Pázmány Law Review

X. (2023)

PÁZMÁNY

Pázmány Péter Catholic University
Faculty of Law and Political Sciences

Budapest

Pázmány Law Review
X. (2023)
ISSN 2064-1818 (Print)
ISSN 2786-393X (Online)

Pázmány Péter Catholic University
Faculty of Law and Political Sciences
Budapest

Published by
Pázmány Péter Catholic University
Faculty of Law and Political Sciences
H–1088 Budapest, Szentkirályi u. 28–30.
Responsible publisher: László Komáromi dean
www. jak.ppke.hu

Corrector: Mariann Weiszer
Prepared for printing by Andrea Szakaliné Szeder

Printed and bound by PPKE University Press.

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THEMATIC FOCUS:
Language and Law in the Human-Machine Era

EDITORIAL

"Law, Language and Technology"

The papers presented in the following section of the volume are fruits of an international cooperation project called LITHME (Language in the Human-Machine Era), launched in 2020. LITHME is a COST Action network with members from every EU member state and a number of other countries outside the EU. The overall aim of the project is to facilitate longer-term dialogue between linguists and technology developers and to prepare researchers of the related disciplines for what is to be expected during and after the transition from the *digital era* to the *human-machine era*. The members of the network are academics and researchers whose main goal is explore the implications of the fast emergence of new types of language technologies on specific areas related to language use.

As pervasive human-machine interfaces affect language in diverse areas, LITHME works under eight Working Groups: 1) Computational linguistics, 2) Language and law, 3) Language rights, 4) Language diversity, vitality and endangerment, 5) Language learning and teaching, 6) Ideologies, beliefs, attitudes, 7) Language work, language professionals and 8) Language variation.

Colleagues working at the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University (PPKE JÁK), Budapest, have been actively involved in the work and leadership of Working Group 2 (WG2) whose members are highly qualified and committed lawyers, linguists and legal technology experts and whose main focus is the investigation of interactions between law, language and technology. Between 2020 October and 2023 January, the group was chaired by Dr. Petra Lea Láncos, followed by Dr. Dorka Balogh who has been chairing the group since February 2023, together with co-chairs Dr. Balázs Szabolcs Gerencsér (PPKE JÁK) and Dr. Fernando Prieto Ramos (University of Geneva). WG2 organizes several talks and presentations online and, furthermore, annual onsite workshops where members come together and share their research results.

In 2022 September, the first post-covid, in-person workshop was held in Budapest at PPKE JÁK, where the idea of the publication of the research findings of WG2 members present at the Budapest workshop was born. The papers that were selected for publication approach the subject matter of WG2 research from many different

angles (legal language, legal translation, the translatability of legal language, storytelling in legislative drafting, machine translation, interoperable registers in e-government services, remote interpreting in criminal proceedings, large language models [LLMs] and blockchain technology serving as next generation legal tech tools, new technologies applied in online interpreter accreditation testing), hence, they provide an overview of a broad spectrum of interfaces between law, language and technology.

Thus, the following papers are inter- and cross-disciplinary, covering legal and other sciences, facing the future challenges of language and law. Studies look at the human being and society behind the technology, which gives them added value beyond simple technological analysis.

Finally, we would like to express special thanks to the graduate students of PPKE JÁK who assisted our work by copy-editing the submitted papers and thereby contributed to the accomplishment of the publication: János Tettinger, Péter Bozori, Kiara Jáger-Káposzta, Ákos Balázs Kemény, Orsolya Kocsis, Kata Mezős, Míra Olasz, and Nóra Szili.

Dorka Balogh and Balázs Szabolcs Gerencsér
Section Editors

DOI: 10.55019/plr.2023.1.7-11

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LINGUISTIC CHALLENGES OF INTEROPERABLE REGISTERS IN THE CONTEXT OF E-GOVERNMENT SERVICES

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Abstract

E-administration requires, among others, interoperability between registers kept by authorities. Databases hold data clustered around concepts stemming from the different legal acts governing the procedures of the various authorities. Owing to the conceptual and terminological incoherence pervasive throughout legal acts, the intended interoperability between databases and registers will fail. This paper sheds light on the need for a conceptual consolidation in applicable national law on the example of registers kept by Hungarian authorities and the legislation governing them.

Keywords: interoperability, registers, terminology, definitions, inconsistency

1. Introduction

Budai defines e-government as "the knowledge-based transformation and rationalised, service-oriented reorganisation of the public sector's interconnection system through the public utility-like use of info-communication technology applications," [1] which includes multi-channel, electronic and automated administration.[2] The electronic automated administration of government services requires the digitisation of relevant

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1 Budai, Balázs Benjámin: *Az e-közigazgatás elmélete.* [The theory of eGovernment] (2nd, revised edition). Budapest, Akadémiai Kiadó, 2014. 47.

2 Budai, Balázs Benjámin: *Az e-közigazgatás fogalma, jogi és stratégiai keretei.* [Concept, legal and strategic framework for eGovernment]. Budapest, Dialóg Campus, 2017. 6.

data and the exchange of this data between different bodies. According to Budai, "interoperability … guarantees standardisation and interoperability both within a state, and between administrations and services of the Member States. If there were no common standards, the exchange of data between institutions would be impossible. Interoperability greatly enhances the competitiveness of the state because it leads to faster and more transparent procedures. Consolidating the data landscape improves the reliability of the data and makes it easier for right holders to access them."[3] Interoperability is therefore about increasing the efficiency of administrative activity by enabling the exchange of data between registers that have hitherto operated in isolation from each other, created as registers by different administrative actors for different public authority functions.

In the context of domestic e-government efforts, Act CCXX of 2013 on the General Rules for the Cooperation of State and Local Government Registers (IoPtv.) was the first milestone in achieving the interoperability of registers kept by public administrations. According to Section 1(1) of the IoPtv, the Act shall be applied *in order to ensure the interoperability of the registers (...) established by public bodies in the course of or in connection with the performance of their public tasks, which contain data specified by law and have a statutory procedure for the transfer of changes in the data to the registers.*[4]

According to Budai, the basic principles of the regulation under the IoPtv. included

- "a coherent definition that is appropriate to the legal system", and that
- "the design, development and management of registers should be carried out with due regard to the needs of the administration and the interoperability requirements of the systems". [5]

Bausz defines the linguistic conditions for achieving interoperability as follows: "In order to operate e-government, the task of standardising and harmonising Hungarian terminology must be solved in this system, the relationships between the various concepts must be established, described and linguistic markers must be attached to each concept. The system thus constructed shall be based on, and describe a hierarchical structure of terms, using information technologies".[6] As Felber points out in his paper, "semantic interoperability allows data to be processed everywhere for other purposes by means of the same format. In these cases, the computer system can also interpret the data, i.e. it receives information that can be processed and interpreted by the computer system".[7]

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3 Ibid.

4 The provisions of the IoPtv. have been incorporated into Act No. CCXXII. of 2015 on the general rules of electronic administration and trust services.

5 Budai (2014) op. cit. 44.

6 Majzikné Bausz, Ágota: Az e-kormányzat, e-közigazgatás problémái és terminológiai vonatkozásai Magyarországon. [The problems and terminology of e-government and e-government in Hungary]. *Magyar Terminológia*, vol. 1. no. 1. (2008), 60.

7 Felber, Zsófia: Útban az interoperabilitás felé. [Towards interoperability]. *Pro publico bono*, vol. 2., no. 1. (2014), 158.

In this vein, and in line with the scope of the IoPtv, I will examine the categories (linguistic markers) and definitions of data recorded in the registers managed by Hungarian public authorities, as defined by the legislation, and the interoperability challenges related to these registers. In my analysis, I will not address the data protection aspects of the exchange of data between administrative records; instead, I will examine the types of terminological and definitional challenges that may arise in creating interoperability between registers created for the purposes of implementing different pieces of legislation.

In the course of my research, I compared the designation, i.e. term referring to the specific data covered by data provision or data collection obligations, on the one hand, and their definitions, on the other hand, by analysing the following laws:

- Act LXVI of 1992 on the Registration of Personal Data and Address of Citizens (hereinafter Nytv.);
- Act LXXXIV of 1999 on the Road Traffic Register (hereinafter referred to as Kknyt.);
- 326/2011 (XII. 28.) Government Decree No 326/2011 (28.XII.) on road traffic administrative tasks, the issue and withdrawal of road traffic documents (hereinafter: Driving Licence Decree);
- Act No. I of 2010 on Civil Registration Procedure (hereinafter: At.).

2. Inconsistent definitions: terms with the same substance, but different designation

In the course of my research, I found several definitions in the legislation examined which, although having the same semantic scope, were presented in different forms in the various legislative provisions. These discrepancies can pose challenges in terms of creating categories in the register and retrieving information.

For example, the Driving Licence Decree defines a third-country national as follows (Section 2(1) 3)):

3. third country national:
   3.1. a person subject to the Act on the Entry and Residence of Third Country Nationals, and
   3.2. a member of the family of an EEA national who is a national of a third country and who is a national of an EEA State subject to the Act on the Entry and Residence of Persons with the Right of Free Movement and Residence.

The Decree refers in point 3.1 to Act II of 2007 on the Entry and Residence of Third Country Nationals, which defines a third country national *as a non-Hungarian national and a stateless person, with the exception of persons falling under paragraph 1(3).* Based on the exception under paragraph 1(3), the Act does not apply to *persons with the right of free movement and residence.*

By contrast, Section 3(v) of the At. defines a third-country national as *any person other than a Hungarian national who is not an EEA national, including a stateless person*. Although 'EEA nationals' do indeed have the right of free movement and

residence, and thus the definitions of the category of third country national used by the Driving Licence Decree and the At. are identical in substance, the two laws, and even the 2007 Act II of 2007 cited by the Driving Licence Decree, have formally defined the same concept differently, which points to inconsistent definitions of the concept in the different legislative acts.

A similar inconsistency may be discovered between the definition of 'address' in the Nytv. and the Driving Licence Decree. According to Section 5(4) of the Nytv., the address of a citizen is the address of his/her registered residence or place of abode (hereinafter together referred to as address). By contrast, Section 2(1)(5) of the Driving Licence Decree defines address as *the residence or place of abode of a natural person party, or, in the absence thereof, the place of accommodation of the party*; i.e. the latter definition includes the party's place of accommodation under the scope of address. Although the Nytv. 5(2) of the Nfv. includes the term accommodation in the definition of the place of residence of the citizen, the two legal acts use different definitions for the term 'address'.

Likewise, in Nytv. Section 5(13) of the definition *of citizen's signature: the spelling of his/her maiden or married name and surname as used and recognised by him/her* does not necessarily correspond to the equirements under Kknyt. Section 11(d): *a handwritten signature*. Yet even if it were to refer to the same substance, the inconsistent wording may impede interoperability.

As regards the data category of 'mother's name', which is often used for personal identification purposes, the different pieces of legislation under scrutiny refer to it in different ways: the Kknyt.'s Section 32/B (2) (dc) and point 4 of the Annex 5 to the Driving Licence Decree simply use the term 'mother's name', whereas the At.'s Section 3 uses the phrase 'mother's maiden name and surname' and Section 29/J(1)(b) of Nytv. uses the phrase 'mother's maiden name'. While the terms used in the At. and Nytv. are clearly identical in substance, they are expressed differently in the legislation. Meanwhile, the designation 'mother's name' in the Kknyt. and the Driving Licence Decree does not contain the adjective 'maiden'. Thus, although administrative practice clearly refers to the mother's name at birth, the wording of the two pieces of legislation not only differs from the wording of the At. and Nytv., but is also imprecise.

3. Terminological confusion: concepts with the same designation but different meanings

A complete opposite of the problem examined above, but a challenge critical from the perspective of interoperability, is the use of terms with the same designation, but different substance.

For example, there are inconsistencies, gaps or contradictions in the definition of 'relative' used in the legislation under scrutiny. While the Civil Code uses the concept of a relative, the Driving License Decree defines a *relative of a member of the foreign armed forces* by reference to the concept of relative under Section 2(2) of Act XXXIV of 2011 on the Registration of International Military Headquarters and their Personnel and Certain Provisions Relating to their Legal Status (Küfetv.). This

concept of relative may differ from the definition in Art. 8:1(1) points 1) and 2) of the Civil Code. Indeed, it may be the same, narrower, or possibly broader in scope than the definition of a relative under the Civil Code, depending on the legislation of the state of nationality or permanent residence of the person concerned falling under the scope of Küfetv. According to Section 2(2) of the Küfetv., a *member of the staff of an international military command* is considered to be a relative if they are

a) the spouse,
b) dependent children, including children by blood, adoption, foster or stepchildren, and
(c) a person defined as a dependant by the law of the State of nationality or permanent residence,

if living in the same household with him/her in Hungary.

Finally, although the Nytv. uses the term 'relative', it does not specify whether it is used in the meaning of the Civil Code or possibly according to the broader definition of the Criminal Code, which includes the civil partner under the scope of the term relative. The latter conceptual discrepancy may create legal uncertainty, and the differences in the definition of 'relative' in other legislative sources may create further challenges when it comes to the automatic exchange of data. Interoperability is a key objective in order to render data exchange between the registers managed by public administrations effective. However, if different data is recorded in the various registers under the same data categories (represented by identical designations, e.g. relative), the efficiency of automated administration will be compromised.

4. Conclusions

"In situation where e-government and e-administration are becoming commonplace in Hungary, parties and authorities should use the same concepts and the relationship between these can be established through language. At the moment however, we do not see this happening."[8] Agreeing with Bausz, it can be confirmed that the stated goal of interoperability may be greatly hampered by the terminological and conceptual differences detailed above. Only human intervention in the process of the retrieval of data can correct inaccuracies resulting from the use of concepts with the same form but different substance. By contrast, the use of concepts with the same substance but different designations may cause problems due to differences in data categories. This may prevent interoperability between the registers managed by public authorities. Under such circumstances, the unimpeded exchange of data cannot be achieved or can only be achieved with the serious risk of inaccuracy. Consequently, the objective of using coherent definitions – which forms part of the regulatory principles of the now repealed IoPtv, i.e. harmonising the terminology of legislation in order to achieve interoperability of the registers created to implement legal rules – should be achieved as soon as possible.

[8] Majzikné Bausz op. cit. 59.

DOI: 10.55019/plr.2023.1.13-26

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A TEXT TYPE-SPECIFIC APPROACH TO PLAIN LEGAL LANGUAGE AND ITS IMPLICATIONS ON MACHINE TRANSLATION

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Abstract

Most characteristics of the legal language go against the idea of plain legal language. However, there are huge differences regarding the extent to which these characteristics are manifested in various legal text types. That said, the need for plain legal language usage is also subject to the type of the given text. The paper introduces some typical scenarios of legal communication by grouping legal genres into functional text type categories, as the function of the text, together with its recipients, determine whether the complexity of legal language may or may not be disregarded in a given legal text. But even when simplification seems justified, there are serious obstacles and risks in using plain legal language, some of which are also approached from the perspective of genres and text types. It is suggested in the paper that regarding written legal texts, syntactical and structural changes are a safe way to increase comprehensibility as opposed to lexical alterations.

Keywords: legal drafting, legal text-types, legal communication scenarios, functional legal text typologies, pragmatic and linguistic factors of comprehensibility

1. Introduction

The idea of simplifying legal language might be as old as the law, but counterarguments cited by the opponents of the idea must be just as old. An argument frequently used by legal drafters who would rather stick to traditional drafting conventions is that since law itself is complex and complicated, the language of the law should necessarily

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bear the same attributes. The interests of legal drafters and the recipients of legal texts are obviously in conflict: while a layperson rightfully expects legal texts to be comprehensible, legal drafters are afraid that any simplification will result in damage to the precise content of the text. This is a valid concern, as in legal drafting and legal translation priority is given to accuracy, coherence and consistent terminology under all circumstances, sometimes even to the detriment of style, register, and in some cases grammar, as well.

But the expectations of laypersons to understand legal texts is just as valid. By accepting the validity of these two circles of interest one might wonder whether the clarity versus accuracy controversy in the context of legal drafting may ever be dissolved. Nevertheless, orthodox views are slowly but surely changing. As Adler[1] remarks, many lawyers "are aware of the need for change and some are effecting it", while a few decades before "they believed that plain language represents irresponsible over-simplification". But even if legal drafters are ready to break with traditional drafting conventions, the question remains whether the linguistic tools suggested by advocates of plain writing will solve the problem of comprehensibility, which is not purely a linguistic, but also a pragmatic issue, since, in order to understand a legal text, one must be aware of the whole referential network (in the present case, the system of the law).

The paper takes into account the obstacles in the way of simplifying legal language, arguing that some of these obstacles originate from the very nature of the legal language, and therefore can only be overcome with extreme care or, in some cases, cannot be overcome at all without losing the explicit legal content. It is suggested that instead of arguing for or against plain legal language use in general, it makes more sense to state that in some communicative situations simplified language is crucial, while in others it is unnecessary. In case of doubt as to the necessity of using plain language, legal text typologies categorizing legal genres by archetypal scenarios of communication in the legal domain serve as a suitable starting point for legal drafters, who need to explore some extra-textual factors of the given genre, such as, e.g., the recipients and the communicative function (or purpose) of the text. Only after analyzing the text from these aspects may it be decided whether the extreme complexity of legal language may or may not be disregarded in an actual legal genre and whether the toolkit suggested by plain language guides can be applied safely, without damaging the legal content.

2. Definitions

The subject of 'genre' and 'text type', which are key concepts of this study, has been addressed by researchers of several disciplines, but there is no consensus on their interpretation. Therefore, some clarification is provided below regarding the

[1] Mark Adler: The Plain Language Movement. In: Peter Tiersma – Lawrence M. Solan (ed.): *The Oxford Handbook of Language and Law*. Oxford, Oxford University Press, 2012. 74. http://dx.doi.org/10.1093/oxfordhb/9780199572120.013.0006

content behind these concepts. It must be noted that there are several approaches to the definition of genre, from which only the ones relevant to this study are presented.

