyond doubt.

In the Atrato case, the court proclaimed it a legal person in response to a *tutela* action brought by an NGO – *Tierra Digna* – on behalf of residents suffering the harm of illegal mining activities on the river. A tutela action is a constitutional mechanism that allows any person to "request any judge in the country to protect his/her fundamental constitutional rights when they are being violated by a state agent or an individual" (Calzadilla 2019, 4). Because of the high levels of pollution caused by mining activities on the river, the NGO used the tutela mechanism in order to compel the state to take

protective action for safeguarding the wellbeing of local residents as well as that of the river.

Several things are important to note at the outset. First, this case begins as a violation of the rights *to* nature of the local residents (as well as a host of other human rights) and becomes – through the decision of the judge – a case of rights *for* nature. This is not the first time we encounter the tension between these two different kinds of rights. It again shows that the binary thinking in terms of anthropocentric versus ecocentric laws is not really fit for purpose: it cannot make sense of rights of nature laws themselves, which are supposedly ecocentric. As Macpherson and Clavijo Ospina (2020) argue, this kind of case raises doubts “about the usefulness of the ecocentric/anthropocentric divide”.

Second, the mining activities that were the source of contention and harm were already illegal. In other words, the state already had mechanisms at its disposal to protect the wellbeing of local inhabitants, human and non-human alike. The Colombian Constitution itself, which made space for a tutela action, is also known as an *ecological constitution*. This point must be underlined because of the often-repeated advocacy claim that giving nature rights is necessary in order to ensure environmental protection. But no compelling reason is given for *why* these would fare better than already existing legislation, especially once we dispel the myth that ecocentrism can exist as such, let alone be effective in practice. In the end, the issue of state power is central and cannot be avoided. Chapter 6 will show how, in the cases of Ecuador and Bolivia extractive industries have *increased* since the passage of those country’s radical-seeming rights of nature laws. This is a possibility that cannot be ignored in the Atrato case as well.

Similarly, the 2018 decision to grant the Amazon legal personality status came from another tutela action against government actors that failed to uphold resident’s constitutional rights in the face of increasing deforestation. Just like in the Atrato case, this decision enacts a passage from the violation of rights to a healthy environment towards rights for the environment itself. Similarly, the deforestation under question was already illegal. Finally, the role of the state is ambiguous and central: In the Amazon case, the state

was explicitly targeted as a cause of deforestation, while the idea of legal personality also depends on the state for its functioning. It may seem as if the mechanism of judicial decision sidesteps the importance of the state, but it does not: the newly created Atrato and Amazon legal entities will have to be incorporated within political processes mediated by and through the state; they cannot exist in the hands of judges alone nor, perhaps, should they.

In the Atrato case, the court gave the river specific rights, namely to “protection, conservation, maintenance and restoration” (operative part 4). These rights are very similar to the ones coming out of the ecotheological tradition analyzed in depth earlier, though here they are applied to a particular place. The right of restoration raises the same conundrums already explored, as by the admission of the court itself it is impossible to currently establish the ‘original’ course of the river (see Calzadilla 2019). The judicial decision in this case repeats the majority of ecotheological orthodoxy, from the gendered use of nature as feminine figure to the anthropocentric – ecocentric distinction and the idea that rights are recognized and depend on the existence of intrinsic values.

This case is both place-based in that legal personality applies to Atrato river, a particular being in a particular place, and is steeped in totality thinking. This combination is striking, and it remains to be seen just how it may play out in practice. But exposing conceptual commitments is already a good indicator of what may happen. The specific combination in this case is brought about by the international diffusion of the two kinds of rights of nature exemplified by Ecuador and Bolivia on the one hand and New Zealand on the other. But the lack of proper attention to their differences allows ecotheology and totality thinking to monopolize the way in which rights are conceived of and implemented, even when applied to specific territories.

For example, the court frames the legal personality of Atrato in terms of “the planet” and “humanity”. It claims that “nature” must be recognized as an entity with intrinsic value, though it also speaks about the necessity to protect resources for future generations, in line with the sustainable development commitments already present in Colombia’s ecological constitution. But under

the premises of intrinsic value that the court itself upholds, why would future generations be allowed to use resources at all, on their own terms? This tension between intrinsic value and resource use is not a real tension, but one created by the theoretical artifact of framing the rights of nature as a passage from anthropocentrism to ecocentrism (as part of the expanding circle of moral concern). As I have argued in the case of Te Urewera and Te Awa Tupua, use as such is central to a-modern ways of living. In the neoliberal universe that ecotheological rights cannot but inhabit, there will always be an unresolvable tension between use and intrinsic values.

The majority of the literature starting to take stock of the Atrato and Amazon cases continues to frame these as a passage from anthropocentric to ecocentric law (with notable exceptions, such as Macpherson and Clavijo Ospina 2020). This is because of the so-far absent questioning of rights of nature orthodoxy. In fact, it is impossible for the rights of nature to be consistently ecocentric, and no case to date has managed this unmanageable feat. Besides the lack of consistency, there are two basic problems with thinking in terms of the opposition anthropo-eco: it repeats exactly the same opposition that is foundational for modernist ways of thinking and is therefore impotent to overcome these; and it depoliticizes rights by making it seem as if the problem of environmental degradation and destruction is nothing but a problem of having the wrong kind of consciousness (rooted in the ‘anthropo-’). This latter problem obscures the fundamental role of political infrastructures in *causing* environmental destruction, a thesis that has been amply demonstrated, beyond reasonable doubt, in the vast literature on political ecology. The underlying problem of environmental destruction is not the lack of ecocentric values, now widely shared, but rather the willful persistence of political arrangements that demand a consumptive relationship to the environing world for their own reproduction.

The irony of the anthropocentric – ecocentric framework is that it modernizes indigenous thinking, thus rendering it much less radical. Indigenous thinking is mostly of the relational type because it is not predicated on some foundational separation of humans from nature (Tănăsescu 2020, Macpherson 2021). The image of this sepa-

ration in Biblical cultures is that of the fall, which is often repeated in rights of nature literature precisely because of the influence of ecotheology: man has fallen away from his Mother, and the fall is basically an error of thinking. Instead, indigenous philosophies have much more ambiguous genders for both the human and the natural side (they can contextually change; see last section for discussion in relation to Māori conceptions) and don't posit an original fall but an original differentiation into types of beings that, crucially, continue to have access to each other. The error of environmental destruction is therefore not primarily one of thinking, but one of *doing*, which is always a political error: a community member can only be destructive of the environment if the political infrastructure of her community allows it.

Indeed, the Chocó region through which Atrato flows is a densely layered landscape of historical uses that all have to do with various political infrastructures that make certain kinds of living, and doing, possible. The current population of the region is both overwhelmingly Indigenous and Afro-descendant, and overwhelmingly poor (the poorest in one of the most unequal countries in the world). This coincidence of poverty and ethnic background is no coincidence at all, but rather a trademark of settler states everywhere. The Afro-descendent community owes its very existence in this territory to the slave trade that captured the vast natural resources of this 'marginal' territory for transfer to the centers of power. In fact, artisanal mining has been a presence in the region (Atrato is rich in gold) since the 16<sup>th</sup> century (Macpherson and Clavijo Ospina 2020, Cagüeñas et al 2020). The 'traditional' panning for gold gave way to a mechanized and much more destructive form of mining in the 1990s. But it is important to see that at each step of interaction with the riverine environment, there is a political infrastructure that allows and makes possible certain activities, despite (and often because of) the law.

The anthropocentric - ecocentric framework is paradigmatically steeped into the modernist obsession with totality and grand narratives, a move that is anathema to highly localized ways of thinking and doing. The influence of totality thinking on the Colombian Constitutional Court is perhaps nowhere better seen than when the

court identifies the human species itself as the main culprit for ecological devastation. It also thinks that its own action of declaring Atrato as a bearer of rights is part of a change in consciousness that is necessary for reorienting human behavior away from ecological sin and towards intrinsic value virtue.

These kinds of claims are not supposed to be verifiable or factual. Instead, to the extent that they have any meaning at all, it is because of the underlying theoretical construction that brings them forth. Humanity did not fall from Eden and lose its native benign ways. Instead, a well-documented history of colonial capitalism, which mutated into neoliberal consumerism actively promoted by nation states, has occasioned ecological crises (Tzouvala 2020). There is plenty of eco-consciousness to go around, but until the nation state is no longer predicated on neoliberal consumption, none of that will matter decisively. The 21<sup>st</sup> century miners devastating the poorest region of Colombia are part and parcel of a transnational network of resource extraction that the state makes possible and, on occasion, directly controls.

Besides receiving the status of legal person and a series of rights, Atrato was also granted guardians. This was an explicit reflection of the Whanganui case, though the nuance of Whanganui *iwi* being the human face of their river, and not its guardian, was lost. The way in which the Whanganui case has been appropriated by ecotheological rights influences the way in which policy diffuses from one place to another: the way laws from elsewhere are presented comes to influence new rights of nature cases (Kauffman and Martin 2017b). In this diffusion the work of the transnational network of rights of nature advocacy is undeniably strong. This is why it is crucial to restore the diversity of theoretical and practical orientations, so as to avoid a perpetuation of the same ecotheological tropes in myriad cases, together with their tensions and inconsistencies. These tensions are perhaps nowhere better exemplified than in the court's dealing with the idea of guardianship.

The guardians of Atrato are the national government itself, as well as "ethnic communities living in the Atrato River basin" (Calzadilla 2019, 7; *Tierra Digna*). The court further ordered the formation of a Commission of the Guardians to be subsequently

established in order to represent the river. In the Aotearoa New Zealand cases, there was a very careful and innovative parsing through the political motivation for assigning representative powers to certain groups and not others. In the Atrato case, the stereotypical idea of “native” guardianship is particularly stark, as the court identifies local guardians by ethnic criteria, as if being local depended on one’s genetic makeup or, conversely, being a miner does. At the same time, the central power of the state cannot be sidestepped, and therefore the very state that was sued because of its gross negligence in defending constitutional rights becomes a guardian! This state, as I argued earlier, already had plenty of laws at its disposal for stopping Amazonian land grabbing or mining with mercury. The court seems to think that it either lacked the appropriate ‘consciousness’ or else that rights by themselves can do the job the Colombian state has been actively resisting for centuries (because it is part and parcel of its very existence).

Despite the seemingly insufficient order of a bilateral guardianship model for Atrato, local communities seized on the opportunity created by the ruling to develop the model further, for and by themselves. Simply fulfilling the court’s order of appointing one guardian from local communities would have been widely insufficient in getting across the multiplicity that is inherent in the river itself and in its human neighbors. As with Whanganui, the river is a being of multiple facets, flowing differently, with different waters in different places, with various speeds and over varied terrain. These kinds of specificities, completely alien to modernist thought, were nonetheless brought in by the local communities themselves when they decided to use the order of the court to create a multiple local guardian made up of 14 different people. These represent the seven local communities interacting with substantively different portions of the river. The communities appointed one male and one female guardian in order to ensure equitable representation. Both moves go beyond the decision of the court itself (Macpherson and Clavijo Ospina 2020, Cagüeñas et al 2020).

Cagüeñas et al (2020) document how communities have invented a forum of dialogue that will slowly parse through the meaning of representing the river. This is also in contrast to the

Māori experience, which already had such representation and was seeking its formal recognition by the state. In the Atrato case, the court order is used for political innovation on the ground, but it is locals themselves that are most aware of the dangers of working together with a state apparatus that has always excluded them. In this case, the local communities do not have any privileged relationship with the Atrato that is recognized by the law, and therefore the new legal person can easily be captured by the state and put to work for an extractivist agenda. This law can be used, for example, to ban *all* artisanal mining, without making the necessary difference between local kinds and mechanized ones. Afterwards, and especially in light of the river's right to restoration, the state can make concessions to mining conglomerates that fill all the necessary permits and promise all the necessary remediation. This, the state can argue, is in the interest of the river and of local people that can be brought out of poverty through organized resource extraction. If this sounds fanciful, it bears mentioning that this is what has happened in Bolivia and, to a lesser extent, in Ecuador (see Chapter 6).

The Colombian Constitutional Court painted a picture of the Atrato River as the victim of greedy "humans", without any identifiable enemies that could in fact be targeted by the law. This kind of judicial proclamation, despite its seemingly strong rhetoric, is therefore very comfortable for the neoliberal state, which can go on scoring minor victories for "environmentalists" while maintaining its *de facto* course. It propagates stereotypical views of Indigenous and local people and shows its lack of serious commitment to radical solutions in rushing though decisions without any democratic process. The timeline that the court sets for the implementation of its orders is stunning: *four months* for the creation of a medium and long-term plan for the river; five months for an intergenerational agreement.

The contrast with the patient Māori approach is obvious. The culprit for the degradation of Te Urewera is not "humanity", but the colonial state. A correct diagnosis of the ill can therefore lead to innovative solutions. In the Colombian case, the apparatus of policy diffusion that has propagated the idea of guardianship as a total-

izing model, while mixing it with particular rights, has influenced the court's judgment decisively.<sup>4</sup> However, local communities have started a necessarily slower process of dialogue that gets closer to the Māori notion of paying attention to a particular place.

Local deliberation has already started to question, for example, the environmental impacts of traditional mining pre-mechanization, and to ask to what extent those can be tolerated. It has also taken an approach that rebukes the claim that locals are ecocentric, inasmuch as they relate to the environment primarily through use. It is very interesting that in this case local communities had not previously been organized as such, nor was there a pre-existing ontological and philosophical system that rendered Atrato in a particular kind of way (Cagüeñas et al 2020). What comes out of this new experiment in river representation can be extremely significant for the future of Atrato, but the court order itself can eventually act as a straitjacket for that kind of innovation, even though it initially spurred it. Instead of the rights of Atrato being the tool that the state lacked for environmental protection, it may prove to be another tool that it can use to exclude locals (so far the state has had very little interest in the local experiments with representation) precisely under the guise of protecting the river.

### Ganga and Yamuna

Ganga (also known as the Ganges) is both one of the world's best-known rivers, and one of the most polluted. In 2014, Muhammad Salim, a resident of the riparian town of Hardwar, "initiated public interest litigation in the High Court of Uttarakhand" to ask the court to compel the state to enforce the already existing legal protections of the river (Clark et al 2018, p.813). This case draws on many of the strands already discussed, but also introduces new elements that are significant for the further development of the rights of nature.

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4 Coverage of the river rights cases have tended to lump them all together, particularly in media reports. Scholarly works, too, have hastily concluded that Atrato and Whanganui are analogous cases. My argument should cast serious doubts on this assumption.

Initially, the Court ruled in favor of Salim and ordered the State of Uttarakhand to act by forming, within three months, a Ganga Management Board. When this was not respected by the state, the judge – Sharad Sharma – penned another judgment that granted legal personality to Ganga and Yamuna (an important tributary). The High Court ruled that “the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities, of a living person in order to preserve and conserve river Ganga and Yamuna” (UHC 2017, 11). The Court also ordered three specific government agencies to act as guardians of the river, explicitly using the doctrine of *in loco parentis*, the same doctrine used to appoint guardians to children or incapacitated adult humans. In this judgment the doctrine is explicit, whereas in other guardianship models it is merely implicit.

As part of the motivation for this decision the Court argued that the two rivers are “worshipped by Hindus. These rivers are very sacred and revered. [...] Thus, to protect the recognition and the faith of society, Rivers Ganga and Yamuna are required to be declared as the legal persons/living persons” (IHC 2017, 4, 11). Immediately after this judgment, the appointed guardians appealed to the Supreme Court, which swiftly stayed the original order. The case is yet to be decided. Regardless of the eventual outcome, it is a very useful one to illustrate the complex interplay of totality thinking with local specificities.

The fact that the rights of nature are travelling to diverse places has been understood as a process of international policy diffusion, most notably by Kauffman and Martin (2017b). As we have seen, it makes sense to see these cases as being inspired by other instances elsewhere, most notably Ecuador, Bolivia, and New Zealand, which have become paradigmatic in their own ways. As scholarship has shown, the most instrumental organizations in diffusing rights for nature laws have been the Global Alliance for the Rights of Nature

(GARN), CELDF<sup>5</sup> (already encountered earlier), and the UN Harmony with Nature Knowledge Network. These organizations have also become important in proposing rights for nature at the international legal level. The mechanism of policy diffusion pass, as Kauffman and Martin point out, through these channels.

Equally important has been the international press coverage of rights of nature cases, starting with Ecuador and really coming into its own with New Zealand. Whereas Ecuador could have seemed like an outlier, the New Zealand developments, and their assimilation by international media into fundamentally the same kind of case, has given a lot of hope that we are witnessing a growing trend that will increasingly influence laws in many different places. These mediatic channels are themselves influenced by the international policy network as to the general framework in which rights of nature are presented. These cases offer easy pickings for hopeful media coverage in a world awash in environmental doom. But they are also routinely inaccurate and very scant on details. For example, the very separate histories of Ecuador and New Zealand are almost always lumped together. This is also the case in coverage of the Indian judgment. Scholarship has been much more careful, of course, but also there, it is commonplace to see the Whanganui case presented as one of guardianship, and to see most cases of rights presented as 'emanating' from indigenous worldviews (with some exceptions of Macpherson, O'Donnell, and Sanders).

The case of Ganga and Yamuna, like that of Atrato, is influenced by the false presentation of Whanganui as a case of guardianship. Whereas in Ecuador, as we have seen, the issue of guardianship was not addressed, the New Zealand cases have generally been understood as only offering this innovation to theory and practice. The careful way in which Māori legal tradition has in fact subverted the ideas of rights and guardianship has been mostly unremarked. This subversion is itself good proof of the uneasy conceptual relationship

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<sup>5</sup> Recently, the original founders of CELDF have started another organization, the Center for Democratic and Environmental Rights (CDER). As apparent from the title itself, the issue of rights became even more entrenched than before.

between rights and indigenous thinking, but the rights of nature have continued to be presented as coming out of, or ‘translating’, indigenous conceptions. The alliance between rights and national states has also been sidelined (with the notable exception of Rawson and Mansfield 2018).

The way in which the ecotheological history of rights has managed to become dominant and largely unquestioned matters because policy diffusion tends to happen along lines steeped in totality and with a moralistic framing of environmental harm. In the Indian case, moralizing nature came under the guise of the religious significance of the river, which is revered by many in India, though the Court only recognized its significance to Hindus. The plaintiff himself did not present his case in terms of religious significance; it was the judge that took the opportunity to introduce the idea that the religious/moral personality of the river deserves legal recognition.

In the Indian context, the idea of a juristic persons has a long history, going back to British colonial rule (Alley 2019, Berti 2021, Patel 2010). In the mid 19<sup>th</sup> century, the British introduced this concept so they could handle the complexities surrounding religious idols. They therefore used juristic person to format the being of idols in law. They were particularly interested in being able “to decide land, property, and entitlement disputes” (Alley 2019, p.4). As Doctor (2018) further explains, the juridical personhood of a religious idol “avoided having to sift through all the claims of tradition, while also neatly appearing to respect Indian sentiments by treating the idols as living persons” (in Alley, *idem*). The practice of legally personifying religious idols survived British rule and became a commonplace way of handling disputes over ownership, particularly in cases that involved gifts and other kinds of property being given to an idol by worshipers through, for example, wills.

The idea of juristic person grants idols the ownership of assets. This means that the goods of the idol are not public goods, but neither are they fully private, because they are supposed to be used for funding rituals and supporting pilgrimage (Alley 2019, Das Acevedo 2018). One of the key motivations of the Indian judiciary in upholding legal personhood of this kind has also been to facilitate the paying of taxes by idols, which can file their income declarations

through their guardians, which are to take care of the idol as they would of an infant. The ownership of temple assets by the personified deity has given rise to different kinds of judicial decisions, adjudicating which deity can own which assets, how many deities can be owners, and so on (Berti 2021). This is to say that the interpretation of legal personhood for idols is a matter of continuous dispute, though the mechanism itself is widely accepted.

In recognizing the personhood of deities, judges do not necessarily attach it to a particular image, or embodiment, of the idol (in an object or statue). What is recognized are the human *purposes* embedded in such images, and in this sense idol personality is a recognition of human interests that are expressed through religious form. Colas (2012) argues that religious scholars are not unproblematically enthusiastic about the idea that idols are persons that can own assets. Idol personality “is hypothetical and has to be taken as a socio-religious convention” (in Berti 2021). Idol jurisprudence looks like idol politics because it ultimately adjudicates, as it was originally intended to do, between different ways of employing wealth that empower certain groups over others. Through this differential apportionment, different rituals or pilgrimages are promoted; different conceptions of right conduct, or rights to access religious sites, are weighted against each other.

For example, a controversial 1991 state-level decision, reversed by the Supreme Court, ruled that God Ayyappan, of the Sabarimala temple, did not wish to allow women between the ages of 10 and 50 (so of menstruating age; see Alley 2019) to enter the premises. The Kerala High Court justified its judgment by arguing that the deity “was conceived in the form of a renunciant” and he therefore expressed “the wish to continue to live in celibacy and austerity without being disturbed by the presence of women” (Berti 2021). Ayyappan evidently channeled sexist beliefs, but as lord of his assets he in principle had a right to them – an idea clearly justified by the High Court. I have pointed out consistently how rights of nature can be used selectively to bolster already existing power relations. This seems to also be the case for idol personality.

In the Indian legal tradition, there is a long history of public interest litigation. Unlike in the US, everyone can have standing to

sue if done in the name of a public interest, which means that the kind of theory that Christopher Stone proposed has less purchase in this context. In fact, this doctrine has given rise to judicial activism, because it allows “judges to use *suo motu* powers to bring a case forward without a petitioner” (Alley 2019, p.6), meaning that they can initiate action of their own accord. This is partly what happened in the Ganga and Yamuna case, where the plaintiff did not ask for legal recognition of the kind granted.

The reasons why the judge decided to grant legal personhood to Ganga and Yamuna are to some extent opaque, but it can be said that the international diffusion of the rights of nature had an important role to play, while interacting with a local legal tradition that inflected the case in specific ways. Given that Ganga is also a deity in Hindu religious traditions – Mother Goddess<sup>6</sup> – Judge Sharma used the idea of juristic person for deities to frame the river as just such a deity. This parallel is not explicit in the judgment but given the Indian legal context it is obvious that it informed the underlying thinking. The rights of the sacred rivers also departed from this tradition in important ways. The river, by becoming a legal person, does not also become self-owning, as in the case of Te Urewera. It does not have property, like other idols do. Instead, its personality is purely fictitious and attached to religious custom in loose ways so that it could introduce the idea of guardianship, which is where the legal proclamation connects with practice.

Judge Sharma charged the director of the national program Clean Ganga, the chief secretary of Uttarakhand, and the advocate general of the state, to be river guardians. The *parens patriae* doctrine is the basis for guardianship, the same doctrine used for minors and people that otherwise cannot fulfill, for different reasons, their own rights and obligations. Unlike in the New Zealand and Colombian cases, this is a more paternalistic view of rivers that are in the same breath pronounced to be sacred and to have the same rights as humans. In interviews with Varanasi residents,<sup>7</sup> Kelly Alley discovered that many did not share the idea that Ganga

<sup>6</sup> It is important to note that the gendering is of the river, not of nature as such.

<sup>7</sup> Varanasi is on the Ganges, but is not in the state of Uttarakhand.

is a person – she is a God, nor that people could take care of her as parents, seeing that *she* is the Mother. This refusal to think in the same terms as the legal pronouncement reveals the distance between the decidedly top-down, elite judgment and the ways in which people that have relationships with the river conceptualize its existence.