In the context of linguistics, genre is usually considered to be a term used in semiotics, pertinent to the comprehension and the production of texts, and, within the category of semiotics it is closely related to pragmatics, which comes down to how language is used to achieve a certain communicative goal, and how context aids the transmission of meaning in a certain discourse. A broader definition for genre was provided by Swales, who sees it as a phenomenon determined by a complexity of linguistic, social and cognitive factors. Genre in his view is "a class of communicative events, the members of which share some set of communicative purposes"[2]. In addition to purpose, genres can be distinguished by structure, style, content and intended audience, and they also display differences and similarities in language use. One important common element of the definitions of genre is the conventionalized use of language, i.e., fixed language patterns used repeatedly in a genre. The fixedness of these language patterns varies greatly across genres, but legal genres typically feature a lot of fixed formulae and set patterns.

Within the discipline of rhetoric, text types are typically determined by the purpose of the communication (to inform, to persuade, etc.), which is in close connection to the rhetorical purpose and strategies used in the text. While communicative purpose represents the ultimate aim of a text, rhetorical purpose is made up of rhetorical strategies which constitute the mode of discourse realized through text types. Text types are identified by Hatim and Mason[3] as "a conceptual framework which enables us to classify texts in terms of communicative intentions serving an overall rhetorical purpose". For Biber[4], however, the differentiation of text types implies groupings of texts which are similar in linguistic form, irrespective of genre. Linguistically distinct texts within a genre may represent different text types (e.g., newspaper articles can range from narrative and colloquial to informational and elaborated in linguistic form), while linguistically similar texts from different genres may represent a single text type (e.g., newspaper articles and popular magazine articles).

Based partly on the views introduced above, in this paper genre will be regarded as text used in a particular situation for a particular social purpose, composed and structured according to the norms accepted by a particular discourse community and thus displaying differences in external format (e.g. newspaper article, essay, contract, etc.), while text types are differentiated according to their specific rhetorical (and communicative) function (e.g. narrative, descriptive, prescriptive, argumentative, comparative, etc.) – in other words, the mode of the discourse.

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2 John Malcolm Swales: *Genre Analysis. English in academic and research settings*. Cambridge, UK, Cambridge University Press, 1990. 58.

3 Basil Hatim – Ian Mason: *Discourse and the Translator.* London, Longman, 1990. 140.

4 Douglas Biber: A Typology of English Texts. *Linguistics,* vol. 27., no. 1. (1989), 6. http://dx.doi.org/10.1515/ling.1989.27.1.3

3. Obstacles in the way of plain legal language

One of the premises of reader-friendly drafting is that the text should be adjusted to the status and expectations of the recipient. An obvious conclusion to be drawn from this is that if the addressee of the text is a layperson, complicated legalese should be avoided, whereas in case the recipients are legal professionals, they will most probably find it easier to process complicated language, because they are used to it. (Professionals might also experience difficulties in understanding and processing legal texts that are extremely complicated, but these difficulties are typically related to grammar and syntax rather than lexis or terminology.) Consequently, the communicative situation, defined by the function of the text and its recipient, is a decisive factor to be checked out by legal drafters.

Yet, even after the decision to simplify has been made, drafters face several technical and theoretical obstacles in the realization of using plain legal language.

One of the technical obstacles is that lawyers and law students are still socialized on corpora of texts written in legalese and featuring conventional language patterns, which prevents them from acquiring the so-called plain writing tools. Because of that, even those legal professionals who accept the rationale for plain language may find it tedious and discomforting to change their conventional writing habits, discard the old schemes and use different terms, phrases or sentence patterns. Furthermore, the expectations of the professional community and their clientele (who were also socialized on traditional legalese) may add to the discomfort. As Biel remarks[5], "one of the consequences of the conventional use of language in genres is that it sends recognizable signals of being 'in a genre' and creates expectations in the discourse community about communicative purpose, form and content." Thus, even for those drafters who are brave and willing to apply plain writing tools, the question arises whether the recipients of the text will not become skeptical regarding their professionalism and credibility for using a register different from what they are accustomed to, which might be hugely demotivating for the authors of such texts. Approaching the problem from this perspective, complicated legalese could also be regarded as a professional norm.

This professional norm has such a strong effect on students of law that it is internalized by them already in the first year of their studies. Let me justify this statement with one of my personal experiences gained from teaching legal writing in English to Hungarian students of law[6]. When we are discussing and applying the clear writing rules (as laid down in the style guides of EU institutions and suggested by Bryan Garner's school of legal writing[7]), I am always bewildered by how challenging most students find it to paraphrase complicated legal content in simple language.

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[5] Lucja Biel: Genre analysis and translation. In: Kirsten Malmkjær (ed.): *The Routledge Handbook of Translation Studies and Linguistics*. London and New York, Routledge, 2017. 151. http://dx.doi.org/10.4324/9781315692845-11

[6] At Pázmány Péter Catholic University, Faculty of Law and Political Sciences (Budapest).

[7] lawprose.org

The exercise they do is a kind of intralingual translation: students receive a case in English, the text of which is a typical legal text (with sophisticated vocabulary, long and complex sentences, lots of references and other typical attributes of legal texts drafted in conventional legal style), which they are supposed to summarize as if they were explaining it to a layperson with no understanding of the law. No wonder it is a challenge for the students, first, because English is not their native language and second, because most of the legal texts (English or Hungarian) they have encountered during their studies are drafted in conventional legal style, which, by the passage of time, they adopt as a norm. There is also a third reason: even in their first year and all through their studies, law students are conditioned to be precise and accurate and learn that every single detail might be important. So, by performing the task of extracting the relevant information and conveying it to lay people, using simple sentence structures and general vocabulary, they must cope with multiple (both linguistic and pragmatic) challenges and, in addition, let go of the so-called "lawyers' mentality". Their plight is aptly summarized by the paradox attributed to Floyd Abrams, an American attorney: "The difficult task, after one learns how to think like a lawyer, is relearning how to write like a human being." In fact, the students' concern over not being detailed and precise enough is understandable, and the reason why this task is so hard is that in order to decide on the appropriate content and drafting style, one must be in possession of both thorough legal and linguistic knowledge. Introducing students to functional legal text typologies together with an exhaustive explanation about the target audience and the function of the text might be of some help in deciding what tools can be used to what extent, but the confusion experienced by the students while performing the task is justified, as they must take several decisions that require meticulous judgment. With that said, we have arrived at another significant paradox of legal drafting, namely, that clarity and accuracy in a legal text can mostly be achieved at each other's expense.

There is a further obstacle in the way of plain legal language, which is of a more theoretical nature. It is the general view that the complicacy of the law naturally results in the complicacy of the language of the law. Content and form are closely related in all professional languages, but law is in a special status, since, as opposed to natural and technical sciences, the law, as a discipline, cannot even exist without language. Therefore, this view deserves credibility and cannot be disregarded.

Based on the above, the very nature of the law seems to be challenged by the rules of plain writing, while it also must be considered a logical expectation that the addressees of legal documents understand the message conveyed by them. As regards understanding, it is also worth noting that the problem of comprehensibility cannot be resolved by linguistic tools alone, although there are several obstacles in the way of comprehensibility that are of purely linguistic nature. According to studies in psycholinguistics,[8] the linguistic phenomena that negatively influence comprehensibility are the following:

[8] E.g., Pléh, Csaba – Lukács, Ágnes (ed.): *Pszicholingvisztika*. [Psycholinguistics] Budapest, Akadémiai Kiadó, 2014. 251.

- long words and sentences;
- reversed or unconventional word order;
- lack of the verb in sentences;
- lack of the subject (impersonal structures);
- inadequate structuring of sentences;
- clauses embedded in the main sentence.

In the next section we will see that the phenomena listed above are not uncommon in the legal language.

4. Some characteristics of the legal language that go against simplification

Certainly, legal languages in all parts of the world show some general characteristics, which, as seen by lay people, are mostly negative. A lot has been written about the characteristics of the English legal language in the past centuries, and David Melinkoff's remarkable book, published in 1963[9], provides a broad overview and a synthesis of many of the views expressed regarding the incomprehensibility of the English (and the American) legal language. As early as 1963, Melinkoff warned of those 'redundant' characteristics of the legal language that endanger clarity and differentiated them from the ones that are neutral or do not have a negative effect on comprehensibility. He concludes that most lexical characteristics are neutral, while the negative ones are typically related to syntax and phraseology. These statements and the need for legal language that is understandable for the general public seem to be valid for all legal languages.

The Hungarian legal language, for example, follows Indo-European sentence patterns (since its development was dominated by German influence) in spite of the fact that Hungarian belongs to a different language family, which makes legal language 'foreign sounding', as opposed to the general language. Therefore, if laypersons in Hungary were asked to list a few characteristics of the legal language, they would very probably come up with a fairly negative depiction of it, maybe something like this: 'formal, impersonal, sophisticated, high-brow, pompous, verbose, ritualistic, archaic, vague, distant, exclusive, mannered, etc.', which reveal a lot from the frustration of lay people for not being able to fully comprehend the language of the law. And although the Hungarian legal language is still not as well-researched as it could be, there are quite a few research results (mainly from the past decade, when the interest for legal language research has significantly grown) that reinforce this negative public opinion.

A groundbreaking corpus-based research project was carried out by Hungarian lawyers and linguists between 2014–2018[10] with the aim of mapping the characteristics of Hungarian legal text types and comparing them with the general language register

[9] David Melinkoff: *The Language of the Law*. Boston, Little, Brown & Co., 1963.

[10] K-112172 OTKA research project (2014–2018), research results are published in the volume Szabó, Miklós – Vinnai, Edina (ed.): *A törvény szavai.* [The Words of Law] Miskolc, Bíbor Kiadó, 2018.

to identify the linguistic impediments in citizens' access to the law. Among other findings it was proved by quantitative research methods that compared to the general language, all legal text types are characterized by nominalization, impersonal style and grammatical structures, complicated compound and complex sentences, a high number of embedded and relative clauses, multiple subordination, unusual word order, redundancy, etc. – in other words, attributes that have a negative impact on comprehensibility and clarity.

It must be stressed, nonetheless, that many of these negative attributes – which are typical of legal languages and usually take shape in the form of grammatical structures – have not developed by accident, they perform specific functions. Nominalization, e.g., is used to enhance formality as opposed to the informal nature of ordinary language, while passive voice is used to avoid personalization – a hugely important function in the legal context. Complex and compound sentences, which are typical in legal acts and codes, are complicated, because the aim of the legislator is to include as much information in a single legal act as possible in order to avoid continuous back- and cross-referencing. In the same way, redundancy is used to avoid misunderstanding and ambiguity. Finally, while clear writing guides suggest replacing sophisticated terminology with shorter and more transparent vocabulary, we must be aware that in a legal context the use of synonyms is risky, because the law cannot operate coherently without legal concepts bearing consistent and well-defined meaning. If legal terms are substituted by their quasi-synonyms, the legally relevant referential meanings may be unclear, which, by the way, also explains why such a dominant part of the research on legal language focuses on legal terminology.

Based on the above-mentioned reasons we can conclude that legal language, which is considered by many researchers of the field to be the most archaic among specialized languages[11], is so persistent with its conventional language patterns because these patterns were shaped by and adjusted to the operation of the law. Taking a step further, if the characteristics of legal language derive from the nature of the law, then the question arises whether these characteristics (apparently conflicting with the principles of the plain language movement) are redundant at all, and whether they could be or should be replaced with less complicated alternatives.

Regarding legal language in general, there is clearly no single best answer to this question. However, by investigating legal genres and text types separately from each other, we will see that there are marked differences between each legal genre in terms of their comprehensibility, which depend greatly on the phraseological, grammatical and stylistic language patterns used in the given genre. Legal language in general is said to be the most slowly changing professional language, while even within legal genres there are some (e.g., common law contracts and wills) that stick to archaic patterns more than the others. This phenomenon has also been identified

[11] E.g., Enrique Alcaraz – Brian Hughes: *Legal Translation Explained.* Manchester, St. Jerome Publishing, 2002.; and Balogh, Dorka: *Műfajtudatosság a jogi szakfordításban és szakfordítóképzésben*. [Genre-awareness in Legal Translaton and in Legal Translator Training] Doctoral Dissertation. Budapest, ELTE, 2020.

by the above-mentioned research on the characteristics of the Hungarian legal language, which pointed out significant differences between the sentence structures used in legislative, judicial and theoretical legal documents (the reasoning section of judicial decisions and theoretical legal texts featuring the longest and most complex sentences).

As for language patterns, it is also important to note that while the differences between legal systems and branches of law typically pose terminological challenges in legal drafting and translation (due to the system-bound nature of legal terms), text types and genres exceed the level of terminology, as, in addition to featuring differences in grammar, form and style, they operate with a special set of multiword expressions (e.g. phrases and collocations) characteristic of their respective register.

In the following section of the paper, we will take an overview of how text typologies may assist in deciding if a legal text can be or should be adapted to the expectations of the lay audience.

5. Legal text types and plain language

Assessing each legal genre separately to decide on the rationale for using plain language in them would be hardly feasible, so it makes more sense to group these genres into larger categories, namely, text types. From the perspective of comprehensibility, functional text typologies are a suitable starting point, since the function of the text (that usually implies the addressees/recipients as well) determine the typical language patterns to be used in the given text type. This means that legal genres falling into the same category bear similar rhetoric and pragmatic characteristics.

While in legal theory legal texts are traditionally grouped into two functionally distinct categories: normative (prescriptive) and informative (descriptive)[12], most functional legal text typologies divide the latter category of informative texts into two further categories, thus distinguishing 3 large groups of texts according to their field of application.: 1) normative texts used in statute law (e.g., legal acts), 2) texts that are used in the application of the law / procedural law (e.g., judicial decisions), and 3) texts on legal science (e.g., books on legal theory or law reviews).

This distinction serves as the basis for the typology created by Šarčevič[13], who complements the above 3 legal text categories with the specific rhetorical function they are supposed to perform, thereby distinguishing the following groups:

1) Primarily prescriptive texts including normative legal genres.
2) Primarily descriptive but also prescriptive (mixed) texts including genres that are used in the application of the law.
3) Purely descriptive texts including genres that describe or analyze the law – these are meta-texts that are not applied directly in the mechanism of the law.

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[12] Hans Kelsen: *General Theory of Norms.* Oxford, Clarendon, 1991.

[13] Susan Šarčević: *New Approach to Legal Translation*. Hague, Kluwer Law International, 1977.

Hence, the first group includes the broad spectrum of legal instruments whose dominant function is the imposition of obligations, such as statutory law, like legislation and codes, but treaties and contracts belong to this category as well. The second group is made up of legal texts with mixed functions, i.e., texts that are mostly descriptive in their function, but feature prescriptive elements as well. Typically, these are texts used in court procedures, such as, e.g., judicial decisions passed, or statements of claim submitted to court. Finally, the third group includes the legal genres that are of purely descriptive nature: texts which have been written about the law, but which do not play a direct role in the application of the law, such as, e.g., textbooks, articles on legal matters and other theoretical works on legal science.

There are various factors, both linguistic and pragmatic, calling for the need to simplify a given legal genre or text type. Based on the text typologies introduced above, let us now examine how the function of legal texts may or may not support the need for simplification and plain language use in the respective text categories. As understanding legal language obviously poses a challenge to lay people, it seems logical to conclude that simplification is justified in legal texts whose recipients are laypersons. From the 3 categories presented above (texts with either prescriptive, mixed or descriptive function), it is only the last one (texts with a purely descriptive function) where the recipients are almost exclusively legal professionals, while normative and mixed text types address laypersons as well.

Therefore, in the case of descriptive texts, plain language use is not crucial, because these texts are mostly read by legal professionals and students of law, who have got used to the traditionally complicated language of the law during their legal practice and studies, which implies that processing them does not require such strenuous efforts on their part. On the same note, the discipline of legal science requires a specific sophisticated register, consequently, paraphrasing it in plain language might even be shocking for those socialized on traditionally drafted theoretical works.

Let us now focus on the other two types of legal texts: prescriptive and mixed texts. The recipients of these text types are typically both lay persons and legal professionals, two target groups with different expectations regarding the texts. Examining the 2 text types separately, what happens frequently in the case of prescriptive (or normative) legal texts (as opposed to "mixed" or procedural ones), is that lay people must rely on themselves (on their own resources), because people rarely hire a lawyer to explain legal acts for them – that typically happens when they are involved in actual legal actions and procedures at court. Thus, in terms of legal genres, it is mostly legal acts that cause the biggest headache. Indeed, there seems to be a huge demand by laypersons to understand legal texts – as proven by the myriads of posts in legal chat forums, which clearly show that people try interpreting the law on their own, but finally give up in most cases, possibly because they are unable to absorb and navigate between the large number of cross-references (which again justifies the assumption that the comprehension of legal texts is partly a pragmatic question).

Therefore, on the one hand, it would be crucial to simplify the language of legislative genres so that laypersons are given a chance to comprehend it. However, the fact that the recipients of legal acts are not only laypersons but legal professionals

as well, raises further questions, because it also implies that the function of legislation is two-fold: while laypersons want to understand what practical effects the law has on their everyday lives, legal professionals use legislation – which is regarded as the prototypical genre in the legal domain[14] – as a primary referential source.

Drafting legal acts in two different versions might be a solution to overcome this anomaly: one version in conventional legal language used for references, and another in a register and style that is closer to that of everyday language, supplemented by explanatory notes for lay people.

In the second category of mixed texts, that is, in texts used in the application of the law (in procedural law) laypersons are generally represented by legal professionals (they act on behalf of them and very probably explain the relevant points of law to them), in which case it is a question whether laypersons expect their advocate to use plain language in the documents submitted to the court and in their verbal manifestations (e.g., pleadings) during the official procedures. We might as well presume that some clients are so used to the conventional patterns of legal language used in a particular legal situation that they would be disoriented if addressed in plain language, simply because communication involves the shared expectation that a particular speech situation will call forth a particular discourse involving set language patterns. To justify this presumption, we'll take a short detour from the path of written legal genres and quote a specific case of verbal courtroom interaction to show that lay persons do get confused when faced with legal professionals not applying the language patterns they are used to. In the case study described by Phillips[15], a journalist gives an account of his jury service, where the judge, in a conscious effort to use plain language and avoid legalese, gave instructions to the jury by saying: "…convict only if you are sure, if you are not sure, then acquit". After deliberating for almost a day, the jurors came back and said they were having trouble with the word 'sure'. Could the judge help them: for example, would 'beyond reasonable doubt' suffice instead of 'sure'? This example sheds some light on the true nature of legal language and the reason why the use of synonyms is so questionable in a legal context. Still, similarly to medical documents, clients must be granted the right to be able to understand documents affecting them directly, like, e.g., in the case of consumer contracts, wills, pleadings, judgments or court orders, hence, plain language use is justified in procedural legal texts, as well.