The misalignment between the Court judgment and that of Varanasi residents has several levels. First and perhaps foremost, residents deeply distrust the state, for good reason. Central and regional bureaucracies have not lived up to official promises in terms of pollution reduction and the restoration of the river's health. Therefore, the appointment of state officials as guardians seems, at best, suspect. Secondly, religious framings around Ganga as goddess stress its independence from humans, as well as its own life that will, at some point, end. Alley reports one resident as saying that “thousands of years from now Ganga will not be here. After thousands of years, she will be gone. There will be rivers but not Ganga. Like the Saraswati river in Allahabad is finished. Yamuna river will also go like this” (p.10).

Grounded ways of thinking about the river, and most importantly of understanding human – river – deity relationships, escape the simple pronouncements of the law. In this sense, the concept of juristic person is in line with its British beginnings, as a mechanism of cutting through complexities. Ganga will die, and others will take her place, as the manifestations of deities are mutable. She cannot be vulnerable, or in need of protection, because she is all powerful. The way in which these conceptions relate to efforts at pollution reduction, for example, is a question to be asked, and a very important one. But it cannot be answered through simply declaring the river to be a legal person, precisely because this formulation was neither initiated by communities, nor does it seem to be widely accepted by them. It does not ‘translate’ their way of thinking.

Perhaps most surprisingly, the Court’s decision on guardianship was not accepted by the guardians themselves. They promptly appealed to the authority of the Supreme court, which stayed the lower Court’s decision. A guardian as construed by the Court would be fully responsible for the actions of the river, something explic-

itly stated in the judgment. The Supreme Court wondered if flood victims could then sue the state – the parent of the river, really – for damages. It also justified its decision by noting that Ganga flows through several states, and it is unclear whether the judgment issued in Uttarakhand would apply to downstream states, and whether the parents of the minor would be responsible for pollution initiated in their state that would inevitably cross administrative borders.

The Court of Uttarakhand also used the mechanism of legal personality for mountains and glaciers. As the court states in the glaciers case, “a juristic person can be any subject matter other than a human being to which the law attributes personality for good and sufficient reasons” (Glaciers, 62-3). But, as O’Donnell (2018) shows, the doctrine of legal personality is extended to its maximum girth in being conflated with the notions of living entity, as well as “legal entity/legal person/juristic person/juridical person/moral person/artificial person” (138). Many of these concepts invoked by the Court are synonyms of the juridical person idea established in Indian legal tradition. But the inclusion of moral person/artificial person raises questions, not least about the relationship between moral and legal personality in a deeply religiously inflected context, as well as the meaning of artificiality side-by-side with supposedly obvious moral values. This seems to elevate potentially anything to the status of legal person as an ontological category, therefore emptying the power of the ontological by relegating it to whim.

The Indian case is good at showing further dendrites connecting the state and the rights of nature. The court identified the rivers Ganga and Yamuna as being sacred to Hindus, omitting to say anything about its status to other groups. Given Hindu nationalism and its influence on the Indian state, this may be dangerous (O’Donnell 2018). Vrinda Narain argues that “in the context of rising Hindu right-wing rhetoric, the Court’s linking of the Hindu faith with national identity and the corresponding casting out of religious minorities implied by this method of argumentation by the court is cause for concern” (in Clark et al 2018, p.816). The potential nationalist uses of Ganga’s legal personality have so far not materialized. Instead, the nationalist government that holds power both at state

and central levels has distanced itself from the ruling, as evidence by their appealing to the Supreme Court.

If the Supreme Court judgment upholds the legal personality of the rivers, the avenue towards nationalism may as well be exploited. This can be done in two ways. First, the original judgment mandates participation of local communities. This kind of top-down mandate for participation rings hollow, as true participation tends to travel the other way around. Be that as it may, it is not a stretch to imagine that whatever participation may come about would be restricted to Hindus, because Ganga and Yamuna are *their* idols. Second, the Court adopted a very wide definition of environmental harm, stating that even the “plucking of one leaf” constitutes harm. Given current levels of pollution (also tied to industries promoted by the state), this is an extreme interpretation of what the law may achieve and of what may constitute harm. It seems to be a radical application of ecocentrism that may be combined with Hindu nationalism in potentially discriminatory ways. Is every person’s plucking equal? Whatever may happen in the future of this judgment, it is safe to say that it gives more tools to the state than it takes away, regardless of the intentions motivating it.

The kind of ecocentrism that rights of nature have inherited is steeped in ecotheology. The Indian cases show this to be true from the perspective of polytheistic religions as well. Alley (2019) calls the framework at work here “spiritual ecology” (or sacred ecology). Spiritually inflected ecology is very old and common (see Berkes 2017), and on account of that also very varied. The Court ruling, however, is not based in the specificity of sacred *ecological* practices, but rather uses religious/legal personality to gloss over the existing relationships that construe the river (along its 2500km!) in different ways. This seems to be a different kind of ecotheology, not a sacred ecology.

As with all cases of rights of nature, close attention needs to be paid to the local contexts in which they appear. The Indian local traditions, in religious, political, and legal senses, have had a decisive influence on this case, but they also combined with the idea of the rights of nature being fundamentally ecocentric and applicable everywhere in more or less the same ways. Though it may seem that

this case is tailored to particular needs – the pollution of the river, as well as particular beliefs – the holiness of the river, it trades much more in modernist abstractions cemented into legal traditions borrowed from Europeans. In fact, there is no local participation to speak of.

As high-minded as the Court may have been, it could not help but sneak into its pronouncement problems that can only be solved by going into the specific relationships that people entertain, as well as through tailored mechanisms of enforcement. The Court did not develop any kind of institutional or participatory framework to see through the protection of the rivers. It simply mandated guardians, who do not want to act as such. It gave the juristic person no funds, and no property. It said nothing about already existing interests in the river. And it is unclear how it interacts with already existing laws, which already prohibit much of what the Court wanted to prohibit.

This case renders the mechanism of judicial pronouncement for achieving rights of nature suspect, and should raise doubts regarding the dominant mechanisms of policy diffusion and on what they accomplish. The assumption that rights are primarily about ecocentric values and the protection of nature (as opposed to being primarily about new political configurations that may play in the favor of the state) has incentivized their presentation as all part of the same movement, a claim I will investigate in the next chapter. This has meant that any law, however contextually different or problematic, is quickly adopted as proof that the movement is gaining steam and that the world is finally turning towards ecocentric law. This has been further bolstered by the promotion of rights of nature as an international level solution, a strategy to which I now turn.

## Universal Declarations

The history of human rights would not be the same without its Universal Declaration, a document that internationalized human rights while also laying an international framework for their protection. Similarly, rights of nature advocates have looked towards the international arena since before the case of Ecuador. In fact, the case of

Ecuador itself was partly motivated by the ambition to gain international prominence, as I have documented in Tănăsescu (2013, 2016). This is why the first attempt to apply the Ecuadorian provisions was by using the idea that these constitutional rights apply extrateritorially (like human rights do). A group of plaintiffs, most involved with the drafting of Ecuador's constitution, sued BP for the Gulf of Mexico Deepwater Horizon oil leak on the grounds that it violated the rights of nature enshrined in the Ecuadorian constitution. The lawsuit went nowhere, but the point was not to actually win; the point was to make an international entry and to popularize the idea that rights of nature can, and should, become international law.

Several years later, in 2010, and with the explicit support of Evo Morales, then Bolivia's president, a Universal Declaration for the Rights of Mother Earth<sup>8</sup> was drafted and presented to the UN for consideration. Advocates modelled it explicitly on human rights declarations of the 20<sup>th</sup> century, believing that its adoption will usher in a new, international era of rights of nature. This may be so; and it may also be that the more cases at all legal levels there are, the more this kind of universal declaration stands a chance of being adopted. What is interesting from a critical perspective is to assess the intellectual genealogy of this proposal as well its relationship with liberal rights discourse.

It would be repetitive to dwell too much on the expression Mother Earth, as I have already pointed out the problematic gendering of nature that it accomplishes. The Universal Declaration for the Rights of Mother Earth would impose this kind of gendering everywhere through its adoption at the UN level. This, to my mind, would be a blow to indigenous conceptions, which are much more multidimensional and variegated. This kind of gendering accord well with ecotheology. And as Tola (2018) points out, it also goes seamlessly with the neoliberal idea that nature is first and foremost a producer, just like the stereotypical image of motherhood as fertility would suggest.

It may, however, be instructive to pause on how some indigenous philosophical traditions conceptualize the environment in

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<sup>8</sup> Available here: <https://www.therightsofnature.org/universal-declaration/>

non-gendered ways. Merata Kawharu, writing specifically about Māori relations with the environment, explains that the surrounding world is conceptualized (and lived) as a living ancestor. This conception is given succinct expression in the saying “Māori walk backwards into the future” (p.222), which means that present generations take their cues from stories about past deeds of important ancestors. These past actions are mostly in relation to specific environments, which are in some sense personified, but in ways that need not be explicit about gender. Creation myths, too, portray the world as both male and female (Ranginui and Papatūānuku). The productivity of nature, which leads western conceptions towards the idea of Mother, is recognized through gender relations, or else through ancestor – environment relations. The gender of the ancestor is irrelevant, as the accent falls on her/his deeds.

If the environment is to be likened to anything, in Kawharu’s account, it is not a person, nor a particular gender. Instead, it is akin to a *marae*, “forums where tikanga or customs are performed, discussed, and negotiated” (p.221). Notice that this is a dynamic, processual rendering of customary law itself, which is amenable to discussion and negotiation, as it is within any living culture. “The meeting house” (the physical one, *whare whakairo*), Pakariki Harrison explains, “is conceptualized metaphorically as a human body, usually representing the eponymous ancestor of a tribe” (in Kawharu 2010, p.228). He goes on to explain how the different parts of the building, elaborated in the famous Māori wood-carving style, represent parts of a body, such that inside the building people are held within the ancestor, just like they are held within the surrounding environment. The gender of the ancestor is not transferred to the environment. If we thought that way, nature here would be male, given that tribal leaders were mostly men.

The environment as *marae* therefore consists of two different concepts: the body of the living ancestor, symbolized in the physical building, and the correct (or incorrect, as the case may be) way of acting that is informed by the relationship between ancestors and places. James Henare expresses the relationship between these two concepts thus: “when I look at these landscapes I see my ancestors walking back to me” (in Kawharu, p.228).

In contrast to these textured conceptions, totality thinking is most starkly expressed in the Universal Declaration. It is framed to emanate from “we, the people and nations of Earth”, which may very well be interpreted as a synonym for “humanity”. The text of the declaration also makes the claim that human rights cannot exist without nature’s rights because humans are part of nature. This claim accomplishes two things: it clearly establishes the genealogical connection between liberal human rights and rights of nature without engaging with the problems that it may pose; and it hides the many ways in which human rights and nature’s rights are at odds, as we have already seen in the analysis of cases.

The language of the declaration also raises other fundamental questions. For example, it speaks of Mother Earth as both a living and indivisible being, while also granting rights (at the very least the right to exist) to all specific beings. Presumably, this includes all known pathogens as well as charismatic animals. In fact, it may include more, as the declaration also extends its protection to the abiotic realm, in an apparent nod to indigenous thinking. In practice, a declaration worded through an unreflective repetition of ecotheology would mean that powerful actors, including first and foremost states and multinational corporations, could use it selectively, as has so far happened in Ecuador and Bolivia (see Chapter 6). As has been firmly established, this would be largely to the detriment of the already disenfranchised.

Traces of the perpetuation of disenfranchisement through rights are already visible in certain key omission from the Universal Declaration as well as in the Colombian Atrato case. In the former, the only perceived enemy of nature is “capitalism”, which has the benefit of at least getting closer to identifying a culprit but remains completely silent as to the crucial role of nation states in silencing revolt against the dominant mode of political economy. In the Atrato case, the court ruling was occasioned by illegal mining, but the court identifies as the ultimate culprit the human species, omitting to mention that illegal miners are often poor and excluded populations that are forced into that way of life by government policy. Rights of nature are against illegal miners has also been expressed in Ecuador during one of the first cases of

constitutional protection for nature's rights in the country. In that case, the Ecuadorian state used nature's rights to evict small-scale artisanal miners in a remote region of the country (Daly 2012). The same state that evicted artisanal miners has, since 2008, expanded corporate mining, often in indigenous territories.

Rights liberalism has evolved to be a growing kaleidoscope of rights that are incompatible with each other and therefore remain at the mercy of the state for resolution and effective application. This point has been made by many critical scholars of human rights (see for example Douzinas 2000), who show that the supposedly universal rights of humans are always differentially applied to suit the agenda of the nation state. Migrants don't have the same rights as citizens, for example. Human rights are inseparable from citizenship rights, which are their channel towards effective protection. In particular, socio-economic status has a decisive impact on one's human rights, as the poor are routinely treated as rightless and subjected to paternalistic state surveillance.

Similarly, the rights of nature add to the liberal kaleidoscope a tool for the state to satisfy certain environmental interests while advancing its largely extractivist agenda. Under conditions of a globalized capitalist economy, this will continue even if the world transitions to renewable energy, which is itself extractive of land and many other resources used in its production. As Bruno Latour pointed out in a public lecture delivered in 2021, the goal of mainstream political economy seems to be to pursue a kind of Total Production, where everything is integrated within a productive apparatus that yields 'economic value', whether in the form of 'ecosystem services' or consumer goods. Surely despite the best intentions of advocates, ecotheological rights participate in this dream of Total Production by extending rights to everything, while undermining radically different forms of living in particular places, as championed by many Indigenous Populations.

The rights of nature do not *inherently* do this. I have argued that a certain *kind* of rights, enamored with totality and completely uncritical of its own intellectual inheritance, can – perhaps despite themselves – do this. But the rights of nature harbor other possibilities as well, and the New Zealand cases are instructive here. If

nothing else, advocates should be thanked for ushering in a new era of legal innovation. But like so much other legal and political innovation, the settling of orthodoxy risks uprooting the initial radical potential of the new idea. Hence critique is crucial, in order to be lucid about unintended consequences and to keep the innovative impetus alive.

In the next chapter, I will examine how the critique offered so far can help move the rights of nature towards a greater diversity of practice. I will also look at how practical experimentation and diversification can change our theoretical models for the better. Finally, we will see what legal innovation outside the hegemony of totality may look like and how rights advocacy can participate by becoming conscious of the inherently political nature of their favorite tool.

## **Chapter VI: From Practice to Theory**

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The many different cases presented so far show a diversifying toolbox that is used for multiple purposes. But how can the diversity of practice be reflected in diversity of theory, and how can it in turn inform future cases? A process of reflective learning is crucial in order to both avoid the settling in of orthodoxy and keep advocacy open towards yet unknown possibilities.

To draw out the various insights useful for further development in both theory and practice, I want to look at some court cases that already show, in practice, some of the theoretical tensions I have pointed out. In particular, these clarify the essential role of the state in rights of nature. After doing this, I will discuss a series of crucial ideas for the rights of nature that need to be rethought. I will start with looking one last time at the relationship between indigeneity and rights so as to open up new avenues for Indigenous empowerment that look beyond the concept of right. I will re-examine the idea of legal person with a particular focus on the *person* as a model for what counts (legally, politically, ethically). Indigenous thought offers plenty of resources for decentering the person in legal and political thought.

The last sections think about what a critical engagement with rights suggests for further practice. I argue that the crucial question is not what rights nature may have, but rather who is entitled to speak for nature. In other words, the role of political representation is central in all rights of nature practice and should be better reflected in theory. Lastly, I will examine whether the rights of nature can, at this point in their history, count as a movement. The claim that all cases so far are part of a movement is so ubiquitous

as to need no particular reference. The expression “the movement for rights of nature” has become a habit for advocates and commentators. I will examine in detail whether this claim is warranted, and I will argue that it risks hiding the diversity of practice in favor of ecotheological orthodoxy. In order to restore diversity, we need to think much more critically about what makes a movement, and how movements themselves need to remain open to unpredictable possibilities.

## Some Court Cases

Most rights of nature laws so far have been untested in court. The discussion developed in this book should help anticipate the diversity of cases that will ensue in the next decades, with results ranging widely. The expected, and so far witnessed, variation in results follows from the conceptual and practical diversity of rights for nature as well as from the different contexts in which they have appeared. The purposes motivating different legal provisions vary, and therefore their application will as well. Even if there haven't yet been a lot of legal cases to speak of, some of the earliest installments of rights of nature have been tested in court. This is the case in Ecuador, where there are already several court cases that can be examined. And they already show the practical consequences of many of the theoretical ambiguities explored.

The most widely covered case so far is also the first one in the country, namely the protection of the rights of Vilcabamba river. The plaintiffs sued the municipal government for having modified the course of the river through a road construction project. The municipal government undertook the expansion project without having the necessary environmental impact assessments. The resultant material from the construction project was dumped in the river, and this caused a modification of its course, which then resulted in flooding the downstream property of riparian landowners. These sued the municipal government using the constitutional rights of nature provisions adopted in 2008.

The landowners could have also sued for damage to their property, but they did not, instead choosing the mechanism of nature's rights. As I have argued in Tănăsescu (2016), the wide standing that the constitution grants for the legal representation of nature is shown to also have a connection with the issue of property. Though advocates routinely claim that the rights of nature are opposed to property rights, this is not necessarily so. The Loja provincial court recognized the legal standing of the riparian owners also because they were directly interested in the fate of their property, now partly flooded. This makes perfect sense, and other legislation (for example, the New Zealand cases) already takes into account the special relationship that obtains between places and their owners.

The local government was ordered to remedy the harm caused to the river and issue a public apology. The remediation has been quite slow to materialize. In principle, the river is supposed to be turned back to the state that the riparian owners preferred. However, if restoration is to be understood strictly, then the rights of nature could also have been used against riparian owners, for the return of the river to some earlier state. However that may be, the potential tension between human and nature's rights was resolved by the judge apparently in favor of nature. He explicitly stated that the right to a healthy environment is more important than the right to a better road, even though this is weighing two different kinds of *human* rights against each other. In this case, the judge imposed this particular hierarchy of rights, but there is nothing definitive in the Ecuadorian constitution that obliges judges to reach the same decision elsewhere. The constitution in fact states that all of its many rights are on the same level of importance. This is impossible to implement in practice, where decisions will have to prioritize some rights over others, thus leaving ample room for interpretation. Human rights jurisprudence especially has as a core task the balancing of rights.

This wide interpretive space is even better exemplified in another case in Ecuador, namely the Mirador case of 2013. Here, an alliance of Indigenous Groups and environmental NGOs sued a mining conglomerate and the state for violation of nature's rights in a planned mining operation in the Cordillera del Cónedor, a hyper-

biodiverse region of the country and also home to Indigenous populations. The plaintiffs sued because the mining concession was approved by the relevant ministries, and they alleged that this concession would violate several rights given by the constitution, including the rights of nature. They also claimed that the precautionary principle enshrined in the constitution would be violated by the planned mining activities.

Unlike in the Vilcabamba case (which, it is important to keep in mind, was a small-scale project of little national importance), the company planning to do the mining – Ecuacorriente S.A. – had undertaken all necessary environmental impact studies, which were approved by the resource and environmental ministries. The judge ruled that, because all of the necessary documentation had been correctly filled, there was no basis for the plaintiffs to assume rights were being violated. Furthermore, the alleged violation was supposed to happen in the future, and therefore the plaintiffs had no basis to claim that it would in fact happen.

The judge interpreted the *buen vivir* doctrine enshrined in the Ecuadorian constitution as requiring a level of resource extraction and argued that there is no inherent reason why such extraction cannot be done in an environmentally responsible manner. Here, the weighing of nature's rights against the human right to development was done in favor of the latter, clearly understood as the prerogative of a modern state that needs to be integrated within a global economic system predicated on consumptive lifestyles. Although this decision was obviously unpopular with rights of nature advocates, it is no faultier than the Vilcabamba one. Both of them operate within the wide margin of interpretation that the constitution makes possible. Considering these cases together, it becomes clear just how important the political dimension of the rights of nature is. In fact, we can only understand such cases by thinking about them as instances of political weighing of interests that, in any particular case, may run in incompatible directions.

To this end, the important role played by the environmental assessment documents is telling. In the Vilcabamba case, it was their absence that occasioned the lawsuit and figured greatly in the decision of the court. In the Mirador case, their existence – in fact, the

defendant's compliance with the law – also proved crucial, but in the opposite direction. CELDF, the American organization instrumental in codifying the Ecuadorian constitutional provisions, has long argued that granting rights to nature would overcome the role of the state as mere regulator of environmental harm. In their view, things like environmental impact assessments simply tell companies how they can be allowed to do damage. The rights of nature, they argue, would be a solution to this problem. In practice, however, these kinds of impact assessments prove to be very sticky indeed. In the context of already existing rights of nature, judges will still have to decide whether the defendants have complied with existing law (which requires impact assessments). If they have, it will still be very hard to forbid resource extraction, especially because the neoliberal state committed to it, nature's rights notwithstanding. As I argued previously, the state is comfortable with rights and knows how to bend them as it suits political and economic elites.

Though this particular case doesn't immediately show the problems raised by nature's right to restoration, it does open up a speculative space where these problems can be explored. In philosophical debates on the meaning of restoration, one of the greatest issues identified by philosophers (see Elliot 2008, Katz 2009, 2012) has been the problem of "moral hazard". Restoration started its life as a technical solution to industrial disruption of environmental conditions. It really took off in the late 20<sup>th</sup> century, when the belief that humans can turn environments back really took hold, largely because of advances in restoration techniques. However, the idea that one can return a place to a previous state in a sense incentivizes extractivism, because it is now possible – at least on paper – to extract while only temporarily disrupting. This is the issue of moral hazard, namely that restoration can act as an incentive, as just another box to tick in order to be allowed to progress with the project of modern development.

While the idea of moral hazard is not the only way of assessing restoration, it is a real problem in baseline-specific projects. Where the target of restoration is a particular past *composition* of the environment (known as a baseline), it is easy to see how extractive industries can promise to turn back the clock. This, in fact,

already routinely happens, and whether such promises are kept or not is then subject to lengthy litigation.<sup>1</sup> Additionally, only large industry players can even promise to restore, precisely because of the costs involved and the technical expertise required. Thus, enshrining a right to restoration without specifying what this means immediately opens the possibility of empowering extractive industries. This is implicit in the Mirador case, in which the judge obviously thought that mining can be done in a responsible manner, which includes the remediation of a site after extraction is complete. In future cases, this use of restoration may as well become explicit.

The role of the state is clear in the Mirador case, particularly because the sentence was specifically justified in terms of the duty of the State to “develop” and, in so doing, to protect the liberal rights of its citizens (some of whom count more than others). The inherent tensions in the liberal rights concept and its constructive relation with modern nation states can be contemplated here in its practical effect. These effects are also in line with the political moment. Rafael Correa, president of Ecuador at the time of this case, made clear his position that development is paramount and that it can be pursued whilst respecting the environment. Extractive industries under the Correa government expanded at an unprecedented rate (Lalander 2014), and they were explicitly justified through both nationalism (the nation state, not corporations, must reap the benefits) and progressive policies of redistribution (funding healthcare, education, infrastructure for the poor).

This, what Gudynas (2009) has called progressive neo-extractivism, functions very well with a panoply of rights that it selectively activates. In this selective activation, several things help greatly. On the one hand, the vague standing requirements of the Ecuadorian constitution are incredibly helpful. On the other, the gendering of nature, as I have argued previously with support from the work of Tola (2018), works in favor of extractivism.