Based on the above, it might be concluded that, as a rule, plain language use is justified in normative and mixed legal texts, while in the case of descriptive texts it is not that crucial. Nevertheless, that would certainly be an oversimplification, because legal genres are rarely static, they continuously change, interact with and transform into each other as required by the mechanism of the law – a phenomenon that has

[14] E.g., Risto Hiltunen: The Grammar and Structure of Legal Texts. In: Peter Tiersma – Lawrence M. Solan (ed.): *The Oxford Handbook of Language and Law*. Oxford, Oxford University Press, 2012. 39–51. http://dx.doi.org/10.1093/oxfordhb/9780199572120.013.0004

[15] Alfred Phillips: *Lawyers' language*. London, Routledge, 2003. 43. http://dx.doi.org/10.4324/9780203220313

been described by a number of legal translation scholars[16]. In addition, the language and terminology of one genre may be taken over by the others due to constant cross-referencing. The best example to illustrate this is the case of the legal act, which, as mentioned before, is considered to be the prototypical and dominant genre of the legal domain and as such, nearly all legal genres belonging to mixed and descriptive text type-categories rely on it as their primary source: judgments, legal opinions and theoretical works on legal subjects all refer to legislation in one way or another, and by this constant cross-referencing the language of legislative texts becomes an organic part of the genres belonging to the other two text types, as well.

6. Linguistic tools in the service of better understanding

Once it has been defined which text type the given legal document dominantly belongs to, further decisions regarding plain language use can be taken more easily. The crucial question is whether simplified language endangers the legal content and the realization of the ultimate goal of the text. As mentioned before, lexical changes and the use of synonyms (simplified vocabulary) poses higher risks, therefore, if drafters want to play safe, they are to avoid terminological alterations. The good news is that even if synonyms are avoided, there are still a few linguistic tools left to improve comprehensibility without endangering the legal content. Empirical[17] and psycholinguistic experiments (mentioned in more detail under point 3) prove that comprehensibility can be improved even by minor grammatical and stylistic alterations, while macro-structural changes may also enable recipients to process the text with much less effort.

The safest grammatical tools are related to syntax: shorter sentences with a lower number of lexical units (maximum 20 words per sentence[18]), changing the word order, not separating the subject and the verb from each other, avoiding multiple negation, cross-references, embedded clauses and ellipsis – these will unquestionably help the reader to better understanding of the content. Making a conscious effort to use more verbs will counterbalance nominalization (a typical attribute of legal texts) with the added value of shorter sentences and a livelier text. Although implementing such changes in legal texts has certain limits – due to the fact that specialized languages cannot be expected to operate with the same grammatical rules as general languages –, they are rather safe as opposed to lexical and terminological alterations and is unquestionably beneficial for both laypersons and legal professionals.

Macro-structural changes should be handled a bit more prudently, as most legal genres have a standard and obligatory structural frame (many of them bearing similarities across legal cultures), which may only be diverted from under limited

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16 E.g., Vijay Kumar Bhatia: Interdiscursivity in professional communication. *Discourse and Communication,* vol. 21., no. 1. (2010), 32–50.; or Ződi, Zsolt: Jogi szövegtípusok. [Legal Text types] *Magyar Jogi Nyelv,* 2017/2. 26.

17 See research project K-112172 OTKA, Szabó–Vinnai (2018) op. cit.

18 E.g., Garner.

circumstances and in certain communicative situations. But text-organizational tools (i.e., using bullet points and a logical order in listing) combined with correct punctuation may be applied safely under all circumstances.

Finally, while lexical alterations are not recommended (or recommended only after careful evaluation of the consequences of the alterations), it is important to stress that once a term has been selected by the drafter, it should be used consistently throughout the whole text, since inconsistent terminology will have an extremely negative impact on comprehensibility.

7. Plain legal language and machine translation

So far, the paper mainly discussed plain legal style in the context of legal drafting, although the issue of plain legal language has several implications for legal translation, and, therefore, machine translation, too. In fact, so many that the scope of this study would not allow for a detailed discussion of the subject. Still, a few of these implications are presented below, because the challenges of simplifying legal language (deriving from the characteristics of the language of the law) are closely related to the challenges faced by both the human translator and the non-human translator software when translating legal texts. It is the multiple layers of characteristics of the legal language that make the case of legal translation special even among the other special fields of translation.

As it was discussed in the previous sections of this study, legal texts are hard to process (and translate) due to their complexity (both in the linguistic and the pragmatic sense): in addition to complicated content subordinated to specific legal systems and branches of law, legal text types and most legal genres feature a special and unique set of terminology, multi-word expressions and other language patterns (e.g., set phrases or collocations). Furthermore, the law operates in different social subsystems (i.e., it describes or regulates other disciplinary fields) whose complexity and language are also taken over and reflected by the language of the law[19]. Therefore, legal translation requires switching between a higher number of codes than translation in other fields of science, which might explain why the number of possible errors is also higher in the machine-translated legal texts. If legal translation is already a hard nut for machine translation engines due to the above-mentioned complexity of the legal language, the decisions to be made regarding plain language use very probably just add to the confusion by increasing the number of factors to be taken into consideration during the translation process (in terms of both vocabulary and style). In addition, as mentioned before, the spreading of plain language practices is a slow process, which suggests that texts drafted in the conventional legal drafting style are still dominant in translation memories. As these memories are used to teach translation engines, this also implies that complicated legalese will be reproduced by machine translation for some time to come, and it will probably take a long time until

[19] Heikki E. S. Mattila: *Comparative Legal Linguistics*. Hampshire, Ashgate Publishing, 2013. 97.

the recent efforts for simplification are rolled over into the corpora used by MT and other AI-based systems.

On the other hand, in the case of widely used languages, the available corpora of legal texts are now so extensive that it is easier to teach the machine to use the register of each individual legal genre respectively and thereby produce more authentic target texts in the appropriate register (the process further supported by the amazing efficiency of neural machine learning methods). Sadly, this is not the case regarding under-resourced languages (such as. e.g., Hungarian), and this will increase the gap between the quality of machine translations in certain language pairs as opposed to others.

The above facts, together with the general characteristics of the legal language, might explain why legal translations performed by the machine cannot be regarded as perfect or complete without human intervention – at least for some more time to come.

8. Conclusions

In summary, we can say that using plain language in legal texts remains a controversial issue. As argued in the paper, in the case of certain communicative situations it is more justified than in others, and legal text types, which provide a clue regarding the function of the text and its audience, may serve as useful guides in deciding to what extent plain language use is allowed without risking losing legal content. We could also see that even when the text type and the communicative function enables plain language use, the tools must be picked with extreme caution, and that serious obstacles arising from the nature of legal language stand in the way of simplification efforts, which make compromises hard to avoid. Furthermore, it has been pointed out that although grammatical and stylistic changes may improve comprehensibility a lot, they do not directly lead to better understanding, which, in the legal domain, is closely related to pragmatics. Added to that, it must also be acknowledged that the more complex and complicated the content, the more risks simplification poses.

As regards the 3 legal text type categories introduced in the paper, it has been suggested that in the case of normative and mixed text types (legislation and procedural documents), simplification might be justified regarding grammar and style, but as for terminology, legal drafters should be careful to eliminate the risks of misinterpretation, which is hardly possible by using synonyms and changing the form of the words. In the case of the third big category of purely descriptive texts, there is no crucial need to simplify, as the recipients are typically legal professionals themselves who are accustomed to reading and writing in traditionally complicated legal language, so it takes them less effort to process it. Plus, the theoretical nature of this text-type requires a more formal and sophisticated register anyway.

Nevertheless, even if plain language use is not the ultimate goal in each and every legal genre, there are situations where it is absolutely necessary. Such situations include, e.g., communication between the state and its citizens, and between service providers (banks, insurance companies) and their clients. Drafting documents used by these companies in clear and understandable language would lead to a win-win

situation, because a lot of money and work can be saved by effective communication, which is beneficial for both service providers and their customers.

Cost-efficiency and granting citizens easier access to the law are significant driving forces behind the plain legal language movement, having caused a rapidly increasing number of institutions to review their conventional drafting methods. Albeit with different intensity and at different pace in each country where the rule of law prevails, institutional style guides are published and constantly updated, projects and trainings are launched in the subject, and research groups including lawyers, linguists and language technology experts are created to survey possibilities, match them to demands and maintain a healthy balance between the clarity and accuracy of legal texts.

DOI: 10.55019/plr.2023.1.27-44

Pázmány Law Review
X. 2023. • 27–44

IS PLAIN LEGAL LANGUAGE EASY TO TRANSLATE?

Plain English features in machine translation of a contract into Polish

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Abstract:

This article examines two machine translations of the same English contract (contract of supply) made using DeepL Pro in March 2022 and March 2023. The contract was used in my practice as a legal translator trainer. It proved easy to understand but difficult to translate into Polish, where plain legal language is much less developed than in English. The history of plain language in the UK, the US and Poland is briefly presented. The analysis of features of plain English covers: expressions from general language when mixed with legal or technical language, the pronoun you referring to one party to the contract, and other features, like active voice and short sentences. Additionally, renditions of expressions denoting obligation or permission are analysed separately as an important element of contracts. The conclusion is that pronoun you in this context constituted a major source of difficulty and was translated in many ways. The translations are also uneven in terms of register (formal legal language vs language of instructions) or forms of address (degree of politeness), which would make post-editing them demanding. Other problems that a post-editor would face include terminological inconsistency and increased number of nominalizations compared to source text. The active voice or length of sentences are unproblematic in MT. Both legal translators and MT providers should refer to existing plain Polish contracts for solutions.

Keywords: legal translation, contract translation, machine translation of legal texts, plain language, deontic modality

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1. Introduction

Since I started teaching legal translation, I have had many eye-opening moments. One of them was discovering that a plain English contract was difficult to translate for trainees. The problems did not concern source text (ST) comprehension but rendering it in Polish. It should not have been a surprise. Plain English appeared in contracts in the 1980s in response to critiques of their incomprehensibility for an average consumer ('gobbledygook', 'small print') and has had much success. Plain language contracts were found to be more intelligible than traditional legal writing. They are written in a more colloquial and reader-oriented style. Meanwhile, plain Polish only appeared in official texts around 2010 and did not make its way to contracts until 2020. Plain legal style is still developing, and plain Polish contracts are rare, so there is little reference material. Most Polish contracts still contain low-frequency vocabulary, rather complex sentences, and other features like those that champions of plain English criticized.

But what happens when a plain-language contract is machine-translated? Current machine translation (MT) engines are trained on large volumes of parallel texts, i.e., source texts and their human translations. How successful is DeepL Pro, a generic MT engine claiming to outperform competitors[1], in dealing with the plain language features that proved difficult for trainee translators? How well does it cope with a change of register towards a more informal one? And finally, has anything changed between March 2022 and March 2023, when the MT was done?

This article analyses translation solutions applied by DeepL Pro in a contract with some plain English features. Unlike in the case of trainees' translations, it is not a holistic assessment. The focus is on Polish renditions of specific plain language features. Drawing on my own experience in translating contracts, I try to assess how useful MT output would be if I were to post-edit it. But before embarking on a detailed analysis, it is useful to remind a few facts about plain language in general and in contracts in particular. The following section looks briefly at the history of plain language in the UK and the US, contrasting it with the much shorter history of plain Polish. Section 3 reviews some literature on the use of MT in legal texts, including in contracts, while section 4 looks at the features of plain contract language in two DeepL translations into Polish, trying to assess which ones cause problems in MT and which do not. Finally, section 5 summarises the findings and presents conclusions.

2. Plain language: from official communication to contracts

As defined by the International Plain Language Federation, "[a] communication is in plain language if its wording, structure, and design are so clear that the intended

[1] Results of blind tests conducted in 2021 with the participation of professional translators, https://www.deepl.com/en/whydeepl , for more information see https://translatepress.com/deepl-translator-review/

readers can easily find what they need, understand what they find, and use that information".[2] The ISO standard on plain language adds to this definition that "plain language focuses on how successfully readers can use the document rather than on mechanical measures such as readability formulas", that it "saves time or money (or both) for readers and organizations", and even that "the process of translating is more efficient for plain language documents than for documents that are difficult to understand".[3] The last claim is what this article tries to examine in the context of contracts.

Legal English is often referred to as legalese. The name suggests a negative assessment and indeed, it is described as "a peculiarly obscure and convoluted variety of English"[4] or even "a form of prose so jumbled, dense, verbose, and overloaded that it confuses and frustrates most everyday readers and even many lawyers"[5]. Its syntactic complexity was even found to be harder for readers to process than low-frequency vocabulary.[6] So plain language and legalese can be seen as the opposite ends of a spectrum.

2.1. Plain English

Plain language was in fact a response to critiques of the level of difficulty or incomprehensibility of official documents. In his 1940 *Brevity* memo[7], Winston Churchill complained about the time and effort needed to find information in reports, asking for "short, conversational phrases", no "woolly phrases" or "padding", as well as better organisation of documents – with headings, shorter paragraphs and detailed information in appendices rather than in the body. In the US, John O'Hayre published stories showing how members of the administration struggled to understand documents they worked with.[8] Legal language and bad legal drafting were criticised even earlier, including by lawyers themselves[9], and when given a choice between

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2 https://www.iplfederation.org/plain-language/

3 ISO 24495-1:2023 *Plain language – Part 1: Governing principles and guidelines*, https://www.iso.org/obp/ui/en/#iso:std:iso:24495:-1:ed-1:v1:en:ref:3

4 María José Marín: Legalese as seen through the lens of corpus linguistics: an introduction to software tools for terminological analysis. *International Journal of Language & Law (JLL)*, vol. 6., August (2017) 19.

5 Joseph Kimble: *Lifting the Fog of Legalese. Essays on Plain Language*. Durham, Carolina Academic Press, 2006. XII.

6 Eric Martínez – Francis Mollica – Edward Gibson: Poor writing, not specialized concepts, drives processing difficulty in legal language. *Cognition*, vol. 224. (2022) 105070. https://doi.org/10.1016/j.cognition.2022.105070

7 Available at: bit.ly/44TS0pk; Churchill's other calls for brevity reported at: https://blog.nationalarchives.gov.uk/churchills-call-for-brevity/

8 John O'Hayre: *Gobbledygook Has Gotta Go*. U.S. Bureau of Land Management, 1966.

9 Tom Goldstein – Jethro K. Lieberman: *The Lawyer's Guide to Writing Well* (3rd ed.). Oakland, University of California Press, 2016. 3–4., 15–19.; Kimble op. cit. 175–179.

legalese and plain language versions of the same documents, a majority opted for plain language.[10]

In the 1980s, the efforts to introduce plain language in the UK focused on forms, leaflets and standard letters used by the government and local authorities. Simplified official forms were found to generate savings.[11] Several insurance companies followed suit with plain English insurance policies and discovered that not only customers but also their own staff found them "easier to work with".[12] The next step was regulations aiming to ensure availability of certain information in consumer credit agreements to make it "easily legible". Even before they entered into force, the Minister for Consumer Affairs urged trade associations and credit companies to go further and make such information easy to understand too.[13]

The analysis of several standard contracts used by trade associations, undertaken by the Plain English Campaign, revealed that they were slightly or much less readable than the least readable newspapers and much less readable than popular newspapers. A more fine-grained analysis of the language used in contracts produced a list of five major difficulties:

- vocabulary that did not appear in everyday speech (e.g., *hereinafter*, *aforesaid*, *notwithstanding*, *to determine* meaning 'to terminate', *to distrain*, *lien*, etc.);
- long and complex sentences (often with 100 words) with many clauses, as opposed to the standard of 15-20 words in popular newspapers;
- passive voice and avoiding you/we;
- "lack of normal punctuation", especially commas;
- cross-references to other parts of the same document and to laws.[14]

The authors also criticized, citing examples, two related phenomena:

- repetition (up to ~~but not exceeding~~ the cost of…; full ~~and absolute~~ authority); and
- redundancy (strictly in accordance with the terms of this contract ~~without deduction~~; any loss or damage ~~occasioned~~).[15]

In the US, the idea of plain language received much publicity thanks to the plain language promissory note introduced by Citibank in 1975. The bank's team "stripped the prior version, a dense and essentially unreadable document, of many substantive provisions and cleansed the remaining verbiage", sparking interest in rephrasing

[10] Kimble op. cit. 7–8.

[11] https://www.plainenglish.co.uk/about-us/history/timeline.html

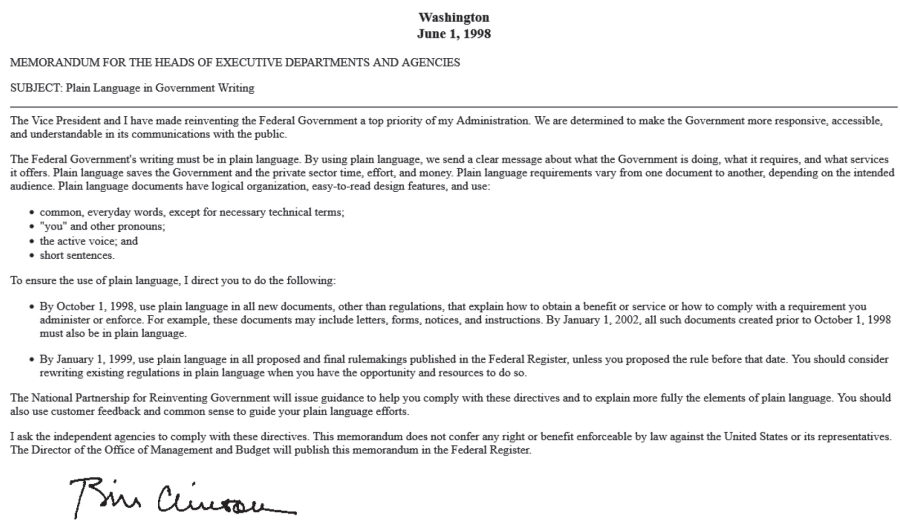
[12] Martin Cutts – Chrissie Maher: *Small Print: The Language and Layout of Consumer Contracts*. National Consumer Council, 1983. 2.