The first point is best seen in the use of rights for nature by the Ecuadorian state itself to clear the way for large-scale mining. The state, this time as plaintiff, sued artisanal miners and argued that

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<sup>1</sup> See the famous Chevron-Texaco case in Ecuador.

“the illegal mining was polluting the Santiago, Bogotá, Ónzole and Cayapas rivers, thereby violating the rights of nature. Two months later, the Second Court of Criminal Guarantees of Pichincha issued the injunction ‘for the protection of the rights of nature and of the people’” (Daly, 2012). Subsequently, army personnel cleared the area of artisanal miners (largely impoverished populations forced into precarious labor) and confiscated or destroyed their property. At the same time, the national government expanded its mining concessions to both state and multinational actors. This kind of use of the rights of nature may seem like a perversion to advocates, but it is not: It is well within the logic of what the Ecuadorian constitution provided bases for.

The second point – the problematic gendering of nature as Mother Earth – is better seen by switching to Bolivia. There this gendering has been explicitly used in relation to resource generation (and, logically, extraction). Generation is the counterpart of the nurturing aspect of femininity stereotypically applied to motherhood. Rights of nature advocates routinely use this portrayal as if it were an unproblematic fact. In Bolivia, as in Ecuador, the government of Evo Morales has expanded natural resource exploitation with largely similar justifications (development and progressive redistribution of the supposed benefits). And it has specifically used the image of Mother Earth in order to achieve this.

Morales, for example, has inaugurated the first Chinese pilot plant for producing lithium-ion batteries, an increasingly crucial part of the global drive towards “green growth”. These batteries are fundamental for, among other gadgets, electric vehicles, which governments the world over are promoting at increasing rates. Morales framed the lithium reserves of Bolivia as a generous gift of Mother Earth, part and parcel of its nurturing its people. Lalander (2014, 169) quotes him as saying that “Bolivia has the largest lithium reserves of the entire world, that’s our Mother Earth. [...] You could not imagine how Mother Nature provides us natural resources”. Wouldn’t it be foolish, the implication goes, to leave those underground? Wouldn’t it be a betrayal of the gifts of nature, that could be used for socially progressive purposes? It is easy to be outraged

at this kind of rhetoric, but it is in fact already sanctioned by the conceptual apparatus explored throughout this book.

There are several other Ecuadorian court cases currently ongoing. So far, of the 13 Ecuadorian cases that have reached final decisions and that Kauffman and Martin (2017a) document, none of those brought by the government were lost. It remains to be seen whether this kind of state bias continues, but the kinds of issues brought out at the intersection of theory and practice are there to stay (at least until the law changes), and they offer great learning possibilities for what is an experimental and evolving practice.

One could expect similar patterns to emerge in future cases where ecotheological rights for nature have been enshrined. The wide variation in outcome between the various extant court cases<sup>2</sup> reveals the problems inherent in a formulation of nature's rights based on a universal subject (nature as person) and wide standing. It remains an open question how other cases, from New Zealand to Colombia, as well as future ones, will play out in practice. For now, there isn't enough empirical evidence to decide, but based on the theory explored I would expect, particularly in the New Zealand cases, further empowerment of Māori groups as well as selective resource development, which does not inherently contradict Māori views. The kind of implementation explored in Ecuador and Bolivia is very difficult to pull off under the New Zealand conditions, which all but preclude it. This is itself an important lesson: paying attention to detailed representative arrangements is very important for what nature's rights may end up doing.

## Indigeneity and Personhood

Though Indigenous People started out as allies of the Ecuadorian and Bolivian governments, they soon fell out. This is a continuation of the always antagonistic relationship between Indigenous communities and the nation state. Ever since the earliest history of colonization, Indigenous People have had to adapt to the increasingly

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<sup>2</sup> Also see Tănăsescu (2016, 129-132).

powerful presence of the state while keeping alive traditions and ways of knowing and thinking that are radically different from the premises of nationalism. Even though the rights of nature initially appeared to bolster indigenous rights, the very concept of rights itself should have alerted advocates to more ambiguous results. Indeed, Indigenous communities in Ecuador and Bolivia have been confronted by yet another case of the state selectively using rights to further its agenda, often at their expense.

The supposedly inherent relationship between the rights of nature and indigeneity has become a trope of scholarship and news coverage. These rights are often presented as emanating from, or translating, indigenous thinking. I have already argued against this view (also see Tănăsescu 2020) extensively.<sup>3</sup> Here, I want to complement that argument with one last element which is revealed by the variation in practical applications of rights for nature laws. The legal person status of nature is very often seen as the bridge between indigenous and western legal conceptions. In the case of Mother Earth, for example, the case for its supposed personality has been forcefully made, and also forcefully tied to indigeneity. However, the way in which indigenous thinking conceptualizes the environment is much more diverse than that and, as I will argue, is not particularly helped by the notions of person or personality.

Critical legal scholarship has started to uncover the moral roots of the concept of legal *person* as well as the tautological relationship it has with the concept of rights. Costas Douzinas, for example, argues that “for the liberal philosophy of personhood, human rights belong to ‘normal’ people” (in Gearty and Douzinas 2012, 65). He goes on to show that normality is itself constructed in such a way as to exclude undesirable people. Joanna Bourke (2011), in *What it Means to be Human*, shows this in detail, demonstrating how ideas of normal personhood have been used throughout the history of liberalism to exclude women, immigrants, and racialized minorities.

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3 But see O'Donnell et al (2020) for a nuanced view of Indigenous involvement in the rights of nature. Despite the nuance, I think most of my critique still holds.

Douzinas further shows that this kind of exclusion is not an aberration of rights theory, but the logical application of its tautological identification of rights with a particular kind of person. Today, it is undeniable that “immigrants, refugees and the poor” are not part of the rights paradigm, even as this paradigm has become the only ideology available in our otherwise post-everything world.

Naffine (2003, 2011), Grear (2013), and Davies (2012) lend further support to the view that the idea of legal personality and its automatic implication in rights theory and practice, derives from a standard imposed by the “normal human individual”. Arstein-Kerslake (2017) has shown how the model legal person has routinely excluded people with disabilities or with identities that differ from the moral standard inherent in the concept. What I also want to point out is that the idea of conformity to a standard, in the history of liberalism, understands the person as an *individual*. The rights of the legal person are therefore primarily the rights of an individual *qua individual*.

It is in the individuality of the person that liberalism finds the foundation for its rights claims. It is the individual that is inviolable, that has rights, and that lends its atomic separation from everything else to the notion of the person. In Western philosophy, the prototypical liberal subject is the Cartesian individual, separated from everything else and alone with his thoughts, through which he comes to know his need and desires. “This conception of personhood becomes the basis for methodological and moral individualism: society exists for the promotion of individual purposes” (Gearty and Douzinas 2012, 71).

Though it is harder and harder to state this today, rights are fictions just as the idea of legal personality is one. To paraphrase Douzinas, there is no right to rights. In other words, rights are not discovered, but invented, proclaimed, given. To make this argument is not to say that rights have no function, or no basis whatsoever, but it is to say that they are not the panacea they claim to be simply because they are grounded in the individual human body.

As Samuel Moyn argues, in *The Last Utopia* (2012), the history of human rights in particular “illustrates the persistence of the nation state as the aspirational forum for humanity”. During the second

half of the 20<sup>th</sup> century, competing ideologies, particularly utopian ones, lost their popular legitimacy, culminating in the post-Cold War era. “It was the crisis of other utopias that allowed the very neutrality [of human rights ...] to become the condition of their success” (213). This supposed neutrality is precisely the claim that rights are recognized and that they are as much moral as political categories.

This moralism of rights, which has been adopted by the rights of nature, came into the contemporary world as a form of anti-politics. In time, though, this stance – as all anti-political ones – became untenable, because “they could not remain wholly noncommittal towards programmatic endeavors” (213). As human rights inevitably moved towards ideology, replacing other dying utopias, they were mythologized as having always existed, a claim that is patently false. Ideologically, however, its empirical falsity matters little, as ideologies must take the move towards universality in order to shore up their program. In the early 21<sup>st</sup> century, they became fully incorporated with the power of the state, a process particularly visible through humanitarian interventions, predicated on incredible violence, in order to shore up human rights. In this way, they became both “the means and object” of politics, a process which moralizes politics such that its capacity to mediate conflict is severely diminished (Douzinas 2007, 7). Or as Kelefa Sanneh (2021) argues, commenting on Jamal Green’s book *How Rights Went Wrong*, “the endless search for ‘fundamental’ rights inevitably makes disputes [...] more intractable”.

The biggest problem with moralism is that it imparts an unjustifiable confidence because one is convinced of possessing the truth. This is the danger of certainty at a time when what is needed is precisely the ability (necessarily cultivated through careful and committed practice) to navigate, and live with, uncertainty (also see Tănasescu 2022). The moralism of the rights of nature stems directly from the moralism of human rights, a phenomenon that really came into its own when rights became tools of the state, even though they were born in opposition to it. The radical core of a universal doctrine of rights – the forging of identities around universal forms of equality – became hollowed out by their becoming ideological tools through which violence is often legitimized.

I have argued that the rights of nature cannot help but participate in the liberal rights expansion that has spawned them to begin with. It is perhaps telling that, in the extant cases with the greatest and, crucially, deepest Indigenous involvement (Te Urewera and Whanganui), rights-talk is minimized as much as possible. Particularly in Te Urewera, even the idea of personhood is minimized, and the new legal construct is mostly referred to as a “legal entity”. Here, theory could help future practice by asking it to reflect more on the availability of “legal entity” as an alternative to the conundrums that personhood throws up. These conundrums will manifest when we pass from human to nature’s rights, because ‘nature’ is the same kind of totalizing abstraction that ‘humanity’ is. It may never be the case that all humans belong to the category of humanity because that process of inclusion is not a merely legal one, but one of political and social economy.

Similarly, and despite the totalizing nature of the Universal Declaration of the Rights of Mother Earth, not everything will belong to the category ‘nature’. Pests will continue to exist, pathogens also, viruses and undesirable animals will continue to be exterminated. It is not in the power of the law to amend this situation. But it is in its power to reflect on its conceptual vocabulary and to see how it may be complicit in certain unintended consequences.

The world of individuals hermetically sealed within their heads, where they can rationally know their interests, is the world of modernity, one that is spatially flat and whose time is that of progressive linearity or development (understood, among others, in terms of the expanding rights of the individual). This world was unknown, in Europe as well as elsewhere, before the advent of modernity, which invented it. This is not, in other words, an indigenous world, and it shares very little characteristics with it. Indigenous thinking, despite its great diversity, does not tend to be focused on binary oppositions (society/nature, individual/group, and so on), but rather tends to be relational. In relational terms, what counts as being a subject varies greatly, and the idea of the person modelled on individual, ‘normal’ humans is entirely absent.

Instead, the world consists of mutating relationships that give rise to various subjectivities, some more enduring than others. Cru-

cially, it consists of alliances and groups that travel through space and time, as visible through the treatment of various embodied spaces as kin (and therefore connected to the present through genealogical lines). This treatment of non-humans and non-related humans as kin is also indicative of the relatively weak role that nativist criteria play in indigenous thinking. Belonging to a place (unlike in the colonial imagination) is not only about birth, but rather about what one *does* and therefore how one relates to a series of environmental beings. The possibility of relating to the environing world in generative ways is not an ethnic one, but an ethical one.<sup>4</sup>

The study of what the world consists of is known in philosophy as ontology, and indigenous ontologies, as Viveiros de Castro has argued, are not simply descriptions of one same world but rather of completely different worlds. In their interaction with colonial modernity, indigenous worlds have consistently had to “translate” themselves, that is to say to adopt and adapt to a world that is not their own. In practice, this has also meant that Indigenous People have had to adopt the terminology of rights through which to interact with the state. But, as I have argued throughout, that terminology hides the power of the state to discount those subjects that do not, for whatever reason, possess the characteristics of the desired “normal person”. Today, we are living through a moment that offers new possibilities for legal pluralism and hybridization, and

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4 Though this argument is seldom explicitly made, it is supported by philosophical explorations of some indigenous thought. For example, Anne Salmond (2017), in recounting the early history of Māori – Pakeha (white settlers) relations, shows how the first fifty or so years of contact were dominated by Māori tikanga, because Pakeha were de facto guests that did not have the demographic dominance that would later allow the rise of a settler state. In this early period, many guests became ‘related’ to their Māori hosts by learning the language and generally adopting tikanga. This indicates that the possibility of belonging was not primarily dictated by birth. Similarly, the ritual recitation that Māori speakers engage in before speaking publically (*whaikōrero*) can draw on all sorts of genealogical lines, most of which are not blood lines, but ones of alliance. This plasticity again lends credence to the interpretation of genealogy in non-nativist terms.

it matters greatly that this moment does not end up reproducing the power differentials that have always characterized Indigenous – state relations. This is why it is important to realize how much of a compromise legal personhood and rights are and to ask what other conceptions, stemming from other worlds, we may work with going forward.

For example, on an ontological level, Amerindian philosophies consider subjectivity (subjective experience) – not matter or material properties – to be what connects all beings. In other words, “the manifest bodily form of each species is an envelope (a “clothing”) that conceals an internal humanoid form” (De Castro 2019). This deep form of anthropomorphism – literally, everything has interiority – sustains a relational ontology steeped in what Marisol de la Cadena (2010, 341) calls “earth-practices”, defined as “relations for which the dominant ontological distinction between humans and nature does not work”. The reason is two-fold: firstly, it is relations that are primary and, secondly, it is subjectivity that connects all beings.<sup>5</sup> In many Amerindian philosophies, Andean ones included, there is one humanity and there are many natures, a view that de Castro calls multinaturalism.

“The core issue, once again, is whether humans share in common with nonhumans the body or consciousness, and by that measure, even efforts against anthropo-centrism in environmental philosophy come up naturalist: either by conferring rights only to animals developed enough to be sentient or by arguing that we are responsible for life and abiotic elements because of our physical interdependence with them” (Skafish 2016b, 79). Animist philosophies posit consciousness as the unifying substance tying all forms of life together, and therefore it throws up radically different problems than the naturalism that still informs eco-anthropocentric debates. For example, the problem of life’s necessity to consume life is deeply troubling in the context of shared interiority because

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5 “Other-than-humans include animals, plants and the landscape” (De la Cadena 2010, 341).

the consumption of any flesh becomes in a sense cannibalistic, requiring careful ritualization for the transgression not to be fatal. As Descola asks in light of this analysis, “do such observations not indicate that it is high time to ask whether ecological politics can really be undertaken on the basis of nature alone, and if the actual and potential actions of other collectives might somehow be needed, and even somehow practicable, by moderns as well?” (In Skafish 2016b, 79).

In the text of the Ecuadorian Constitution, Pachamama is an indigenous other-than-human figure that erupts in the political space of the state. However, the equivalence in the constitutional text between this figure and Nature – including in the Articles that grant rights to nature – is deeply problematic, as it forces the radical potential of an indigenous led politics into the molds of modernist ontology. In particular, the constitutional text falls prey to the Western obsession with totality, visible in the rendering of Pachamama as universal Nature, Earth as such, if somewhat animated by Amerindian ‘beliefs’. The Constitution manages to construct nature on the model of the human person, whereas indigenous philosophy, through its multinaturalism, universalizes the interiority of the human experience (everything has a life of its own) and the dynamism and openness of material forms (and everything changes). From this perspective, it is the concept of a stable human person (with intrinsic characteristics and values) that can be destabilized by modelling it more closely on the dynamism and fundamental openness of nature. Instead, the rights of nature in the Ecuadorian case reinforce a Western view that attaches to nature the universality which it had previously attached to human rights. The possibility of allowing indigenous ontology to disrupt the very notion of universality seems, here, partly foreclosed.

Te Urewera, out of all cases so far, comes closest to ontological mixing on an equal footing. It remains telling, however, that it is not in Te Urewera Act itself that Māori ontology takes the lead, but rather in the management plan, Te Kawa o Te Urewera. There, as discussed in Chapter 4, the very idea of the person is subverted and, instead, the focus is on relationships of reciprocity with the

environing world. This world is very specific, and it is precisely that ability to pay attention to specificities and get to know them deeply that has nurtured indigenous cultures from time immemorial. This capacity has been widely lost through modernity, which is why Te Kawa lucidly speaks of the need that Tūhoe themselves have to re-learn to pay attention to their specific environment. The lessons that this case has for future rights of nature practice are still to be drawn, but theoretically it has already cut a new and promising path.

I do not mean to deny the effort that Indigenous People have put into achieving greater legal pluralism. Quite the contrary, that effort needs to be recognized on its own terms, not always ‘translated’ into western conceptions! And if we start doing that, we begin to see how what appears as an emancipatory expansion of rights may be, from the perspective of those that have never counted as full persons under liberal conditions, a further solidification of oppressive power. The opposition of Indigenous People to the concept of the state is not only philosophical, but political as well. This can be seen through the origins of the international movement of Indigenous Peoples, which has come about both through and against international bodies such as the UN system.

Ronald Niezen (2003) argues that the notion of Indigenous Peoples was itself created through the World War II expansion and internalization of human rights discourses. There is no doubt that the international movement for Indigenous Peoples was first and foremost spearheaded by Indigenous activists themselves, but the very consciousness of a common fate at the hands of settler powers was a relatively late achievement that incentivized international cooperation among different peoples. The sedimentation of indigeneity as a category referring to particular people was created through a reiterative interaction between external gazes and internal identity formation. In other words, the process of colonization and the subsequent transformation of world order through the ascendancy of the nation state interacted decisively with indigenous societies that were routinely marginalized. This is also the case in the very creation of an international indigenous identity.

The variety of experiences within Indigenous societies is seen in the difficulty of a unified definition of what constitutes indigeneity.

Despite the lack of such a definition, several common features appear, in particular the common destruction of traditional heritage at the hands of colonial powers. Indigenous identity is united around a terrible loss. The multiplicity of indigenous positions is further unified by the “absence of centralized dogma. Its main ideas [as reflected through international fora] coalesce within a large number of micronationalism and micro-orthodoxies, each a discrete movement oriented toward small communities or regions [...]. Indigenism involves reinvigoration of the comfort and color of local traditions with the safety-in-numbers effect of a global movement” (Niezen 2013, 13).

This is to say that an international Indigenous identity is in a sense forced by the dominance of nation states both in local politics and, indisputably, on the international arena. Politically then, a wide variety of different kinds of societies have had to coalesce around an international indigeneity that, despite this necessity, itself retains a commitment to a kind of inner diversity that is radically opposed to the homogeneity, and the homogenizing force, of states. The partial adoption of rights language on the international arena is a pragmatic accommodation of dominant power relations. But a closer look at what exactly the international indigenous movement claims to want reveals that it does not consistently, or even primarily, ask for equal rights, but rather for self-determination such that the small microhistories that Niezen talks about can be given practical purchase.

That is the radical core of Indigenous Peoples claims. And that is precisely the claim that states neutralize through rights. In the case of Te Urewera, the issue of full tikanga authority was taboo, because it would lead to fears of secessionism among an overwhelming settler majority. It would also pose existential question for the unified state of New Zealand and create precedents that would risk radically transforming its shape towards unknown configurations of power sharing. The Ecuadorian constitution, for example, though widely commented upon as radical in its empowerment of Indigenous People, clearly states that “The indigenous communities, pueblos and nationalities, the afroecuatorian pueblo, the montubio pueblo and the comunas form part of the Ecuadorian State, one and indivisible”

(art. 56). It is the state that is one and indivisible, and the furthest it will go in relation to colonized populations is to recognize their equal status as rights bearers. Indeed, “the greatest duty of the State consists in respecting and enforcing the respect of the rights guaranteed in the Constitution” (art.11/9).

With each successive wave of national solidification around rights expansion, different possibilities are shut out. Consider again the right to restoration that has become a staple of rights of nature theory and practice. In Andean, as well as Māori, thinking, the beings that are constituted through relations are in flux; they change and adapt to new circumstances and new relations. Therefore, it is not a ‘nature out there’ that is worshiped as an unchangeable form. Rather, Amerindian philosophies posit environmental relations in terms of reciprocal exchanges, as do Māori ones. Through these iterative exchanges, beings continuously mutate. It is not surprising that radically place-based philosophies would also see the world as highly dynamic, because careful observation of the world reveals precisely that fact. So, something like a right to be restored needs to at least be specified in terms of what restoration may mean. If it is taken to mean a return to a ‘pre-disturbance’ form (baseline restoration), this kind of right can easily be used by the state to further disempower communities, as I have already shown.

Restoration, as I have argued elsewhere (Tănasescu 2017, 2022), needs to itself be understood in relational terms and therefore in terms that let indigenous ontology lead. Restoration in the Anthropocene can no longer be about returning to some previous state but rather about returning to meaningful relations with particular places. The recurrence of an unspecified right to restoration in different cases also encourages people to think about rights as applicable to ‘untouched’ places, exactly the kinds of places that colonial nations had designated as Indigenous reserves. But in a world that is increasingly urban, and in any case increasingly humanized, there is an urgent need to think about what the rights of nature may mean in those settings as well, and what a right to restoration may mean in a densely populated environment. These are all issues that

will have to be ironed out in the future, but in order to do so it is important to flag them as worthy of attention to begin with.

## The Rights of Nature as Representation

I have argued for some time (Tănăsescu 2013, 2016, 2020, 2021) that the rights of nature are unintelligible without thinking about them as a process of politically representing nature. A nature with rights becomes, first and foremost, a *political* subject, just like a corporation with rights does. I will not repeat the details of this argument, which can be found elsewhere. Instead, I want to sketch its importance for critically examining rights of nature and draw out some of its implications.

Formally speaking, the rights that nature may receive have to be represented by someone. But this formal requirement has no purchase whatsoever unless this representation is also institutionalized in some form. This is to say that rights of nature cannot be an end in themselves or a self-implementing solution. Simply granting rights to an entity that cannot defend them on its own is useless unless the necessary aspect of representation is given a practical outline. This is partly why, in the cases of Ecuador and Bolivia, the representation of nature is prone to partisan abuse: There is no mechanism of representation mandated by these laws, so anyone can bend them to their particular interest. Similarly, in the Indian cases, the mechanism of representation – affording guardianship to local authorities – was so shoddy that the putative representatives themselves refused to do the job.

Focusing on representative arrangements makes it possible to ask why rights are granted to nature in any particular case. The orthodox answer is that they are granted, in every case, in order to achieve environmental protection. This should ring hollow by now. I don't doubt advocates' good intentions, but I think I have shown in detail how these do not translate into guarantees of environmentally friendly results. Instead, I have demonstrated that the rights of nature are inevitably intertwined with pre-existing power relations. Thinking about them as mechanisms of representation allows this

aspect of power to come to the fore and therefore to determine how laws are written. If, indeed, they are to be written for environmental protection, then this needs to be carefully thought out in terms of who has the moral and political authority to oversee such protection.