[13] Ibid. 4–5.

[14] Ibid. 5.

[15] Ibid. 11.

contracts to be clearer.[16] After a period of federal-level initiatives in the field of plain language being promoted and withdrawn (though often continued at state level and promoted by law professors), there has been steady progress in its implementation since the late 1990s, when federal administration was requested to write plainly (Figure 1). Plain language subsequently became mandatory in legislation, reports or on websites thanks to the Plain Writing Act of 2010 and several Executive Orders. Importantly, in both UK and US, glossaries[17] were prepared with explanations of and suggested replacements for more formal words and legal terms, including Latin expressions and words of Latin origin.



Washington
June 1, 1998

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Plain Language in Government Writing

The Vice President and I have made reinventing the Federal Government a top priority of my Administration. We are determined to make the Government more responsive, accessible, and understandable in its communications with the public.

The Federal Government's writing must be in plain language. By using plain language, we send a clear message about what the Government is doing, what it requires, and what services it offers. Plain language saves the Government and the private sector time, effort, and money. Plain language requirements vary from one document to another, depending on the intended audience. Plain language documents have logical organization, easy-to-read design features, and use:

- common, everyday words, except for necessary technical terms;
- "you" and other pronouns;
- the active voice; and
- short sentences.

To ensure the use of plain language, I direct you to do the following:

- By October 1, 1998, use plain language in all new documents, other than regulations, that explain how to obtain a benefit or service or how to comply with a requirement you administer or enforce. For example, these documents may include letters, forms, notices, and instructions. By January 1, 2002, all such documents created prior to October 1, 1998 must also be in plain language.

- By January 1, 1999, use plain language in all proposed and final rulemakings published in the Federal Register, unless you proposed the rule before that date. You should consider rewriting existing regulations in plain language when you have the opportunity and resources to do so.

The National Partnership for Reinventing Government will issue guidance to help you comply with these directives and to explain more fully the elements of plain language. You should also use customer feedback and common sense to guide your plain language efforts.

I ask the independent agencies to comply with these directives. This memorandum does not confer any right or benefit enforceable by law against the United States or its representatives. The Director of the Office of Management and Budget will publish this memorandum in the Federal Register.

Figure 1. President Clinton's 1998 memorandum requiring administration to use plain language

[16] Carl Felsenfeld: The Plain English Movement in the United States. *Canadian Business Law Journal*, no. 6 (1981–1982), 409.

[17] Plain English Campaign prepared *The A to Z guide to legal phrases* https://tinyurl.com/4wx7fhxn , while a list of alternatives is presented in Kimble op. cit. 165—174.

2.2. Plain Polish

Plain Polish remained no more than a topic of discussions and debates for a long time,[18] echoing similar debates in English-speaking countries.[19] The 2002 Regulation on the Principles of Legislative Technique introduced a requirement to use clear, communicative, and adequate language in legislation, but left the assessment to drafters themselves. The 2014 Act on Consumer Rights went a step further and provided examples of information for customers in understandable language.

It was not until around 2010 that any practical recommendations were prepared and any efforts at their implementation made. The need for change became apparent when incomprehensibility of documents on EU funds was blamed for their poor uptake in Poland. Thanks to efforts of the Plain Polish Lab (PPL) and the willingness of local and central authorities, official communication became much more accessible. Banks and insurers, like their UK and US counterparts in the past, embraced plain language as a device that saves time and money. It was banks that made a commitment to introduce plain Polish in communication with their customers and developed the first contracts in plain Polish together with PPL experts.[20]

In defense of Polish contracts, the vocabulary is not as different from everyday language as certain lexical items from legalese compared to general English. There are no pronominal adverbs like the English *hereinafter*, *thereof*, *whereupon*, etc., doublets/triplets are not a standard feature, and – due to different drafting conventions[21] – there is no need to list all possible cases to make contracts self-sufficient[22], all-encompassing, and precise[23], so there are no strings of quasi-synonyms.

The language of Polish contracts is often based on provisions of the 1964 Civil Code, which is not archaic yet, even if not very recent. Importantly, the Civil Code applies to any matters not regulated in contracts or replaces contractual provisions that are inconsistent with it (Article 58(1) of the Code), while interpretation of contracts cannot be based on the explicit wording only but should take into account the 'parties' intentions and the aim of the contract (Article 65(2)). This certainly

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[18] For a summary in legislative context, see Marta Andruszkiewicz: Problem jasności w języku prawnym – aspekty lingwistyczne i teoretycznoprawne. [The problem of clarity in legal language – linguistic and legal theoretical aspects] *Comparative Legilinguistics*, vol. 31. (2017) 7–25. http://dx.doi.org/10.14746/cl.2017.31.1

[19] Joseph Kimble: A Curious Criticism of Plain Language. *Legal Communications and Rhetoric: JALWD*, vol. 13. (2016) 181–192.

[20] For a comparison of readability indices of a plain bank account contract and typical Polish contracts, see Anna Setkowicz-Ryszka: Why can plain English in contracts cause difficulties in translation into Polish? *Lingua Legis*, vol. 30 (2022), 53–57.

[21] Distinction between "concise" drafting style in civil law countries and "precise" style in common law is discussed in Deborah Cao: *Translating Law*. Clevedon, Multilingual Matters, 2007. 28–29.

[22] Giuditta Cordero-Moss (ed.): *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*. Cambridge University Press, 2011. 116.

[23] Christopher Williams: Legal English and Plain Language: an introduction. *ESP Across Cultures*, no. 1. (2004) 111–124., 121.

reduces the responsibility compared to that of drafters of common law contracts, who need to ensure that the contract contains all information needed to understand its meaning[24], so old expressions that stood out in court are preferred as safer than untested plain English alternatives.[25]

That said, there is still much room for improvement in the clarity of Polish contracts. The advice from plain Polish experts as to the choice of linguistic means includes avoiding passive voice, nominalizations, impersonal forms, long words, and complex sentences, while providing paraphrases of specialist terms, using everyday words, addressing the reader directly, as well as making sure conditional sentences start with the condition ("if… then…").[26]

3. Using MT to translate legal texts

The ISO defines post-editing (PE) as "edit[ing] and correct[ing] machine translation output", either "to obtain a product comparable to a product obtained by human translation" (full PE) or "to obtain a merely comprehensible text without any attempt to produce a product comparable to a product obtained by human translation" (light PE).[27] It is stressed that MT errors differ from human errors. Frequent MT errors include transfer errors (omissions, additions, distortions), wrong terminology, lack of terminological consistency and textual coherence, as well as inadequate – too colloquial or too formal – register and wrong forms of address.[28]

In general, contracts are repetitive texts, so MT of contracts – especially the standard provisions – should be fairly successful. Back in 2014, a study on the MT of four contracts (in the PL-EN direction) showed that although approximately 90% of sentences needed PE, the share of nonsense sentences was low – 8% in total - with the highest share of nonsense sentences in a contract type without an English equivalent: *umowa o dzieło* [contract for a specific task]. Most errors concerned wrong choice of words or phrases – including imprecise legal terms – or missing words or phrases. Unsurprisingly, terminological incongruity between the two legal systems was not addressed in MT output.[29] Yet, more recent literature on post-editing neural MT

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[24] Peter M. Tiersma: *Parchment, Paper, Pixels: Law and the Technologies of Communication*. University of Chicago Press, 2010. 126.

[25] Williams op. cit. 118–120.

[26] Tomasz Piekot – Grzegorz Zarzeczny – Ewelina Moroń: Standard 'plain language' w polskiej sferze publicznej. [Plain language' standard in the Polish public sphere] In: Monika Zaśko-Zielińska – Krzysztof Kredens (ed.): *Lingwistyka kryminalistyczna. Teoria i praktyka*. [Forensic Linguistics. Theory and practice.] Wrocław, Quaestio, 2019. 202–203.

[27] ISO 18587:2017 *Translation services – Post-editing of machine translation output – Requirements*, definitions available at: https://www.iso.org/obp/ui/en/#iso:std:iso:18587:ed-1:v1:en

[28] Łucja Biel: Postedycja tłumaczeń maszynowych. [Post-dispatch of machine translations.] *Lingua Legis*, vol. 29. (2021) 11–34., 20., 25.

[29] Joanna Sycz-Opoń: Machine Translation – Can It Assist in Professional Translation of Contracts? *International Journal of Legal Discourse*, vol. 20. (2014) 181–200.

(NMT) output in other language pairs stresses that post-editing machine-translated legal documents leads to gains in both quality of the translations and productivity.[30]

However, in EN-PL language pair, an evaluation of the effort needed to correct NMT output in the context of European Union texts revealed that most mistakes concerned accuracy and terminology, including inconsistent use of terminology, though a modest productivity gain was reported.[31] Also for other languages (e.g., Slovene, Dutch), EU translators using NMT complained about "polysemic misrepresentations" leading to terminology errors, "complete semantic blunders", "neural neologisms", problems with proper names, abbreviations, and even additions or omissions that sometimes changed the meaning to the opposite.[32] That seems to confirm findings about accuracy errors being more demanding to correct than fluency errors.[33] It should also be noted that Polish is an inflectional language, so a change of one element in a sentence can require changes to other elements to maintain agreement.

4. Features of plain English contracts in MT

This section seeks to analyse how successful DeepL MT engine was in translating in March 2022 and March 2023 a contract which, although not fully adherent to the rules of plain English, is closer to plain English than to legalese. It is a standard contract of supply entered into via a UK website which matched wood pellet buyers and suppliers, governed by Scottish law. (The website no longer exists, the contract was retrieved for teaching purposes in 2019.) The Gunning Fog index for a sample of this contract is 9.3 on a scale from 0 to 20, the Flesch reading ease index is 65.1, so it should be easily understood by 13- to 15-year-old students, while the average sentence length is 15 words.[34] Naturally, readability indices are a crude measure of how plain a text is, as they focus on surface-level features, such as sentence or

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30 See special issue of *Revista de Llengua i Dret, Journal of Language and Law*, vol. 78. (2022), including Jeffrey Killman – Mónica Rodríguez-Castro: Post-editing vs. translating in the legal context: Quality and time effects from English to Spanish. *Revista de Llengua i Dret, Journal of Language and Law*, *78*, 56–72. https://www.doi.org/10.2436/rld.i78.2022.3831 ; Vilelmini Sosoni – John O'Shea – Maria Stasimioti: Translating law: A comparison of human and post-edited translations from Greek to English. *Revista de Llengua i Dret, Journal of Language and Law*, *78*, 92–120. https://doi.org/10.2436/rld.i78.2022.3704

31 Karolina Stefaniak; Evaluating the usefulness of neural machine translation for the Polish translators in the European Commission. *Proceedings of the 22nd Annual Conference of the European Association for Machine Translation*, 2020. 263–269.

32 Mateja Arnejšek – Alenka Unk: Multidimensional assessment of the eTranslation output for English-Slovene. *Proceedings of the 22nd Annual Conference of the European Association for Machine Translation*, 2020. 383–392. 386.

33 For an overview see Valentina Ragni – Lucas Nunes Vieira: What has changed with neural machine translation? A critical review of human factors. *Perspectives*, vol. 30., no. 1. (2022) 137–158. 142–149.

34 Setkowicz-Ryszka op. cit. 53. Measures from free online tools: https://tinyurl.com/4w8rmff2

word length, while neglecting textual coherence or content.[35] A closer examination revealed that there are almost no binomials (except for *any and all* twice), no quasi-synonyms (except for *valid and enforceable* and *enforce or execute*, each used once), and no pronominal adverbs (except for one occurrence of *hereof*). The whole 3,426-word contract was analysed using memoQ Live Docs feature, which enables creating a parallel corpus.[36] The "find" function enables finding the relevant features and translation solutions can be examined manually.

The following subsections focus on Polish translations of plain English features listed in President Clinton's memorandum, namely passages where "common, everyday words" are mixed with legal or technical terminology and phraseology (4.1 and 4.2), pronouns instead of names of parties (4.3). Due to the importance of linguistic expressions of obligation, prohibition or permission in contracts, modal verbs and other markers of modality are also analysed (4.4), while other, mostly unproblematic, plain language features are discussed jointly (4.5). Original spelling from ST is retained, while backtranslations are provided in square brackets.

4.1. "Common, everyday words, except for necessary technical terms" – scenario 1: legal language

From the point of view of keeping the right register the fact that colloquial expressions appear next to formal ones seems the main difficulty for a translator dealing with a plain(er) English original. Given the scarcity of plain contracts in Polish and their concentration in banking, there is little reference material for translating a contract of supply. In DeepL renditions of mixed passages where legal terms appear into Polish there are no colloquial expressions at all, so the style is closer to the English legalese. The more colloquial English expressions in the examples below, such as:

- *do not pay* [formal equivalent: *fail to pay*],
- *to chase the payment* [*to collect the payment*],
- *in line with* [*in accordance with/pursuant to*],
- *to change* [*to amend*],
- *as they relate to* [*to the extent they concern*],
- *You are not happy with* [*you disagree*/*do not consent*]

are changed to a more formal style, so the effort made by the original drafters to include informal expressions where possible is lost. Interestingly, certain Polish expressions, like *w przypadku* [*in the event of*], must be followed by a noun, which increases the degree of formality with a nominalization[37] used where the ST may contain a verb, as in example (1). Apart from nominalizations, formality is increased by the use of words like *niniejsza*, *powiadomić*, *wszelkie*, *skutkować*, all of which have

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[35] Kathy Conklin – Richard Hyle – Fabio Parente: Assessing plain and intelligible language in the Consumer Rights Act: a role for reading scores? *Legal Studies*, vol. 39. (2018) 378– 397. http://dx.doi.org/10.1017/lst.2018.25

[36] https://docs.memoq.com/current/en/Places/resconsole-livedocs.html

[37] Additional nominalizations are italicized.

less formal equivalents. Moreover, examples (2) and (3) also demonstrate confusion with 'parties' names (see subsection 4.3).

(1) ST: In the event that You do not pay any due sums via XXX, Supplier reserves the right to chase the payment directly.
DeepL-2022, DeepL-2023: W przypadku *nieuiszczenia* przez Klienta należnych kwot za pośrednictwem XXX, Dostawca zastrzega sobie prawo do bezpośredniego *dochodzenia* zapłaty.
[In the event of non-payment by the Client of due sums via XXX, Supplier reserves the right of direct collection of the payment.]

(2) ST: You may not withhold payment in the event of a dispute and any late payments may accrue interest and other charges in line with government late payment guidelines.
DeepL-2022: W przypadku sporu Dostawca nie może wstrzymać płatności, a wszelkie opóźnienia w płatnościach mogą skutkować *naliczeniem* odsetek i innych opłat zgodnie z rządowymi wytycznymi.
[In the event of a dispute Supplier may not suspend payment and any delay in payment may result in the accrual of interest and other charges in accordance with governmental guidelines.]
DeepL-2023: Nie wolno wstrzymywać płatności w przypadku sporu, a od wszelkich opóźnionych płatności mogą być naliczane odsetki i inne opłaty zgodnie z rządowymi wytycznymi dotyczącymi opóźnień w płatnościach.
[It is not permitted to suspend payment in the event of a dispute and on any late payments there may be accrued interest and other charges in accordance with governmental guidelines concerning delays in payments.]

(3) ST: If Supplier change this Contract of Supply as they relate to your Delivery, Supplier will give you reasonable advance notice of the changes and provide details of how to cancel if You are not happy with them.
DeepL-2022: Jeżeli Dostawca zmieni niniejszą Umowę Dostawy w zakresie dotyczącym Dostawy Dostawcy, powiadomi Dostawcę o zmianach z odpowiednim wyprzedzeniem i poda szczegóły dotyczące *sposobu odstąpienia* od Umowy, jeżeli Dostawcy nie odpowiadają te zmiany.
[If Supplier amends this Contract of Supply to the extent concerning Supplier's Supply, it will notify Supplier about the amendments appropriately in advance and provide details concerning the manner of withdrawal from the Contract if the amendments do not suit Supplier.]
DeepL-2023: Jeśli Dostawca zmieni niniejszą Umowę Dostawy w zakresie dotyczącym Dostawy, powiadomi o zmianach z odpowiednim wyprzedzeniem i poda szczegóły dotyczące *sposobu odstąpienia* od Umowy, jeśli nie będą one satysfakcjonujące dla Dostawcy.
[If Supplier amends this Contract of Supply to the extent concerning the Supply, it will notify about the amendments appropriately in advance and provide details concerning the manner of withdrawal from the Contract if they are not satisfactory for Supplier.]

As observed by Sycz-Opoń, system-bound legal terms, like *waiver of breach*, *reasonable*, *legal duty of care* or *fraudulent misrepresentation*, are not provided with explanations for recipients from a different legal system or accompanied by the original terms in brackets. They are translated literally, which may cause misunderstandings, especially with *waiver of breach*, which should be explained as, e.g., *waiver of the rights available to a party in case of the other party's breach of contract*. This does not concern plain language features in the ST, but since plain language is also concerned with substance, lack of explanations makes the translation more difficult to understand.

4.2. "Common, everyday words, except for necessary technical terms" – scenario 2: technical language

What happens with fragments where there appear technical terms concerning wood pellet delivery is quite different. In translation into Polish, the language remains less formal and resembles that used in instructions (which may explain the word *User*, discussed in the next subsection). It is in these fragments that verbs in 2nd person singular appear most often in the 2022 rendition. The following examples illustrate this (and inconsistent translations of *Wood Pellets*, italicized).

(4) ST: If Wood Pellets are left in the delivery pipe when Supplier is unable to blow any more into your store, Supplier will have to clear the pellets from the pipe, onto the ground where the pipes lay, if you do not provide a more suitable receptacle.
DeepL-2022: Jeżeli *peletki drzewne* pozostaną w rurze dostawczej, a Dostawca nie będzie w stanie wdmuchać ich do magazynu, Dostawca będzie musiał usunąć *peletki* z rury na ziemię, na której leżą rury, jeżeli nie dostarczysz innego odpowiedniego pojemnika. [backtranslation not needed, *do not provide* retained in 2nd person singular]
DeepL-2023: Jeśli *pelety drzewne* pozostaną w rurze dostawczej, gdy Dostawca nie będzie w stanie wdmuchiwać ich więcej do Państwa magazynu, Dostawca będzie musiał usunąć *pelety* z rury na ziemię, na której leżą rury, jeśli nie zapewnią Państwo bardziej odpowiedniego pojemnika. [backtranslation not needed, *do not provide* changed to 3rd person plural with the honorific *Państwo*]

(5) ST: It will be Your responsibility to dispose of these pellets, at your cost.
DeepL-2022: Klient będzie odpowiedzialny za pozbycie się tych *peletek* na własny koszt.
DeepL-2023: Klient będzie odpowiedzialny za pozbycie się tego *granulatu* na swój koszt.
[both versions: Client will be responsible for getting rid of these pellets at their own cost.]

(6) ST: You must provide your own means of moving the bags from kerbside to where they will be stored.
DeepL-2022: Użytkownik musi zapewnić sobie własny środek do przenoszenia worków z krawężnika do miejsca ich składowania.

[User must provide their own means for carrying bags from the kerb to the place of their storage.]
DeepL-2023: Należy zapewnić sobie środki do przenoszenia worków z krawężnika do miejsca ich składowania.
[One should provide one's own means for carrying bags from the kerb to the place of their storage.]

4.3. You and other pronouns

For many types of contracts regulated in the Polish Civil Code. the names of parties are mostly standardized. For instance, in *umowa dostawy* [contract of supply], the parties are called *odbiorca* [recipient] and *dostawca* [supplier], except for cases where pronouns, especially *it* are used to avoid repeating the party's name. This influences verb forms: verbs are in 3rd person, singular or plural. There are already some contracts where 'we' and 'you' are used to refer to parties, but most of them relate to banking products. Therefore, translating *you* requires human translators to adopt a top-down strategy and either use the parties' names as in the Civil Code, or *ty* [*you*] needs to be retained. Somewhat in between the two solutions, it is possible to use honorific forms of address with a verb in 3rd person singular – for *Pan/Pani* – or plural – for *Państwo*. This form of address is used in the Schedule to the Act on Consumer Rights of 2014,[38] containing examples of information about consumers' right to withdraw from a contract of sale.

The ST is mixed in that one of the parties is referred to as *Supplier*, while the other as *you*. The pronoun *we* is probably not used to avoid confusion, because the contract is made via an intermediary. In both DeepL versions, *Supplier* is translated consistently and correctly as *Dostawca*. What happens with *you* is that its direct equivalent, *ty,* appears in the definitions and some other provisions in both 2022 and 2023 versions, while the honorific *Państwo* features quite often in the 2023 version. We also find various parties' names as translations of *you*. Some are safe general equivalents, like *Klient* [Client] or *Kontrahent* [Counterparty], some are wrong, like *Subskrybent* [Subscriber], *Dystrybutor* [Distributor] or *Użytkownik* [User]. There are even cases of *you* mistranslated as *Dostawca* [Supplier] (see examples (2) and (3) in subsection 4.1). The only correct name of the party receiving the supply – *Odbiorca* – appears in the 2022 version, but as a translation of *Customer* in the ST. Additionally, in Polish, the pronoun can be omitted, as the verb form alone denotes it. Verbs in 2nd person singular appear in both MT versions.

The full set of solutions and numbers of instances they are used is provided in Table 1. Only nominative forms of the names are provided, but they appear in the appropriate cases in the text. Instances when *you* appears in the same sentence as Supplier and without it are grouped separately, to see what happens when a contextual cue is available or not. Judging by various names used to refer to that party, this

[38] Kancelaria Sejmu: USTAWA z dnia 30 maja 2014 r. o prawach konsumenta: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20140000827/U/D20140827Lj.pdf

cue is not decoded. Different total numbers of solutions result from the fact that sometimes the part containing *you* can be dropped, like when *the terms under which Supplier will supply and deliver Wood Pellets to You* are translated as *warunki, na jakich Dostawca będzie dostarczał Pellet drzewny* [terms under which Supplier will supply Wood Pellets]. Some sentences were reformulated to contain the adjective *własny* or pronoun *swój* [both meaning *one's own*], eliminating the need to choose any equivalent.

Table 1. Renditions of pronoun 'you' in 2022 and 2023 DeepL translations of the contract of supply

Type	Example(s)	DeepL-2022	DeepL-2023
Definition	"You/Your/Yours" – Means the person or company…	"Ty/Twoja/Twojego" - oznacza osobę lub firmę	"Ty/Twoja/Twój" - Oznacza osobę lub firmę…
You/your +Supplier	"The price payable by You to the Supplier will be the price as set out on […] website…" "If your Order Confirmation does not include a delivery date Supplier will schedule your delivery..."	Ty (4) Twoje (1) Verb in 2nd sg (6) - - *Dostawca (4) *Dystrybutor (1) Klient (29) Kontrahent (6) *Użytkownik (5)	Ty (2) Twoje (1) Verb in 2nd sg (4) Verb in 2nd pl (1) Państwo (11) *Dostawca (1) - Klient (23) Kontrahent (1) *Użytkownik (6)
You/your -Supplier	"In such an event You would be liable for a reasonable failed delivery fee." "This provision does not affect your other statutory rights as a consumer."	Ty (1) Twoje (5) Verb in 2nd sg (5) - Klient (8) Kontrahent (2) - *Użytkownik (5)	Ty (4) Twoje (5) Verb in 2nd sg (10) Państwo (3) Klient (6) - *Subskrybent (2) *Użytkownik (5)

* non-recommended solutions

The diverse solutions would make post-editing these translations challenging: even if most are acceptable, they cannot be used interchangeably in the same text and any change of the name may entail other changes, especially in verb forms. Counterintuitively, a simple pronoun causes major difficulty in MT when used in a type of text where pronouns rarely appear in the target legal culture.

4.4. Deontic modality markers

Modal verbs and other constructions expressing deontic modality (obligation, permission, prohibition) are an important feature of texts which establish rights and impose obligations, including contracts. In English this was typically achieved by modal verbs: *shall*, *must*, *can* and *may*, with *not* where necessary, or non-modal verbs

to agree or *to undertake* followed by a verb can also be used to express obligation.[39] Supporters of plain legal language criticized especially *shall* as a confusing and often misused verb and suggested replacing it with *must*.[40] One of the victories of plain language movements may be *must* in statutes enacted in the UK now.

The Polish linguistic means used to express deontic modality are completely different: the main ways are verbs in present or future tense indicative, and constructions such as *być (z)obowiązanym do* [be obliged to], while the verb *musieć* [must] is rare in legislation or contracts. Permission is often expressed by the verb *móc* [can/may] in the present or future tense, though other constructions are possible, e.g., *mieć prawo* [to have the right].[41]

In the ST, the most frequent modal verbs are *may*, *shall* and *can*, but *must* appears as well, along with several other expressions. The distribution of deontic modality markers and their Polish renditions by DeepL is presented in Table 2. Less felicitous solutions are marked with asterisks, but they are not errors.

Table 2. Renditions of deontic modality markers in 2022 and 2023 DeepL translations of the contract of supply

Deontic modality marker	DeepL-2022	DeepL-2023
may (15)	*móc* in present tense (15)	*móc* in present tense (15)
shall (12)	present tense of the main verb (8) future tense of the main verb (4)	present tense of the main verb (4) future tense of the main verb (8)
can (5)	*móc* in present tense (3) *można* – impersonal form of *móc* (1) *możliwość* [possibility] (1)	*móc* in present tense (3) *można* – impersonal form of *móc* (1) *możliwość* [possibility] (1)
must (3)	*musieć* in present tense (2) *mieć obowiązek* [have a duty] (1) -	*musieć* in present tense (1) - **należy* – modal verb, impersonal form of *should* (2)
have the right to + verb (4)	*mieć prawo* in present tense + verb (1) *mieć prawo* in present tense + deverbal noun (3)	*mieć prawo* in present tense + verb (2) *mieć prawo* in present tense + deverbal noun (2)
agree (3)	*zobowiązać się* in present tense (2) **zgadzać się* in present tense (1)	*zobowiązać się* in present tense (2) **zgadzać się* in present tense (1)
would be liable (1)	*być zobowiązanym* in future tense (1)	*być zobowiązanym* in future tense (1)

[39] Aleksandra Matulewska: Deontic modality and modals in the language of contracts. *Comparative Legilinguistics*, vol. 2. (2010) 75–92.

[40] Kimble (2006) op. cit. 42.; Natalia Zych: Idea plain language a teksty prawne. *Przegląd Legislacyjny*, no. 3. (97) (2016), 65–90., 74.

[41] Matulewska op. cit.; Łucja Biel: The textual fit of translated EU law: a corpus-based study of deontic modality. *The Translator*, vol. 20., no. 3. (2014) 332–355. http://dx.doi.org/10.1080/13556509.2014.909675

cannot (1)	*nie można* – impersonal negated form (1)	*nie może* – finite negated form (1)
can not be held liable (1)	*ponosić odpowiedzialność* [be liable] in present tense + negation (1)	*ponosić odpowiedzialność* [be liable] in present tense + negation (1)
may not (1)	*móc* in present tense + negation (1)	**nie wolno* – impersonal form + negation (1)
will have to (1)	**musieć* in future tense (1)	**musieć* in future tense (1)
is not obliged to (1)	*być zobowiązanym* in future tense (1)	*być zobowiązanym* in future tense (1)
will be under no obligation (1)	*być zobowiązanym* in future tense + negation (1)	*być zobowiązanym* in future tense + negation (1)

There are also numerous instances of the future tense, most of which are rendered as the future tense in both Polish versions, with two exceptions – both in the same places in the 2022 and 2023 renditions. The first one is example (6) in subsection 4.2. In both Polish versions a nominalization – is introduced. In the other one, the adverb *usually* seems to cause the use of the present tense:

> ST: The Delivery Date will usually be within the window of dates in Your Order Request…
> DeepL-2022: Data Dostawy zwykle mieści się w przedziale dat podanym w Zamówieniu Klienta…
> [The Delivery Date is usually within the date range stated in the Client's Order…]
> DeepL-2023: Data Dostawy zazwyczaj mieści się w przedziale dat podanych w Zamówieniu…
> [same as above, but: stated in the Order…]

Summarizing, what happens with deontic modality markers in both Polish translation by DeepL is quite typical for Polish contracts and, as can be seen in Table 2, there are small differences between them. Unlike parties' names, deontic modality markers need not be standardized, so replacing *shall* with other modal verbs or expressions in the ST would not make post-editing very demanding.

4.5. Other plain language features

This section deals with the active voice, nominalizations, and short sentences. The active or passive voice is retained in most cases and the only changes are those required by rules of the target language. As an example, in English a *contract is governed* by a certain law, while in Polish the active voice is used: *umowa podlega prawu…* [*contract submits to the law of…], or someone *is held liable* in English, while in Polish this person *ponosi odpowiedzialność* [bears reponsibility]. Sometimes, an English passive construction is rendered differently in the two MT versions: *Payment will be deemed to have been received* was translated in 2022 as Uznaje się, że płatność została otrzymana [*One regards that payment has been received], so the

passive form became an impersonal one, while in 2023 as *Płatność będzie uważana za otrzymaną* [Payment will be considered as received], so the passive form was retained.

Less adherence to plain language rules can be seen in the translations of infinitives, which are often nominalized. For example, the phrase *has the right to cancel the Delivery* becomes *ma prawo do anulowania Dostawy* [has the right of cancellation of the Delivery] in two out of three instances in the 2022 version and in all three instances in the 2023 version, even though in this context an infinitive can be used in Polish. Throughout the contract, many verbs, both infinitives and finite forms are replaced with deverbal nouns, including deverbal nouns (gerunds), which is a typical feature of the Polish official register. Some nominalizations were also marked in earlier examples.

A special case of nominalization is when the verb appears in a heading. Headings are not a key part of a contract (and that they do not influence its interpretation), but they are an important feature of the layout. The difficulty in dealing with plain English lies with the preference for finite verb forms rather than deverbal nouns. In Polish contracts, headings usually contain nouns, not sentence-like structures. The examples provided below show that both DeepL renditions are very similar, though with only two examples no generalizations can be made.

The first heading like that is *How the contract is formed between You and Supplier*, translated with a finite verb form in both versions: *W jaki sposób powstaje umowa pomiędzy Klientem a Dostawcą* (DeepL-2022) and *Jak powstaje umowa pomiędzy Użytkownikiem a Dostawcą* (DeepL-2023). Both verbs are in the active voice and can be back translated as **How the contract emerges between the Client/User and Supplier*. This structure is more typical of manuals or instructions, and I would use a deverbal noun in translation of a contract. The second interesting heading is *Cancelling if You Change Your Mind*, which is nominalized: *if you change your mind* becomes *w przypadku zmiany zdania* [in the case of a change of mind] in both DeepL versions.

Finally, short sentences are not a problem in MT, as the text is segmented and it is only human translators that might be tempted to join sentences to make them longer, like in typical contracts. Again, it is rather the register that causes problems. The sentence *It is your responsibility to ensure Delivery can be made* was translated in 2022 as *Obowiązkiem Klienta jest upewnienie się, że dostawa może zostać zrealizowana* [The duty of Client is making sure that the delivery can be made], so an extra nominalization was introduced, and in 2023 as *Na Tobie spoczywa odpowiedzialność za zapewnienie możliwości dostawy* [*On You rests the responsibility for ensuring the possibility of delivery], with two deverbal nouns added. At times, a sentence grows longer when a single word is translated as a multi-word expression, like in:

> ST: You A_*acknowledge* that B_*airborne dust* may be created during Delivery.
> DeepL-2022, DeepL-2023: Klient A_*przyjmuje do wiadomości*, że podczas dostawy może powstać B_*pył unoszący się w powietrzu*.

As demonstrated by the above examples, verbs in the active voice or short sentences are not problematic in MT. It is rather the register that often shifts towards more formal and heavier, probably in keeping with the register of typical contracts used to train the engine. Interestingly, this tendency is stronger in the 2023 version, despite the gradual progress of plain Polish in general.

5. Conclusions

As we have seen, some features of plain English contracts cause problems in MT (and subsequent PE) and others do not. The latter group includes especially markers of modality, the active voice, and short sentences. The surprising top difficulty in MT is the pronoun *you* referring to one party. The mixing of colloquial expressions with legal or technical vocabulary results in different registers in different parts of the contract. Post-editing of both versions would involve levelling out the patchwork of registers – from legalese to the language of user manuals to colloquial language – and references to the customer – from informal to polite forms of address to completely impersonal constructions. Even if individual segments are acceptable in isolation, they may be unacceptable in context[42] and part of translation competence in the MT era is making translations compiled from various sources read like coherent texts.[43] The analysis confirms some of the findings concerning typical MT errors, including in legal texts. Although this analysis was limited to the English-Polish language pair, some of the problems described above can be expected to appear in translation into other languages with less developed plain registers.

Naturally, there is more to plain language than just register and certain linguistic devices. Legal texts are not read for pleasure but in order to quickly obtain information, so intelligibility is the paramount concern.[44] Text layout and content, including the order in which information is provided, matter a lot.[45] One cannot expect a plain language contract from one legal culture to become easily accessible in another just because its drafters refrained from using words that are difficult in the source legal culture. Besides, plain language is never the product of a single person: it is developed through cooperation or negotiation between various experts, and tested

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[42] Sheila Castilho: *Context-aware MT evaluation: what have we learned?* 2023, talk available at bit.ly/47073zC ; Elena Voita – Rico Sennrich – Ivan Titov (2019). When a Good Translation is Wrong in Context: Context-Aware Machine Translation Improves on Deixis, Ellipsis, and Lexical Cohesion. *Proceedings of the 57th Annual Meeting of the Association for Computational Linguistics*, (2019) 1198–1212. http://dx.doi.org/10.18653/v1/P19-1116

[43] Anthony Pym: Translation Skill-Sets in a Machine-Translation Age. *Meta*, vol. LVIII., no. 3. (2013) 487–503. 496. http://dx.doi.org/10.7202/1025047ar

[44] Justyna Zandberg-Malec: Prosty język w komunikacji prawniczej – okiem redaktora językowego. *Poznańskie Studia Polonistyczne.* [Simple language in legal communication - through the eyes of a language editor. Poznan Studies in Polonistics] *Seria Językoznawcza*, vol. 28. no. 1. (2021) 191–204. 193. http://dx.doi.org/10.14746/pspsj.2021.28.1.13

[45] Felsenfeld op. cit. 419–420.; Kimble (2006) op. cit. 69–72.; Zandberg-Malec op. cit. 194–197.

on potential readers.[46] So, although translators face the challenge of translating plain language contracts before this style of drafting gains ground in Polish, one day our solutions and intuitions must be adjusted to emerging local practice. The new register of plain language contracts in Polish merits also attention from providers of MT services, who need to include them in training data.

[46] Felsenfeld op. cit. 419.; Zych op. cit. 75., Hadryan (2009) 23.

DOI: 10.55019/plr.2023.1.45-55

Pázmány Law Review
X. 2023. • 45–55

ON-LINE INTERPRETER ACCREDITATION TESTS FOR THE BODIES AND INSTITUTIONS OF THE EUROPEAN UNION

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Abstract

Multilingualism being one of the core values of the European Union, EU bodies and institutions rely heavily on the work of interpreters. To select the best candidates, the three biggest institutions organize a common accreditation test for the auxiliary conference interpreters they intend to work with. This paper aims to examine why such an accreditation test is needed by giving an overview of the necessary skills and competences of a professional conference interpreter and by explaining the sub-tasks to be completed during the examinations. Then it presents how new technologies were gradually integrated in the testing methods in an attempt to cut travel costs and to simplify the organization of the accreditation tests. Finally, the most recent, fully online testing procedure will be presented, with an analysis of the possible advantages and drawbacks of a remote exam setting, especially in the context of the lessons learnt about remote interpreting during the COVID-19 pandemic.