In the most innovative cases so far, Te Urewera and Whanganui, environmental protection was not the main motivator. In both cases, classic environmental institutions, like conservation ministries, were sidelined and power given to other groups that may or may not choose similar goals. From a Māori perspective this makes sense, because from their ontological standpoint there is no such thing as pure 'environmental protection', but rather the systematic encouragement of destructive, or regenerative, relationships. The kind of fortress conservation that has been a staple of modernist environmentalism should be actively questioned. Rights of nature will inevitably work to empower certain groups over others. The choice of which groups, and for what reasons, is crucial.<sup>6</sup>

Rights as representative arrangements steeped in pre-existing power relations allows us to find other allies that may not themselves appeal to the concept of rights, or that of legal personality. For example, the idea of commons (or, as it is also known in the literature, commoning – therefore putting the accent on the *process* of achieving commons) is present in many forms and in many different cultures. The basic idea, as developed most famously by Elinor Ostrom (1990), is that lands have, in many cultures and in many places, been managed as common goods. Customary law has recognized and enforced this common good status, which always passes through a series of community-determined rules of conduct that ensure the sustainable long-term use of resources (also see Bollier and Helfrich 2019).

The practice of commoning can be seen as a useful bridge between a-modern ontologies in parts of the world that have been put, by modernity itself, in stark opposition to each other. As Tanas and

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6 It is important to realize that choosing to *not* make this choice – and, for example, allowing for universal and wide standing – does not sidestep power relations. Instead, it relegates power to the already most powerful.

Gutwirth (2021) argue, the Whanganui case has definite similarities to the law of commons in Sardinia, Italy (*usi civici*). Other such customary laws exist throughout Europe, and throughout the world, without relying on liberal rights at all. Focusing on the importance (indeed, inevitability) of representation allows us to also see practices such as commoning as important allies that may work, in some cases, together with rights of nature. For example, legal entity status may work in order to bring commoners' lands into a form of representation that empowers local communities. But in this case also, the use of the environment is fundamental, and therefore these kinds of arrangements will often not conform to an ecocentric environmental agenda.

Another potential ally is the much-hated idea of corporate personhood. In particular, the corporate structure that separates ownership (vested in the legal fiction of the corporation itself) from management and governance may also work very well in some cases to solve ownership disputes. In Te Urewera, for example, Katherine Sanders (2018) argued that this is exactly what happened. The rights of nature, as minimalist legal entity status, in fact gave ownership of Te Urewera to Te Urewera itself, which now resembles a corporate structure with a board (ensuring governance) and shareholders (enjoying the benefits generated by Te Urewera). It may be that, because of this structure, Te Urewera can become an important political and economic actor, like corporations have through the granting of their legal personality. Because of this, it matters even more who sits on the board and who gets to determine government arrangements. In other words, it matters even more who represents Te Urewera.

This awareness of rights as representation is obvious when looking at the details of Te Urewera and the Whanganui cases. As I have explored in Chapter 4, these are extremely focused on setting up a democratic process of representation that allows Māori autonomy to come forward in previously suppressed ways. Precisely because these are essentially political arrangements, they will also be temporary and prone to changing. This is to say that the Māori fight for greater autonomy is not over with these arrangements, but rather recast on a basis that grants them more power. All rights of nature are political in this sense. Acknowledging this fact allows us to work

with it and to construct laws that may also have the desired effects in practice. Importantly, it also allows practitioners to question the purpose of nature's rights actively and to perhaps find new purposes that it can ally with.

## The Rights of Nature as Movement

The diversity of theory and practice that I have presented may or may not warrant the claim that the rights of nature constitute a movement. To be sure, homogeneity is not the hallmark of a movement; but it is worth examining more closely the claim that the disparate cases this book has surveyed, as well as others it has not, are all part of the same movement for rights. Questioning this claim is important in order to safeguard diversity and multiplicity wherever it is threatened. There seems to be an increasing capture of diversity for the purpose of molding it into ecotheological orthodoxy and liberal rights expansionism. This is why it is important to be clear about what it may mean to claim that there is a movement, and how that claim may allow, or not, a diversity of views to thrive.

Claiming to be a movement may mean different things. At the most straightforward level, it simply indicates a growing trend, a move towards something, in this case towards rights of nature. At this level of analysis, it is undeniable that these rights are a growing trend. Besides this strictly linguistic definition of movement, there is a vast literature on what are generally called social movements that can be helpful here. I suspect that when advocates claim to be part of a movement, they also mean part of a *social* movement. This interpretation is warranted by the actions and priorities of certain key organizations, while also being doubtful in some of its senses.

In the relevant literature, there is no commonly accepted definition of what constitutes a social movement. This doesn't mean that anything goes. Instead, the lack of a foolproof definition reflects the malleability and largely informal nature of such movements. Marco Diani, one of the leading scholars in that field, speaks of social movements as having boundaries drawn by "processes of mutual recognition whereby social actors recognize different ele-

ments as part of the same collective experience and identify some criteria that differentiate them from the rest" (in van Stekelenburg et al 2013). However, this does not mean that a social movement is formed by formal interests that may be in common between different organizations. As he points out, an organization for the protection of birds need not also be part of the environmental movement unless, of course, it has specific ties (organizational and identity-based) with that movement.

Following from the above, the overall narrative within which a particular event, or a particular organization, is embedded, is extremely important for deciding whether something is a movement. Diani gives the example of a protest against industrial pollution in a working-class area. He points out that it could be part of an environmental movement, a class struggle, or a not-in-my-back-yard movement. It all depends on the overall narrative within which it is inscribed and the goals and policies that the narrative endorses and makes possible. This means that it is crucially important to see how different cases are presented, and by which organizations, in order to assess if a movement is indeed taking shape.

Social movements rely on interorganizational networks that present an encompassing narrative and set goals to be pursued. However, unlike in formal organizations, movements are largely informal, and a strong identity component is present. This also implies that movements can be very fluid, change over time, and include a great heterogeneity of views. These may splinter, in the course of time, into separate movements, or else continue co-existing within an overall grander narrative. But if we speak of a movement, the literature tends to agree, we are also speaking of "networks of informal interaction between a plurality of individuals, groups and/or organizations, engaged in cultural or political conflicts, on the basis of shared collective identities" (Diani 1992).

As we have seen earlier, the main rights of nature organizations have indeed been engaged in largely informal interactions that have been decisive for several cases, key among which the Ecuadorian constitution. That experience and its wide publicity have also popularized nature's rights as an idea and diffused it widely. However, that kind of diffusion does not necessarily make a movement since

the recipients of the idea (as in the Colombian and Indian cases) may or may not share organizational networks and/or collective identities. What is certain is that important organizations are putting a lot of effort into expanding their base and transforming the organization of rights of nature from an elite-driven enterprise into a grassroots one.

Early cases, and especially the most publicized ones, like Ecuador and Bolivia, have been elite driven. In these cases, political and intellectual elites had already decided on a preferred course of action, which was then implemented when a window of opportunity opened up (Kingdon and Stano 1984). CELDF, the most influential organization in the actual writing of legislation to date,<sup>7</sup> has also driven community initiatives for rights of nature at municipal levels in the United States. Here, too, there has always been a pre-determined goal (of reaching rights of nature), and an increasing effort to diffuse this goal widely and gather community support. This meant that CELDF has been putting a lot of effort into tying community rights, human rights, minority rights and nature's rights into a logical and seamless web.

Whether the rights of nature conform to the scholarly definition of a social movement may, in itself, be of little interest. What I want to show through this short foray into that literature is that there are characteristics that these rights share with social movements, and others that they don't. For example, not all rights for nature have emanated out of an international policy network. The New Zealand cases, for instance, have had a parallel development and, indeed, share little of the ecotheological history.<sup>8</sup> In terms of the identity of people participating in rights of nature advocacy, this also varies widely, and at this point it is hard to say whether there is such a thing as a shared identity at all. If anything, considering

<sup>7</sup> Given its composition, the new Center for Democratic and Environmental Rights (CDER) may as well become equally influential in the future.

<sup>8</sup> This does not mean that important actors in the NZ cases had no idea of their history and practice elsewhere. For example, Morris and Ruru (2010) explicitly follow Christopher Stone's analysis of legal personality and draw an explicit parallel between that Western legal concept and Māori tikanga.

rights of nature as a movement in this particular historical moment would require a definition of movements as quite encompassing of heterogeneity of identities.

The most important question that arises out of this discussion, as far as I'm concerned, is what the grander narrative that organizes the movement is. If we take our cue from the dominant organizations, then this narrative is undeniably the liberal theory of rights and its expansion. These organizations promote this particular narrative while incorporating all possible cases into it even though there is great diversity of practice. This can be both a tool for further expansion and one for policing how rights of nature may develop. Whether or not advocates in new and different cases subscribe to the ecotheology of rights is important in assessing what kind of movement is burgeoning. Currently, a look at the resources pages displayed by the most important organizations reveals that they list no critical titles, even though these exist. This can be a deep problem for the creation of an inclusive movement.

Some of the theoretical commitments of ecotheology, including the idea that the rights of nature are but the next step in the expanding circle of moral concern, may restrict how future cases develop. If Te Urewera would have indeed developed as part of an international movement, it would have granted Tūhoe the status of guardians, therefore restricting the ways in which Māori jurisprudential traditions may influence current and future governance practices. Other potential innovations would benefit from a wider opening within the growing trend towards rights divergence, and for self-reflection and questioning. The kind of questioning I have in mind is already present in cases that are currently being theoretically elaborated, in preparation for future practical deployment.

For example, a recent article (RiverOfLife et al 2020) proposes that Martuwarra river in Australia be designated a legal person, but it does so in a way that puts indigenous jurisprudence front and center and therefore builds yet another path for the rights of nature to travel through. It proposes, among other innovations, that the right to life be interpreted as connected to the crime of ecocide, itself connected to the internationally recognized crime of genocide. It convincingly argues that ecocide is a way towards genocide,

a claim that comes directly out of Indigenous experiences of dispossession.<sup>9</sup> But it does not make this argument based on the liberal expansionism of rights, and this matters greatly in diversifying the theoretical and practical toolkit that legal innovation can propose in the future.

On the strength of the social movement literature, rights of nature both are and aren't a movement at this stage in their development. If it is to become a truly inclusive one, then the organizations currently dominating the field need to adopt, in my view, a much more critical stance towards the orthodoxy that they themselves are helping build. Any movement is as good as the vigilance that allows it to stave off the almost inevitable ossification of its positions. Defending against this inherent danger will allow the rights of nature to evolve and perhaps to overcome their uncomfortable alliance with liberal rights orthodoxy.

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9 As Philip Sands showed in *East West Street* (2016), by uncovering the origins of genocide, this internationally recognized crime stood in contrast to the contemporaneously created "crimes against humanity". The former applies to groups, while the latter to individuals. In this sense, crimes against humanity comes closer to the rights-driven approach explored here, whereas genocide/ecocide would apply to specific groups/biomes. This distinction is worth pursuing further, especially as the crime of ecocide is poised to become increasingly important in international law. Ecocide may well offer a way towards condemning ecological crimes without heavily relying on the category of rights.

## **Chapter VII: Conclusions**

### The Problem of Good Intentions

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An introductory book cannot help but gloss over many details that more thorough scholarly engagement would be sensitive to. But if it succeeds, it manages to focus on strains and connections that may not be visible when looking too closely at individual cases. An introduction should straddle the perilous border between generality and particularity and show the many ways in which they connect. Indeed, it should show how abstraction is the infrastructure of practice, and practice the fodder of abstraction.

I set the rights of nature within the context of the inseparability of liberal rights expansion on the one hand and growth-fueled development on the other. I argued that the glue that holds these apparently divergent movements together is the power of the (often colonial or neo-colonial) nation state. Because of this, one of the most significant contributions of the rights of nature so far has been the opening up of spaces that subjugated people can use in order to inject radically different legal and philosophical traditions into the Western mainstream. On the other hand, the insistence on rights risks propagating liberal orthodoxy further, unwittingly accelerating the Great Acceleration.

Erin O'Donnell and colleagues (2020), in an article analyzing indigenous involvement in nature's rights, very helpfully separate the cases seen so far into two different kinds: cases focused on Nature and on versions of the right to life (broadly, what I have called ecotheology); and cases focused on particular places and on legal personality only. As the authors explain, legal personality as such gives rise to three different rights, namely the right to hold property

(Te Urewera owns itself), the right to enter and enforce contracts (as a separate legal entity), and the right to sue and be sued (legal standing). The cases of Ecuador and Bolivia have become the emblematic ones for ecotheological rights, while the cases of Aotearoa New Zealand are paradigmatic of the focus on legal personality itself.

O'Donnell and her co-authors also point out, as I have, that the first kind of rights are also moral rights, whereas legal personality is morally agnostic. In the first case, advocates have stressed the opposition between being a thing and being a person. The argument is that those two kinds of beings are incompatible: if nature is a thing (a resource), it cannot be a person, and vice versa. The second kind of rights for nature show this to be a false premise in practice (it had already been shown to be false in theory; see Chapter 2): Te Urewera is both a legal entity and a thing that is owned by the legal entity. These kinds of constructions are familiar to Western law, which routinely aggregates interests into fictitious 'persons' that have different roles in different circumstances.

The minimal grant of legal entity status can, in theory, accomplish a much more focused application of the law to places and allow for representative arrangements that integrate and give practical power to a-modern ontologies. This is incredibly important, as it opens up spaces of innovation. I have argued that there is still a long way to go before a truly consistent indigenous leadership is allowed within the centers of Western legal and political power, but what O'Donnell et al refer to as 'ecological jurisprudence (also see Bosselmann 2012) leaves much more room for this to happen than does the ecotheological Earth jurisprudence that I have analyzed. Though this is not currently the case, ecological law shows promise in potentially side-stepping the issue of rights and its liberal expansionism in favor of allowing radically different ontologies to propose alternative arrangements.

This split within rights of nature theory and practice is thankfully becoming more widely recognized, which should help practice tremendously. What still needs due recognition is the outsized influence that ecotheology still has, particularly in the diffusion of ideas. On the one hand, this can be seen (see Chapter 4) by the

almost universal adoption of the term ‘guardianship’ to characterize the political arrangements inaugurated by Te Urewera and Whanganui. I have myself used this term without realizing that, in doing so, I was unwittingly brushing over the radical novelty that Māori involvement in these cases had proposed (Tănăsescu 2016). A “human face” is not a guardian, but something more like a representative, and once we ask *what kind* of representative that is, a door is opened towards a world in which Māori can lead, explaining what that may mean and showing it in practice.

Similarly, the influence of the Aotearoa cases on the Colombian and Indian ones has been widely recognized. But, because of the capture of the New Zealand cases by ecotheology (through, among other tropes, the one of guardianship), judges in Colombia and India only superficially travelled the path opened by Māori ontologies. Instead, they ended up passing laws that are much closer to Earth jurisprudence and only superficially tied to indigenous ontologies. This is why the dominance of ecotheology in the diffusion of rights for nature globally is so important to challenge; it homogenizes possibilities into a globalist blend of moralist rights that are highly vulnerable.

The movement for rights of nature, inasmuch as there is one single movement at all, has to start taking the real variety of cases and theoretical orientations into account. It may be that, in doing so, the very idea of *rights* needs to be rethought. It may also be that the *purpose* of these rights needs to be much more actively interrogated (see Tănăsescu 2021b). The Indian and Colombian cases seemed to think that rights are for environmental protection, a claim that I have shown to come out of the moral/legal confusion propagated by ecotheology. On the other hand, the Aotearoa cases show clearly political purposes, with no primary concern for environmental protection as such, in part because they are not predicated on a separation of humans and environments.

I don't mean to imply that in New Zealand a perfect ‘inclusion’ of Māori thinking has been achieved. I have presented a much more nuanced view of this in Tănăsescu (2020a). Instead, I do want to suggest that those cases cut a new path, one that has much greater potential for much greater inclusion. In Australia

the Martuwarra/Fitzroy river is currently being considered as a candidate for legal entity status, and crucially this is being done in open dialogue between First Law and settler law. The idea of legal entity status still needs refining, and I have also argued that we may be better served by abandoning the idea of person or personality altogether, focusing on entities instead. This can allow a more important role for a-modern philosophies and legal practices, as ‘entity’ is completely neutral in moral terms. It can therefore defend itself against the liberal rights expansionism that the state is so comfortable with.

Cases of rights of nature are proliferating at an expanding rate. In Bangladesh, the supreme court declared Turag river, as well as all other rivers in the country, to be legal persons (Islam and O'Donnell 2020). Lake Erie, in the United States, was briefly granted rights before the decision was struck down in higher courts. The Universal Declaration of the Rights of Mother Earth may well one day be adopted, and its example has already emboldened the creation of an International Rights of Nature Tribunal. Increasingly, international media report on new and exciting cases: a lagoon in Spain, a wetland in Florida, all aquatic ecosystems in Europe. This proliferation makes the work of critical assessment ever more urgent, such that orthodoxy does not set in and rights expansionism is not unreflectively given an unexpected boost, just when a world of Total Production seems to be imminent.

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The rights of nature are too often presented as achieving environmental protection and moral enlightenment. I have argued against this kind of totality thinking throughout. If we abandon it and instead focus on the multiplicity of struggles, and on the possibility of wide and regenerative cohabitation outside Western moral frameworks, then we start seeing all sorts of allies that were not visible before.

For example, by focusing on representation as a very salient aspect of including environments in political (and legal) processes, Bruno Latour has famously proposed the idea of a parliament of

things.<sup>1</sup> Following up on this idea, a diverse group of people in the Netherlands have put together an Embassy of the North Sea, which is supposed to understand whether there is something like the North Sea that can speak in politically intelligible speech (also see Lambooy et al 2019, who make the case of legal personality for the Wadden sea). Tellingly, their exercise starts with listening, and incorporates art as a fundamental part of both listening and speaking processes (after all, the concept of representation cannot be properly thought without dialogue with art; see Tănăsescu 2014). In other words, this initiative recuperates the need to pay close attention that has been all but obliterated by the homogenous spaces of modern development.

Similarly, the practice and theory of commoning can be an excellent ally, and one that can put into dialogue a-modern traditions that do not have to respect the colonial center-periphery, mainstream-exotic dichotomies. But if the rights of nature continue to be dominated by the call to awaken to the moral personality of Mother Earth, all of these other tendencies cannot really be seen as allies. The parliament of ‘things’ doesn’t fail to see the personhood of nature, but rather tries to imagine worlds governed beyond modernist dichotomies. Similarly, commoners have, and have always had, a wide variety of ontologically derived practices. What matters is that these be regenerative of socio-ecological practices, as opposed to inherently consumptive and destructive.

The expression *rights of nature* is catchy and concise and therefore very amenable to travelling far and wide. But it also risks hiding orientations that are not centered around rights, yet use these selectively, like the cases granting minimal entity status and focusing on representative arrangements. I am not sure that the burgeoning Rights of Nature international trademark can take a step back from rights and recognize their inherent problems. As Douzinas argues, “a society where individual rights with their adversarial culture have become the main moral source can survive only with the help of criminal law, the police force and extensive surveillance”

<sup>1</sup> For the use of this idea in an interpretation of the Colombian case, see Cagüeñas et al (2020).

(Gearty and Douzinas 2012, 64). A society where everything starts having rights will inevitably have to weigh them against each other, and it will generally be the most powerful that prevail. The police and extensive surveillance seem inevitable.

Equally problematic is the reliance on the totalizing figure of Nature. In practice, this risks focusing rights on exceptional environments or on a new kind of conservation agenda that can continue to exclude local communities from using their environment. The urban environment is almost absent from the rights of nature; this is a mistake that will need to be corrected. In order to do so, the right to restoration needs to be thoroughly rethought, in ways that empower local communities to develop regenerative relations outside of the problems that baselines impose. It also needs to be insulated against the capacity of the state to use it selectively for extractive purposes.

The label “ecological jurisprudence” may offer a good way out of the conundrums that enshrining rights and Nature into the very name of the growing movement throws up. It can also help move away from the nation state as the focus of environmental governance. Bosselmann (2015) argues that “as long as innovative ideas are exclusively derived from what states are willing to support, no genuine progress will be made” (268). He shows that legal innovation needs to focus much more on tools that can be used against the state, not on ones that the most powerful actors are already comfortable with. In other words, we need as much political as legal innovation, and the two have to work together in order to make a substantive difference. In the New Zealand cases, for example, the settler state was more comfortable giving rights to nature than to the Indigenous populations (like full property rights over their lands and waters). The idea of self-ownership for Te Urewera, though incredibly useful in many ways, was nonetheless a way to *not* vest ownership in Tūhoe.

The question of the purpose (what do we want to achieve, and who is this we?) of rights and/or legal personality should be actively and critically asked. It is not enough to assume that rights of nature are for environmental protection. Inasmuch as environmental protection is the goal, an active engagement with the colonial history of

conservation should be pursued. If local community empowerment is the goal, then care should be taken to provide for the appropriate political infrastructure. If both of these goals are pursued simultaneously, then the question of how to do so remains an open one and each case will probably have a different answer.

But thinking that rights are a protection *per se* and that ecocentrism vs anthropocentrism is *the* way to think about legal and political pluralism shackles the imagination and risks being damaging. Instead, the opening that the explosion of rights of nature cases has created can be used to free the political and legal imagination to think critically beyond rights and beyond well-trodden binaries. For example, it may be worth considering how the law can help scale back the monopoly that state power has over setting economic and social goals. The movement for degrowth (D'Alisa et al 2014, Demaria and Kothari 2017) is yet to be allied with legal innovation, but it may hold exciting promises by writing degrowth goals into legal personality arrangements and by providing the appropriate infrastructure. Similarly, the infrastructure for alternatives to development needs to be thought out in detail, as it is not enough to proclaim grand goals that can be easily accommodated to progressive neo-extractivism.

In the Cambridge Companion to Human Rights Law, Costas Douzinas opens his chapter on rights jurisprudence with the following cautionary tale: "when, in 1983, I ran the first-ever human rights course in my Law School only four brave and idealistic students registered, making me almost abandon the exercise. I told these pioneers that human rights are the conscience of law, practiced by a few idealistic lawyers and invoked by dissidents and rebels. How different things look today. If only thirty years ago rights were the repressed conscience of the profession, they have now become its dominant rhetoric. [...] The dissident pioneers have become the established majority, the repressed idealism dominant consciousness, the protest ruling ideology" (Gearty and Douzinas 2012, 57). It would be a momentous loss of opportunity if, thirty years from now, the rights of nature have become the new mainstream, the domain of "the established majority". Defending against this possibility goes

through political as much as legal innovation. Refusing orthodoxy in favor of new and unprecedented alliances is the moral task ahead.

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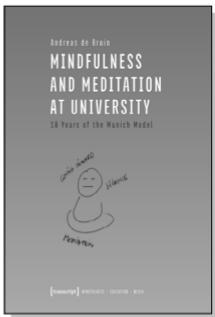
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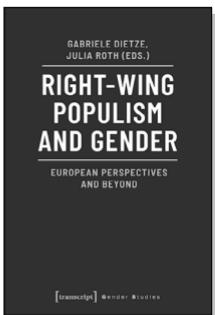
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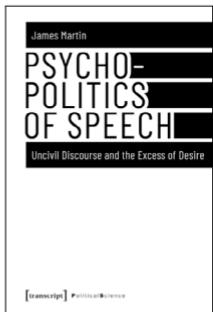
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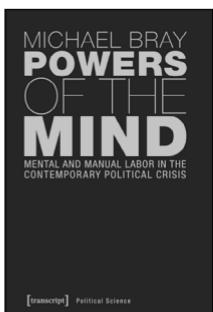
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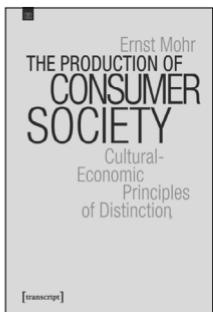
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