Keywords: inter-institutional accreditation test, auxiliary conference interpreter, ACI, institutions and bodies of the European Union, remote interpreting

1. Introduction

Multilingualism being one of the core values of the European Union, translators and interpreters play a key role in European policy making. Around 1000 staff interpreters work for the European Union's bodies and institutions. But the EU's complex linguistic needs cannot be covered only by permanent staff. Depending on the number and the nationality of the participants, the linguistic regime of a meeting can be rather simple or highly complex; demands fluctuate constantly; and

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the organisation of the interpretation services must stay cost effective. Therefore, instead of giving all interpreting assignments to staff interpreters, the EU bodies and institutions rely heavily on the services of around 3000 free-lancer interpreters, the so-called "ACIs" (auxiliary conference interpreters)[1].

To become a staff interpreter and thus a *fonctionnaire* of the EU, one must pass the EPSO exam. ACIs, on the other hand, sign a new contract for each and every interpreting assignment, and need to be accredited to get into the pool of interpreters the EU institutions can choose from. To recruit free-lancer interpreters, the three biggest EU institutions: the European Parliament, the European Commission and the Court of Justice of the European Union have a common accreditation procedure, commonly called "the SCIC test". This denomination comes from the original name of the European Commission's Directorate-General for Interpretation: SCIC (*Service commun Interprétation-Conférences*).

This paper will explain the purpose of organising an accreditation test for ACIs, then will give a brief historical overview of the inter-institutional accreditation test. In the second part, the new, fully on-line accreditation procedure will be presented, as well as its possible advantages and drawbacks, in the context of the recent technological developments.

2. Why is an accreditation test needed?

According to a common misconception, being bilingual means that one can automatically fulfil the role of a translator or an interpreter. But it couldn't be further from the truth. Being a professional language mediator is much more than being able to communicate in more than one language.

According to Jones's definition, interpreters are professional communicators who give an immediate oral translation of what is being said in order to enable communication between people speaking different languages. They do it not only by conveying the semantic content of what their clients say, but also by bridging the cultural and conceptual gaps that may separate the participants of a conversation[2].

The main difference between an interpreter and a bilingual person is that while laymen use their language skills to fulfil their own communicational needs, professional interpreters must be able to enable communication for others, about subjects they do not necessarily know well or find interesting[3].

To be able to do so, interpreters need a highly organised mental lexicon with conscious connections between their working languages that allow a quick access to equivalents, synonyms, antonyms etc. On the other hand, the working languages

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1 Seresi, Márta –Láncos, Petra Lea: Az Európai Unió intézményeinek és szerveinek dolgozó szabadúszó tolmácsok akkreditációs vizsgája (Accreditation examination for freelance interpreters working for the institutions and bodies of the European Union). *Magyar Jogi Nyelv*, 2018/2. 1–7.

2 Roderick Jones: *Conference Interpreting Explained*. Manchester, St. Jerome Publishing, 1998. 2–3.

3 Szabari Krisztina: *Tolmácsolás. Bevezetés a tolmácsolás elméletébe* és *gyakorlatába* (Interpreting. An introduction to the theory and practice of interpreting). Budapest, Scholastica, 2002. 96.

must also be separated from one another, to avoid involuntary code-switching or linguistic interference[4].

Having firm linguistic skills in all of one's working languages is a *sine qua non* condition to become an interpreter, but it is not enough in itself. An interpreter must be well informed and have a vast general knowledge to be able to analyse and understand the ideas and argumentations presented by the speakers. Without a solid understanding of the basic economical, legal, and sociological concepts and processes, interpreters would always have to rely on their short-term memory, which would lead very quickly to a complete exhaustion. These pieces of background information also allow the interpreters to understand the communicational intent or the eventual hidden agenda of the speaker[5].

Interpreters must also be able to cope with the stress they are exposed to during the assignments. According to certain studies, the amount of stress a conference interpreter has to face is similar to the stress levels of an air traffic controller[6].

1. Figure: Conference interpreter sitting in an interpreting booth with a good view on the meeting room

Interpreters also need strategies to cope with difficulties that arise during an assignment[7]. These can be the results of the interpreting activity itself: interpreters work under very strict time constraints, especially in simultaneous mode. They must adapt their own speech production to the speech production of someone else, and

4 Szabari op. cit. 97.

5 Danica Selescovitch – Marianne Lederer: *Pédagogie Raisonnée de l'Interprétation* (Reasoned Pedagogy of Interpretation) Paris, Didier Érudition, 1989. 76.

6 Hans Zeier: Psychophysiological stress research. *Interpreting,* vol 2., no. 1/2. 1997. 231–249.

7 Láng, Zsuzsa G.: *Tolmácsolás felsőfokon. A hivatásos tolmácsok képzéséről* (Advanced level interpreting. On the training of professional interpreters). Budapest, Scholastica, 2002. 83–87.

work on a text that is often being born in that very moment. The difficulties can also be linked to the interpreters' lack of skills and competences, who might be working on an unfamiliar subject or have to decode an accent they do not know well. The difficulties can also result from the speaker's badly chosen pace or from the lack of coherence in the argumentation. The physical conditions of the assignment can also hinder the interpreters' work, for example when the interpreting booth does not comply with the ISO standards, or when the interpreters cannot see the Power Point presentation well. Students enrolled in interpreter training learn to assess these difficulties in a conscious manner and acquire tactics and strategies to cope with them[8].

The purpose of the SCIC test is to evaluate whether the candidates are able to fulfil the role of a professional conference interpreter. The objective is to select the candidates who can analyse the message and present it coherently; who demonstrate strong and conscious language skills; have a good basis of general knowledge; show efficient coping strategies and good presentation skills; and who are flexible and able to cope with stressful situations.

3. How to become an ACI?

To be able to try the SCIC test, one must fulfil certain requirements. First of all, candidates must be qualified interpreters and have a BA, an MA or a postgraduate degree in interpreting. Candidates with a BA/BSc in any field can also be eligible if they have at least one year of documented experience in conference interpreting.

Candidates must submit their application on-line, via the European Union's homepage.[9] If their language combination is currently needed in the EU (and if they didn't fail the SCIC test previously three times), they will be invited to sit the test. If their language combination is not needed at that moment, they will be put on a waiting list[10].

3.1. The inter-institutional accreditation test before 2016

Before 2016, all SCIC tests were organised in a presential mode, either in Brussels or, during the enlargements, in the accession countries. There would be 2 subtests for each language pair: the consecutive interpretation of a 6-minute-long speech, and the simultaneous interpretation of a 10-minute-long speech.

When speaking about an interpreter's working languages, we can talk about three different categories. The interpreter's *A language* is the language he or she speaks the most perfectly. Very often this is the interpreter's mother tongue, or the language

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8 Daniel Gile: Conference interpreting as a cognitive management problem. In: Joseph K. Dansk et al. (ed.): *Cognitive processes in translation and interpreting.* (*Applied Psychology: Individual, Social, and Community Issues 3*) Thousand Oaks, Sage, 1997. 196–214.

9 https://europa.eu/interpretation/freelance_en.html

10 Seresi–Láncos (2018) op. cit.

in which the interpreter completed his or her studies. The *B language* is a foreign or learnt language that the interpreter can use as a source language but also as a target language. When the interpreter is working into a B language, we call it a *retour*. Having a *retour* is considered in this context as having two language pairs (that is from A to B and from B to A). *C languages* (or passive languages) are working languages that can only play the role of a source language for a given interpreter[11].

Candidates usually have at least 3 language pairs; therefore, they have to sit through at least 6 sub-tests. This process can easily take half a day or more. Before 2016, candidates would have to go through all the 6 exam parts, independently of their results. They had to successfully pass the consecutive as well as the simultaneous part to have a language pair accredited.

Before 2016, all the six speeches to be interpreted by the candidates were prepared and pronounced in a semi-spontaneous way (based on notes and bullet points) by a live speaker on site. The examination panel was composed of at least 6 members, all of them the EU institutions' staff interpreters[12]. It was therefore rather complicated to organise exam panels, as all panel members had to be present during at least half a day and could not be scheduled to meetings. The EU also contributed to the travel costs of the candidates, creating a financial burden that did not always pay off.

Later on, to rationalise the preparation time of the exam panel members, and to ensure fairer and more comparable conditions to candidates, the exam panels started to use for the simultaneous examinations video-recorded speeches that were screened in the examination room. That was the first time the SCIC test was reorganised in a way that benefited from the dynamic development of the new technologies.

3.2. Inter-institutional accreditation tests between 2017 and 2022

In the 2017/18 academic year, DG SCIC introduced a new element to the accreditation test: the on-line pre-screening. In order to cut costs and to avoid organising long and complex test sessions for less promising candidates, an on-line pre-screening took place before inviting candidates to sit the complete 6-part-test in Brussels.

The platform used to perform the pre-screening was managed by the European Parliament. The candidates got a link and a timeframe to complete the simultaneous interpreting of one 12-minute-long pre-recorded foreign language speech - usually from English into their A language, but German, French, Spanish and Italian speeches were also available. The language, however, was not chosen by the candidate, but by DG SCIC.

Before starting the interpretation exercise, candidates had to verify their Internet connection and their hardware (microphone and speakers). They worked on the basis of a video file and had to record an audio file of their own performance. The audio recording was then assessed individually by the interpreters of the different EU

[11] Seresi, Márta: *Távtolmácsolás* és *távoktatás a tolmácsképzésben* (Remote interpreting and distance education in interpreter training). Budapest, ELTE Eötvös, 2016. 25–29.

[12] Seresi–Láncos (2018) op. cit.

institutions, who could give a maximum of 3 points in 6 categories. To pass the pre-screening, candidates had to get at least 9 out of the 18 available points. Candidates getting overall less than 9 points or getting 0 point in any of the three categories failed and were not invited to the SCIC test. Nevertheless, they got feedback explaining the possible areas for improvement. Candidates who got at least 9 out of 18 points were invited to Brussels to take the complete SCIC test[13].

3.2. The inter-institutional accreditation test after 2022

During the pandemic, all accreditation exams were suspended for a while. When life was getting back to normal, the institutions came up with a new, fully on-line testing method. In the following points I would like to present how these new accreditation tests are organized, and then analyse the possible advantages and drawbacks of a fully on-line testing regime.

3.3.1. The organisation of the on-line accreditation tests

From 2022 on, all parts of the SCIC tests are to be taken remotely[14]. The tests start with the simultaneous examinations. This part of the test is asynchronous: the speeches to be interpreted are videorecorded and uploaded to the testing platform. The candidates must perform all the simultaneous interpreting tasks on the same day and record their performance via the on-line platform. The evaluation is done later, in quiet periods when the EU institutions' staff interpreters have less work at meetings and can more freely concentrate on the evaluation process[15].

All the assessors sit in the same room and listen to the recordings together. The decisions are taken by consensus, and the assessment follows a pre-established set of marking criteria[16]. The evaluation is done in a "cascade mode": panel members listen to the recordings of the same candidate one by one. Should the candidate fail at any of the tasks, the panel will stop and will not listen to the remaining recordings.

Candidates who passed the simultaneous part of the exam will be later invited to sit for the consecutive exam. During the consecutive examination, the speech to be interpreted in consecutive mode is delivered on-line but in real time (in a synchronous mode), allowing candidates to ask questions before starting the interpretation exercise.

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13 Seresi–Láncos (2018) op. cit.

14 https://europa.eu/interpretation/freelance_en.html#3_accreditation_test

15 Cathy Pearson: Unpublished presentation – EMCI Training of Trainers. Budapest (2022): *The new inter-institutional accreditation tests*.

16 https://europa.eu/interpretation/doc/marking_criteria_en.pdf

2. Figure: Pre-recorded speech available on the Speech Repository of the European Commission for interpreter training purposes[17]

After the examination, candidates receive the results in writing with detailed feedback. Should they fail the consecutive part, they can "backpack" their simultaneous results for an eventual re-sit[18].

3.3.2. The possible advantages of the on-line organisation

When elaborating the new testing regime, the institutions had several objectives in mind. First of all, they wanted to create a system that can stay operational during an unforeseen crisis situation, similar to the COVID-19 pandemic that brought almost

[17] https://speech-repository.webcloud.ec.europa.eu/

[18] Pearson op. cit.

all human activities involving social contact to a halt. The new testing procedure will allow a greater flexibility in case of another regional or world-wild catastrophe.

Secondly, the on-line organisation makes travelling unnecessary. This is on the one hand much more cost-effective than the original testing system that obliged the candidates to travel to Brussels, often by plane. On the other hand, this solution is much more eco-friendly.

It also makes the preparation and the organisation of the tests easier. The same video-recorder speech can be used to test ten different candidates in simultaneous mode, reducing considerably the burden of the exam panel members. Staff interpreters can spend less time in exam panels and more time in the interpreting booths.

All in all, the new testing procedure is more efficient, and therefore allows the institutions to test more candidates than before[19]. It means that candidates do not have to make themselves "more attractive" to be invited to the accreditation test by offering their most complete language combination at their very first try, but can concentrate on their most reliable language pairs and add their other, maybe less accomplished language pairs later.

3.3.3. The possible drawbacks of the on-line organisation

Interpreting in an on-line or remote setting is not the same as interpreting in presential mode. Research on the subject started way before the pandemic, already in the '70s and identified a number of difficulties that are specific to remote interpreting[20].

Interpreters working remotely feel disconnected or even alienated from their audience[21], get exhausted more quickly and are less happy with their own performance[22]. These problems may be linked to the fact that in a remote setting, interpreters do not have a direct view on the meeting room but have to rely on a small screen that only transmits a fraction of the necessary visual information[23].

Before the pandemic, remote interpreting was performed in ordinary interpreting booths that were equipped with the usual consoles and headsets but were installed in a distant room or even in a distant building. Interpreters could rely on their boothmates and could create eye-contact with the eventual other members of the interpreting team.

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19 Pearson op. cit.

20 Sabine Braun: Remote Interpreting. In: Holly Mikkelson – Renée Jourdenais (ed.): *Routledge Handbook of Interpreting.* London–NewYork, Routledge, 2015. 352–367

21 Barbara Moser-Mercer: Remote interpreting: Issues of Multi-Sensory Integration in a Multilingual Task. *Meta,* vol. 50., no. 2., 2005. 727–738.

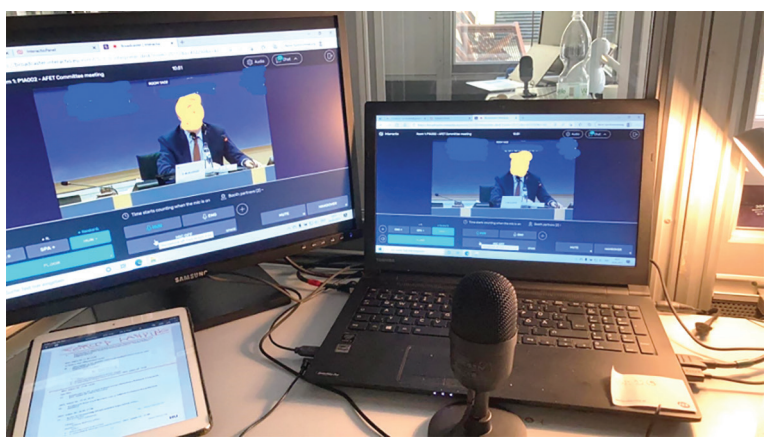
22 Ilan Roziner – Miriam Shlesinger: Much ado about something remote: stress and performance in remote interpreting. *Interpreting,* Vol. 12., No. 2., 2010. 214–248.

23 Panayotis Mouzourakis: Remote interpreting – A technical perspective on recent experiments. *Interpreting*, vol. 8., no. 1., 2006. 45–66.

3. Figure: Remote interpreting hub with traditional interpreting booths

But during the pandemic, the situation changed radically: interpreters were moved onto so-called remote simultaneous interpreting (RSI) platforms and had to work far away from their (virtual) boothmates. This new situation created new concerns about the cognitive load, the working conditions and the well-being of interpreters.

4. Figure: An RSI platform from the interpreter's point of view

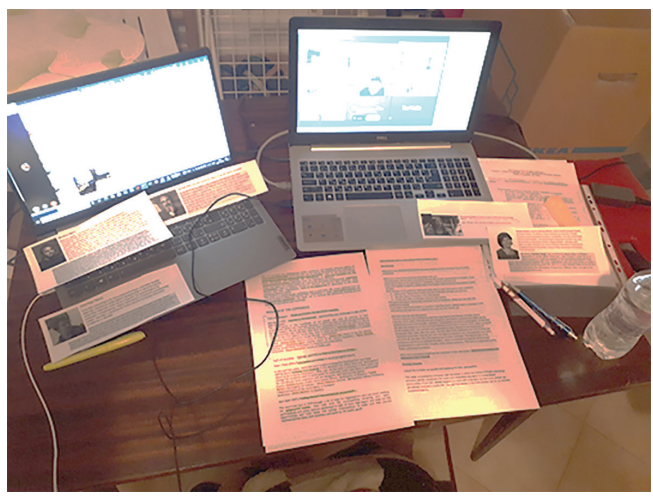


As interpreters were forced to work from their homes, using mostly the same (or slightly better) commercially available devices as their clients, sound quality has become more and more of an issue. Technology in itself became a huge stress-factor, due the tendency of the RSI platforms to collapse[24]. While traditionally conference

[24] Seresi, Márta – Láncos, Petra Lea: A kognitív terhelés változása online távtolmácsolási platformok használatakor (Changes in the cognitive load while using on-line remote simultaneous interpreting platforms). In: Szoták, Szilvia – Lehocki-Samardzic, Anna (ed.): *Nyelvi közvetítés a Kárpát-*

organizers had had to provide technicians and sound-proof interpreting booths for the meetings, clients started to expect interpreters to assume responsibility for the technical background of the on-line meetings, as well as for a calm working environment. The fully on-line setting made it extremely difficult or sometimes impossible for the interpreters to communicate with their boothmates. The new tasks and the loss of their colleagues' assistance meant that interpreters were exposed to a considerably higher cognitive load than before[25].

5. Figure: Interpreters working on RSI platforms must use several devices to follow the speakers, the presentations, and the fellow interpreters' performances at the same time



Furthermore, recent studies suggest that the human mind does not react in the same way to human faces seen on a screen as to faces seen in real life. These findings may explain why communication via ZOOM or other videoconferencing platforms demands more focus and effort from participants than a traditional in-person conversation[26]. These difficulties lead to screen-fatigue even in the case of the meeting participants and make on-line interpreting, an act of communication, particularly difficult[27].

Training institutions are very much aware of how the "new normal" affects conference interpreters. They had started to integrate virtual classes (VCs) to their

medencében a pandémia idején (Language mediation in the Carpathian basin during the pandemic). Osijek, Glotta Language Insitute, 2022. 160–168.

25 Ibid.

26 Nan Zhao – Xian Zhang – J. Adam Noah – Mark Tiede – Joy Hirsch: Separable Processes for Live "In-Person" and Live "Zoom-like" Faces. *Imaging Neuroscience,* 2023. https://doi.org/10.1162/imag_a_00027

27 Márta Seresi: Teaching consecutive interpreting online using asynchronous methods. In: Márta Seresi – Réka Eszenyi – Edina Robin (ed.): *Distance education in translator and interpreter training: methodological lessons during the Covid-19 pandemic*. Budapest, Eötvös Loránd University, Department of Translation and Interpreting, 2021. 90–119.

curriculum even before the pandemic[28], and adapted very quickly to the online setting[29]. Recent graduates today are usually equipped with some training about remote interpreting settings and in particular, online RSI platforms.

But how do all these factors affect candidates' performance during an on-line accreditation test? As candidates are very much aware of being assessed in an exam situation, we can safely say that alienation is not an important risk in this scenario. The lack of visual information or deictic knowledge about the meeting venue is not a relevant concern either, as interpretation test situations are, by their essence, only simulations of real-life interpreting assignments, and are therefore always out of context.

On the other hand, the use of a complex hardware during an exam situation can increase the stress-level of the candidates who have to make sure that their computer, microphone, eventual headset or speakers, as well as their internet connection will work smoothly at the proper time. Communication via a screen can also hinder the candidates' performance, who, as professional communicators, must understand and convey not only the semantic content of a given speech, but also the communicational intent of the speaker.

4. Conclusion

Providing consecutive or simultaneous interpretation on an on-line platform is a more demanding task than doing the same thing in a traditional in-person setting. A number of the difficulties linked to remote interpreting persist even in an exam situation. Nevertheless, on-line interpreting is here to stay, and professionals must be prepared to cope with this new reality. Training institutions are already incorporating the different types of remote interpreting in their curriculum.

Making use of the new technologies that allow remote testing can ensure the continuity of the accreditation tests and create more equal examination conditions for each and every candidate. The on-line accreditation tests have already started, and we will soon have more information about their effect on the candidates.

[28] Seresi (2016) op. cit.

[29] Réka Eszenyi: Teaching simultaneous interpreting during the lockdown. In: Seresi–Eszenyi–Robin (ed) op. cit. 110–120.

DOI: 10.55019/plr.2023.1.57-69

Pázmány Law Review
X. 2023. • 57–69

THE LEGISLATIVE TEXT AS A LEGAL STORY: A STORYTELLING APPROACH TO CONTEMPORARY LEGISLATIVE DRAFTING

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"[…] there is no just LAW without narrative"
(R.A. Matasar[1])

Abstract

A recent approach to legislative drafting, seen in common law jurisdictions which particularly praise plain and accessible legal communication, includes the presentation of legislative provisions to readers in a storytelling format. The legislative story develops progressively, by introducing legal characters, and describing relations, activities, and events. The paper draws on a number of drafting techniques, namely narrative-style drafting, the location of legal definitions in the structure of a legislative act, new types of legal definitions, the formal identification of terms and their signposting, as well as directness and personal tone. Based on various Commonwealth drafting directions, a legislative text is perceived and analyzed as a legal story written by lawyers and legislative drafters. This is in line with the discursive approaches of text linguists, such as De Beaugrande and Dressler, or van Dijk and Kintsch, who looked at the text as a process. Thus, text linguistics might be an adequate methodological framework to describe a legislative narrative.

To successfully tell a legislative story, the identified elements of the storytelling approach are needed, such as a coherent conceptual framework, clear formal identification of terms, their adequate location in the structure of a legislative act, and more. The storytelling approach in common law legislation may be worth considering

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1 Richard A. Matasar: Storytelling and Legal Scholarship. *Chicago-Kent Law Review* 68. (1992), 356. https://scholarship.kentlaw.iit.edu/cklawreview/vol68/iss1/25

in continental (civil law) jurisdictions to improve the readability, accessibility, and clarity of laws.

Keywords: storytelling, legislative drafting, narrative, style, signposting, legal definitions, defined terms.

1. Introduction

In the recent approach to legislative drafting[2], in common law jurisdictions, legislative provisions are presented to readers in such a way that they tell a story which develops progressively, leading one downwards through the structure of a legislative act.

> "Just as a storyteller introduces characters in the story, describes their relationships with each other, the activities they engage in and the events that affect them in a progressive and unfolding way (rather than all at once), so too does the drafter when drafting legislation. The characters in the legislative story may be individuals or corporate bodies, statutory bodies or non-statutory bodies, governmental bodies or private bodies, any of which may be playing the leading role or a minor role. The events that happen to the characters and the activities they engage in may be many and varied, from being paid money or being granted a licence to committing a criminal offence. And instead of our story starting with "once upon a time", we start with "the Parliament enacts"[3].

The storytelling approach involves a number of drafting techniques, in particular drafting in a narrative style, which will be discussed in sections 2-5 of this paper. The aims of the research are the following:

a) to identify elements of the storytelling approach in contemporary legislation, incl. typical drafting techniques;
b) to reproduce the construction of a legal narrative;
c) to find an adequate methodological framework to linguistically describe the legislative narrative;
d) to analyze what is needed to successfully tell a legislative story in the contemporary legal culture, drawing attention to the benefits of plain and accessible legal communication.

The basis for analysis of the legislative narrative is constituted by binding Commonwealth drafting directions (U.S. Congressional and State, British, Canadian

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[2] Louise Finucane: Definitions – A Powerful Tool for Keeping and Effective Statute Book. *The Loophole*, February, no. 1. (2017), https://tinyurl.com/yckr4xz8

[3] Finucane op. cit. 18.

and Australian guides and manuals) and – for comparison – the Polish legislative drafting guidelines.

2. Narrative style and the plot

In the storytelling approach in legislation, drafting in the narrative style is of particular importance. Within each jurisdiction, various styles govern; it also depends on a legal genre (cf. de Cruz[4]). The notion of 'style' is widely used in comparative law and theory of law. Zweigert and Kötz, for example, by a 'style' of a legal system understand collectively a history of a legal system, mode of thought in legal matters, sources of law, and legal ideology[5]. Following Rene David[6], Peter de Cruz notes that "a legal tradition is not a set of rules within a particular jurisdiction, but a set of historically conditioned attitudes to the role of law in a particular society, its characteristic mode of legal thought, and its legal sources and basic ideology"[7]. For example, civil law countries that have inherited the Romano-Germanic traditions, as part of the civil law traditions, have a distinctive juristic style[8]. Irrespective of differences, both French and German legal traditions "share a tradition of devising […] codifications as their law-making style […]" (ibidem). Both these tradition prefer for example, in their method of legal reasoning, the direction from the general to the particular[9].

The stylistics of legal acts vary widely, and there is no single style of formulating legislation, even within a single country. Often, the main source of diversity in style is identified as a legal tradition (Rosenbaum[10]; cf. also Koźmiński[11]). Legislative styles reflect the way in which laws are made and applied (cf. also Zirk-Sadowski[12]). The origins of a given legal system usually have a significant influence on legislative style[13]. A comparison of the two main legal systems, common law and civil law, may

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4 Peter de Cruz: *Comparative law in a changing world*. London, Routledge-Cavendish, 2007. 254–266.

5 Konrad Zweigert – Hein Kötz: *An introduction to comparative law.* Vol. I and II. Oxford, Oxford University Press, 1977. 62., quoted by Peter de Cruz: *Comparative law in a changing world.* London, Routledge-Cavendish, 2007. 30.

6 Rene David – John Brierley: *Major legal systems in the world today.* London, Stevens & Sons, 1985.

7 Cruz op. cit. 27.

8 Ibid.

9 Ibid. 28.

10 Kenneth L. Rosenbaum: Legislative Drafting Guide – A Practitioner's View. *FAO Legal Papers Online* No. 64, February 2007. http://www.fao.org/fileadmin/user_upload/legal/docs/lpo64.pdf

11 Krzysztof Koźmiński: *Technika prawodawcza II Rzeczypospolitej*. [Legislative technique of the Second Polish Republic] Warszawa, Wydawnictwo Naukowe Scholar, 2019. 111–112.

12 Marek Zirk-Sadowski: Sposoby uczestniczenia prawników w kulturze. [Forms of participation of lawyers in culture] *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, vol. 56., no. 4. (1994).

13 Wim Voermans: Styles of Legislation and Their Effects. *Statute Law Review,* vol. 32., no. 1. (2010), 51. https://doi.org/10.1093/slr/hmq013

in fact reveal differences in sources of law, modes of reasoning and legal ideologies, which are collectively referred to as the 'style of the legal system'[14].

There is a well-known distinction by L. Campbell[15] between the lengthy, convoluted, baroque, casuistic, fussy style characteristic for Anglo-Saxon law and the vague, general, blurred, fuzzy[16] style, characteristic of continental law (cf. identically Steiner[17]). However, as H. Xanthaki[18] points out, a certain convergence of the legislative techniques of the common law system and the civil law system has occurred over time, especially on the European continent. As W. Robinson notes[19] (2017), early European acts were drafted in a 'fuzzy' or general principle style, but now we see a shift towards a 'fussy,' or more detailed drafting.

In different legal systems, the styles of formulating a legislative text are also subject to change. Douglass M. Bellis[20] (2008: 10), for example, distinguishes at least two styles in US legislation: (a) 'legislative counsel style,' comprising enumerations combined with graphic highlighting, indentation, and headings, and (b) the older 'traditional style,' characterized by a less elaborate form also in terms of headings and indentation. In the contemporary 'legislative counsel style' (a), the main idea of the section designated for the central, overall topic will come first and undergo elaboration further within the section, with sub-ideas subdivided into paragraphs and subparagraphs.[21] A lesser but independent idea usually follows. The later subsections delve into details that flesh out the main idea covered in the first subsection, such as exceptions, definitions, special rules, etc.[22]

In the 'traditional style', on the other hand, one section conveys several ideas, one after another, each in a separate subsection[23].

The American federal template for organizing a draft law (a bill) is to state the main message at the beginning as a general rule, then mention exceptions and general

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14 Zweigert–Kötz op. cit. 62., quoted by Peter de Cruz op. cit. 30. On the similarities and differences between common law and continental law in comparative terms, see in detail Mathias Siems: *Comparative Law*. Cambridge, Cambridge University Press, 2014. 43–71.

15 Lisbeth Campbell: 1996, Legal drafting styles: Fuzzy or Fussy?, *Murdoch University Electronic Journal of Law*, vol. 3., no. 2., (1996), http://classic.austlii.edu.au/au/journals/MurUEJL/1996/17.html

16 See also the Plain English Manual, 19 December 2013, Office of Parliamentary Counsel, Australian Government https://www.opc.gov.au/sites/default/files/2023-01/plain_english_0.pdf 7.

17 Eva Steiner: *French Law: a Comparative Approach*. Oxford, Oxford University Press, 2010. 14–24.

18 Helen Xanthaki: *Drafting Legislation: Art and Technology of Rules for Regulation*. Oxford, Oxford University Press, 2014. 211.

19 William Robinson: EU Legislation. In: Ulrich Karpen – Helen Xanthaki (ed.): *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners*. Oxford and Portland, Oregon, Hart Publishing, 2017.

20 Douglass M. Bellis: *Statutory Structure and Legislative Drafting Conventions: A Primer for Judges*. Federal Judicial Center, 2008. 10. https://www.fjc.gov/sites/default/files/2012/DraftCon.pdf

21 Quick Guide to Legislative Drafting, Office of the Legislative Counsel, U.S. House of Representatives, 2019. 2. https://legcounsel.house.gov/sites/legcounsel.house.gov/files/quick_guide.pdf

22 Bellis op. cit. 9.

23 Ibid. 8.

rules.[24] A detailed overview of American state legislative drafting manuals is laid out in Hart[25].

By contrast, in the UK Parliament, legislation reflects the individual styles of legislators working in the Office of Parliamentary Counsel; there are no written rules of legislative technique[26]. Style, however, plays a very important role in drafting laws. As B. Garner[27] rightly remarks: "When style suffers, so does the content. Upgrading the style inevitably upgrades the content".

The approach discussed above mainly refers to structural and graphic changes, i.e. form, rather than content, for example, lexicon, sentence structure, global text structure, however it might also affect a substance of a legislative text in the sense of different meaning organization within a text (cf. Garner's[28] observation on upgrading the content). The above changes are aimed at the final result that "a reader of statutes will have a better chance of gleaning the legislative intent that often hides deeply encrusted within the statute's off-putting verbal exterior"[29]. The legal assertions are also supported by linguistic theories, especially the developments of a notion of text in text linguistics, rhetoric, and discourse analysis, such as linguistic concepts of a text as a "communicative event" by text linguists De Beaugrande and Dressler[30], Enkvist's semantic understanding of a text as a global sign[31], 'super- and macrostructures' as forms of global organization of a text by Van Dijk[32], 'story grammar' as a concept of narration schemes developed by Van Dijk and Kintsch[33], and the like. All of the linguistic models discussed above assume that one of the most important goals of human communication is to understand the global meaning of a text.

Legislative acts often reflect a chronological sequence of events or actions.[34] Narration in law also implies structuring provisions in such a way that "the legislative

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24 Ibid. 1.

25 Grace E. Hart: State Legislative Drafting Manuals and Statutory Interpretation. *The Yale Law Review,* vol. 126., no. 2. (2016–2017), https://tinyurl.com/dhhrjata

26 Helen Xanthaki: Legislative Drafting: The UK Experience. In: Felix Uhlmann – Stefan Höfler (ed.): *Professional Legislative Drafters: Status, Roles, Education*. Zürich–St. Gallen, Dike Verlag AG, 2016. 15.

27 Bryan A. Garner: How attention to style improves substance. *ABA Journal*, August, 2013. http://www.abajournal.com/magazine/article/how_attention_to_style_improves_substance/

28 Ibid.

29 Bellis op. cit. 17.

30 Robert-Alain de Beaugrande – Wolfgang Ulrich Dressler: *Introduction to Text Linguistics*. London & New York, Longman. 1981.

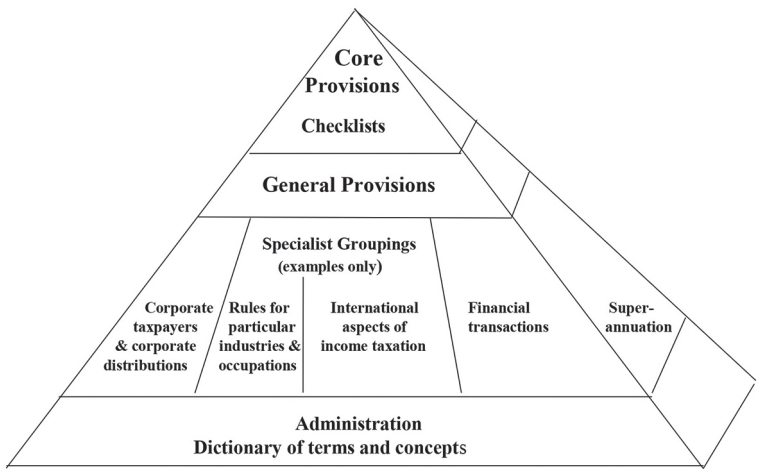
31 Nils Erik Enkvist: From text to interpretability. In: Wolfgang Heydrich – Fritz Neubauer – János S. Petőfi – Emil Sözer (ed.): *Connexity and coherence. Analysis of text and discourse*. Berlin, Mouton de Gruyter, 1989. 369–382.

32 Teun A. van Dijk: *Text and context. Explorations in the semantics and pragmatics of discourse*. London, Longman, 1977.; Teun A. van Dijk: *Macrostructures*. Hillsdale, NJ, Erlbaum. 1980.

33 Teun A. van Dijk – Walter Kintsch: *Strategies of Discourse Comprehension*. New York, Academic Press, 1983.

34 Cf. for example, ULCC Uniform Law Conference of Canada, Revision of the Drafting Conventions, Drafting Conventions (Approved 2023-08-22), Part 4 Arrangement, 10. Logical arrangement: "10.

story unfolds progressively, leading readers downwards in the structure from the general operative provisions to the more detailed operative provisions." (Finucane[35]; cf. also Tyszka[36]). Moving from the general towards specific content is generally a semiotically-motivated principle[37]. The process of interpretation of any text is related to comparing the significance of specific elements, namely statements or concepts[38]. The direction of the interpretation, and the unfolding of a legislative plot from general to specific is well illustrated in Australia's *Income Tax Assessment Act 1997,*[39] where in *Part 1-2, Division 2, Subdivision 2-B – How the Act is arranged,* a conceptual pyramid is included:



(Image source: https://www.legislation.gov.au/)

The pyramid reflects the arrangement of the conceptual structure of the Act as well as the principle of moving from the general case to the particular. Thus, the income tax law is organized in a way that core provisions are at the top of the pyramid, after

A legislative text should be logically arranged. A logically arranged text usually proceeds from the general to the particular or follows the chronological sequence of events. If it deals with matters that occur in a particular order, such as court or administrative proceedings, that order should normally be followed." (p. 9) https://tinyurl.com/269eve67

35 Finucane op. cit. 18.

36 Przemysław Tyszka: O czym opowiadają przepisy prawa? Elementy narracyjne w leges barbarorum. [What are the laws about? Narrative elements in leges barbarorum] *Czasopismo Prawno-Historyczne,* vol. LXVI., no. 1 (2014).

37 Anna Duszak: *Tekst, dyskurs, komunikacja międzykulturowa.* Warszawa, Wydawnictwo Naukowe PWN, 1998. 48.

38 Cf. Duszak op. cit. 49.

39 https://www.legislation.gov.au/Details/C2023C00178

which general rules of wide application are described; provisions then move down to the more specialized topics.[40]

Similarly, the *Quick Guide to Legislative Drafting* of the U.S. House *(2012)*, Office of the Legislative Counsel provides for the following order of a legal utterance:

> "General rule: State the main message. Exceptions: Describe the persons or things to which the main message does not apply. Special rules: Describe the persons or things to which the main message applies in a different way or for which there is a different message. Transitional rules. Other provisions. Definitions. Effective date (if different from date of enactment). Authorization of appropriations (if appropriate—see below)".[41]

The rules on procedures reflect the chronology of a particular type of proceedings, i.e., commencement, hearing, decision, appeal, etc., as in the Polish Code of Administrative Procedure). If a legislative act deals with matters that occur in a particular order, such as court proceedings of administrative applications, that order is normally followed.

3. Legal definitions

In the storytelling approach to drafting, legal definitions (as 'basic interpretation directives'[42]) are integrated into the narrative of the legislative story and "appear in the story just in time"[43]. The location of definitions given 'just in time' in the structure of a legislative act may be analyzed by juxtaposing traditional and modern approaches to legislative drafting[44] to reflect their reader orientation role and the navigation of the legal story. More traditional approaches locate definitions in the so-called Dictionary at the beginning or within the interpretative part. The storytelling approach, on the other hand, puts definitions outside the Dictionary in the main operative provisions, or at the end of the legislative act.[45]

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[40] For comparison, see Lord Thring's Five Rules of Drafting of 1902 which have been implemented in the traditional structure of the common law legislative text despite the absence of written principles of legislative drafting. Henry Thring: *Practical Legislation. The Composition and Language of Acts of Parliament and Business Documents*. London, 1902. 38.

[41] Quick Guide to Legislative Drafting, Office of the Legislative Counsel, U.S. House of Representatives, Revised 10/6/2014 https://tinyurl.com/mzz4a4zh

[42] Agnieszka Choduń: *Aspekty językowe derywacyjnej koncepcji wykładni prawa*. [Linguistic aspects of the derivational conception of legal interpretation] Szczecin, Wydawnictwo Naukowe Uniwersytetu Szczecińskiego, 2018. 195.

[43] Finucane op. cit. 18.

[44] Peter Butt: *Modern Legal Drafting. A guide to using clearer language*. Cambridge, Cambridge University Press, 2013. 221–222.

[45] Cf. Quick Guide to Legislative Drafting, op. cit. 1.

The 'just in time' approach to definitions is reflected in IMF Plain English Tax Law Drafting[46], for example: "The preference should be to put a definition in the body of the Act if it fits within the organisational structure." For tax laws, with lengthy definitions, modern drafting principles suggest that a definitions section is best placed at the end of an act, "in order to avoid overwhelming the reader with a lengthy definitions section as the reader is beginning to confront the law."[47] In special rules for Tax Code drafting (2006)[48], it is drafting policy in Australia accepted in Taxation Laws Improvement Project (TLIP)[49] to use 'just in time' definitions wherever possible; in other words, one should find the point in the narrative structure where the definition is most useful to the reader.[50] Defined terms "can be located on a 'just in time' basis with the provisions they relate to, but must also be signposted in the relevant Dictionary."[51]

As for the location of definitions, most Anglo-Saxon legislative drafting guidelines agree that definitions should either be placed at the beginning of the general provisions or those of the relevant substantive part.[52] Anglo-Saxon rules indicate that regulatory (clarificatory) definitions, e.g., the definition of 'bank holiday', may also be placed at the end,[53] which is in line with the legislative technique of storytelling[54]. This approach prefers the inclusion of definitions in the text of substantive general or specific provisions, rather than the creation of a separate glossary[55], using column and row enumerations, and parenthetical definitions[56].

Regarding the ways in which legal definitions are inserted in the text of a legislative act, for example, Canadian federal Rules of Legislative Drafting called *Legistics* used to favour a so-called glossary, where explanations of statutory terms, in the form of a single sentence, were introduced by means of the following sentence:

"1. In this Act/these Regulations/this Part".

Currently, each definition in Canadian legislation is formulated separately within a glossary which is preceded by the sentence:

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46 IMF Plain English Tax Law Drafting (2008), 9. https://tinyurl.com/2radk8vr

47 IMF Plain English Tax Law Drafting Ibid. 9. https://tinyurl.com/2radk8vr

48 Drafting Direction No. 1.8. Special rules for Tax Code drafting (2006). https://tinyurl.com/nrehmab5

49 Taxation Laws Improvement Project (Australia)

50 Drafting Direction No. 1.8. Special rules for Tax Code drafting (2006), 23.

51 Ibid. 6.

52 Cf. British Drafting Guidance 2020: 33, sec. 4.1.20.: "A definition that is key to understanding a provision will often be best up front, either where it is first used or in introductory material."

53 "A definition that is merely clarificatory will often be left to the end so that the reader can get on with reading the main story before getting bogged down in the definitional detail (for example, "bank holiday")". (Drafting Guidance 2020: 33, sec. 4.1.21).

54 Cf. Finucane op. cit. 18.

55 Finucane op. cit. 17.

56 Finucane op. cit. 19.

> "1. The following definitions apply in this Act/these Regulations/this Part".

and may also consist of more than one sentence.[57] The current practice is said to be preferred because it recognizes that each definition stands on its own.[58]

Alternatively, in accordance with the storytelling approach, new forms of setting out the meaning of a term in a legislative text have been recently introduced. Thus, interpretive provisions that convey the meanings of words are used in law, which are drafted as regular provisions without focusing on quoted words. This may be done in particular, when

(i) a range of words is to be interpreted:
  (1) A reference to a time of day in this Act is a reference to local time.
(ii) the words being interpreted are adjectival or adverbial:
  (2) For the purposes of this Part, one corporation is *affiliated* with another corporation if
    (*a*) one of them is a subsidiary of the other;
    (*b*) both are subsidiaries of the same corporation; or
    (*c*) both are controlled by the same person.
(iii) the provision has a substantive character:
  (2) For the purposes of this Part, a public post-secondary educational institution is *considered to be public* if the Foundation is of the opinion that a substantial part of its funding comes from a provincial government.[59]

Additionally, in Australian legislation, new types of definitions appear which bunch concepts for the convenience of the addressee, placing all designators of a name with common features (including those forming part of other provisions or texts). This is not about the scope of the legal definition, but about its function gathering the designators in one place in order to make it easier for the lay recipients (addressees) of the text (non-lawyers) to read correctly (= interpret) the legal norms contained in the definitions. This type of bunching definitions is not known to Polish legal theory. It allows one, in the opinion of the legislators, to talk about groups of things that have common properties in a comfortable and intuitive manner for the addressees of legal norms.[60]

What counts as definition? In accordance with the Drafting Direction No. 1.8. Special rules for Tax Code drafting[61]: "[c]oncepts that bunch provide a convenient way of talking about groups of things that share a relevant characteristic". "Wherever

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[57] See more in: *Legistics. Definitions. Formal Aspects*, https://tinyurl.com/2t55xsnx

[58] Ibid.

[59] All examples and explanations on the basis of Legistics. Interpretation [Definitions] https://tinyurl.com/2t55xsnx Emphasis in the original.

[60] Drafting Direction No. 1.8 Special rules for Tax Code drafting, Attachment B, TLIP Note 3, What counts as a definition (2006). Cf. specific rules 16–21. https://tinyurl.com/ywptah92

[61] Ibid 28.

possible, bunch in a way that is intuitive to the reader". "Remember that a new item of terminology can become familiar quite quickly, especially if it fits well into the overall conceptual scheme of the legislation."

Example 1

recognised tax adviser means:

(a) A *registered tax agent; or
(b) A *legal practitioner; or
(c) an entity which is not a *registered tax agent but who is exempted under subsection

251L(2) of the Income Tax Assessment Act 1936
from the operation of section
251L (Unregistered tax agents not to charge fees) of that Act.[62]

The appearance of new type of "definitions that bunch concepts" in Australian drafting fits the overall conceptual scheme of the legal text read in an intuitive, natural, *ordo naturalis* way[63].

4. Signposting

To follow the plot, formal identification of terms and their signposting (special typeface, hyperlinks, accompanying graphics, etc.) is also necessary. Among the most typical ways of marking the defined word/phrase in the definiendum is the use of "quotation marks" or 'inverted commas', for example,

> In this Act, "institution" means any international financial institution named in the schedule.[64]

The defined words are not usually capitalized in Canadian legislation, unless they are generally being capitalized.[65] However, when it comes to distinguishing defined terms, graphic conventions range from capital letters, italics, and bold print, to leaving the term without any distinction[66]. Using several distinctions at the same time, e.g., italics and boldface, as in Australian Drafting Direction No. 1.5[67], is the exception.

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62 Ibid.

63 Duszak op. cit. 45.

64 Example from Canadian legislative drafting guide Legistics. https://tinyurl.com/2t55xsnx

65 Legistics https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p5.html

66 Cf. e.g., Butt op. cit. 220–221.; Bryan A. Garner: *A Dictionary of Modern Legal Usage*. Oxford, Oxford University Press, 2001. 258.; Angela Alexander: New Drafter Training. What Does that Mean? Crafting and Using Definitions in Statutes, webinar 25.09.2014.

67 Drafting Direction No. 1.5. Definitions. Document release 4.0, 29 May 2019, https://tinyurl.com/28k9yzuv

An approach recommended by the IMF Plain English Tax Law Drafting[68] is to use a special typeface, hyperlinks, or other tools to identify for the reader which terms in a legal act are defined, so that the reader can consult the definitions section as needed. In Australian legislation, many defined terms are identified by an asterisk appearing at the start of the term: as in "* business".[69] The footnote that goes with the asterisk contains a signpost to the Dictionary definitions. Defined terms co-occurring with mathematical formulae are almost always marked with an asterisk (*), also in other parts of the act.[70] There are some exceptions, such as basic terms for tax law, both key participants in the income tax system and core concepts, such as amount, taxable income, assessment, income tax, company, entity, individual, and foreign resident[71]. Within a definition, the defined term (definiendum) is identified by bold italics.[72]

5. Personal tone

Storytelling in law may additionally invoke the element of directness and add a more personal tone, for example, through the unusual technique of addressing the taxpayers in Australian legislation in the second person ('you'). The following examples (2, 3) illustrate how a legislative story should be told to a taxpayer:

Example 2

"Generally, you should use "you" and draft in the second person when dealing with taxpayers."[73]

Example 3

Guide to Division 30

30-1 What this Division is about

This Division sets out the rules for working out deductions for certain gifts or contributions that **you** make.[74]

Thus, tax law regulations in Australia are formulated in the second person (whether singular or plural).

Linguistically, the opposition of directness-indirectness is measured by the level of explicitness of linguistic forms[75]. The explicitness of legislative texts is not derived

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68 IMF 2008 op. cit. 9.

69 See for example Income Tax Assessment Act 1997 – Sect 2.10 (2) https://tinyurl.com/bdzf5kyx

70 Drafting Direction No. 1.8 Special rules for Tax Code drafting, Attachment B, TLIP Note 2 (2006). Special rules 16–21. https://www.opc.gov.au/sites/default/files/dd1.8.pdf

71 Income Tax Assessment Act 1997 Subdivision 2-C, 2–15. https://tinyurl.com/3fdwn2ne

72 Income Tax Assessment Act 1997 Subdivision 2-D, 2–20. https://tinyurl.com/3fdwn2ne

73 Drafting Direction No. 1.8 Special rules for Tax Code drafting, Attachment A, Example C. 2006. 15. https://www.opc.gov.au/sites/default/fi les/dd1.8.pdf

74 Drafting Direction No. 1.8 Special rules for Tax Code drafting, Attachment A, Example C (2006). https://www.opc.gov.au/sites/default/fi les/dd1.8.pdf

75 Duszak op. cit. 269.

from the communicative situation itself, but directly from the linguistic means used and the underlying legislative drafting techniques[76].

6. Conclusions

All in all, the storytelling approach is reflected in the narrative style, the location of terms in the macrostructure of a legal act, and the signposting of defined terms. It may come as a surprise to perceive a legislative text as a legal story written by lawyers/legislative drafters, though the very idea of legal narrative (in a broad sense) recalls the discursive approaches of text linguists such as De Beaugrande and Dressler[77], van Dijk[78], van Dijk and Kintsch[79], and Kintsch[80], who looked at the text as a process. The sequence of elements ("hypothetical worlds") is constructed via modes of narratives[81]. The plot knits together certain elements into a coherent scheme[82], but as a rule, there is no chronological dimension in a temporal sense (with the exception of broader normative acts, such as codes of procedure).

The narrative of any legislative text may be enhanced with certain formal elements (a special typeface, hyperlinks, accompanying graphics, etc.) to help one better navigate the law texts. The storytelling in law may additionally invoke elements of directness. The explicitness of legislative texts is not derived from the communicative situation itself, but directly from the linguistic means used and the underlying legislative drafting techniques. Hence, elements such as the use of the grammatical category of tense should be researched, starting from the legislative guidelines constituting the canon of good legislation. The recent storytelling approach in contemporary common law (Australian) legislative drafting, as understood by L. Finucane[83], involves a number of drafting techniques, such as:

- a narrative style involving structuring legal provisions and introducing graphics (e.g., such as the conceptual pyramid in the Income Tax Assessment Act 1997[84]);
- changing the architecture of a legislative text;[85]
- signposting terms;

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[76] Cf. also Sir Ernest Gowers: *The Complete Plain Words*. ed. Sidney Greenbaum, Janet Whitcut, Harmondsworth, Penguin Books, 1987. 48.

[77] Robert-Alain de Beaugrande – Wolfgang Ulrich Dressler: *Introduction to Text Linguistics*. London & New York, Longman. 1981.

[78] Dijk op. cit. 1980. Teun A. van DIJK (ed.): *Discourse studies: A multidisciplinary introduction*, vol. 1 and 2. London, Sage Publications, Inc. 1997.

[79] Dijk–Kintsch op. cit. 1983.

[80] Walter Kintsch: *Comprehension: A Paradigm for Cognition*. Cambridge University Press. 1998.

[81] Elinor Ochs: Narrative. In: Teun A. van DIJK (ed.): *Discourse as Structure and Process*, vol. 1. London, Sage, 1997. 190., 189.

[82] Ochs op. cit. 193.

[83] Finucane op. cit.

[84] https://www.legislation.gov.au/Details/C2020C00381

[85] https://www.gov.uk/guidance/good-law#content-language-architecture-and-publication

– a new location of legal definitions ("just in time definitions", outside the dictionary, end of Act);
– introducing a new type of law definitions that bunch concepts, etc.

For other forms of drafting, see also Canada's Legistics[86] and the Good Law initiative by the Office of the Parliamentary Counsel, UK[87].

To successfully tell a legislative story, several elements are needed, such as a coherent conceptual framework, clear formal identification of terms, their adequate location in the structure of a legislative act, and more. Among the outcomes of the possible future research at least two should be mentioned:

a) the identification of the elements of the storytelling approach in contemporary common law legislation, incl. typical drafting techniques and the reproduction of the construction of a legal narrative (on the basis of common law legislative drafting guides and manuals),
d) analyzing what is needed to successfully tell a legislative story in contemporary legal culture, drawing attention to the benefits of plain and accessible legal communication with particular future implications for translators, drafters, and e-tool developers, in the domain of institutional translation and public discourse.

The storytelling approach in common law legislation may be worth considering for implementation – at least partly – in continental jurisdictions, in order to improve readability, accessibility and clarity of laws. Unlike traditional legal writing, which purports to be neutral and dispassionately analytical, contemporary legislative styles and telling legal stories might invest texts with feeling and invite readers (addressees of a legislative text) to participate in a certain legal community[88]. Legal stories may build consensus upon a common system of values which are implemented in a certain legal culture, or a culture of shared legal meanings and understandings, to enhance legal narratives[89].

[86] https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/toc-tdm.html

[87] https://www.gov.uk/guidance/good-law#good-law-the-vision

[88] Cf. also Richard Delgado: Storytelling for Oppositionists and Others: A Plea for Narrative. *Michigan Law Review*, 87. no. 8. (1989), 2040. https://doi.org/10.2307/1289308 ; https://www.jstor.org/stable/1289308

[89] Cf. also Delgado op. cit. 2414 ff.

DOI: 10.55019/plr.2023.1.71-85

Pázmány Law Review
X. 2023. • 71–85

REMOTE INTERPRETING IN CRIMINAL PROCEEDINGS

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Abstract

Court interpreting is a form of community interpreting looking back at a long history. Indeed, the age of modern conference interpeting dates from the launch of simultaneous interpreting at the Nuremberg Trials following World War II. – Interpreting in court proceedings, in particular, in criminal law cases is indispensable for observing the right to a fair trial, enabling the defendant or applicants to understand the proceedings and make claims. Remote interpreting in court proceedings was employed predominantly in combination with remote hearings in the framework of legal aid procedures, however, with the outbreak of the coronavirus pandemic, courts scrambled to continue operations in the uncertain times of lockdown. – This paper examines the fundamental rights backdrop (Article 6 ECHR and Article 47 Charter of Fundamental Rights) and legal basis of court interpreting in Europe (Directive 2010/64/EU) as the legal context of remote court interpreting. Is also examines the European (EU and CoE) policy papers and actions supporting remote hearing and remote interpreting in judicial procedures. It then continues with the case study on remote interpreting at the Hungarian criminal judicial system in the era of the Pandemic. Finally, in light of these findings, the following question is tackled: Does the accused have the same opportunity in the proceedings? In essence: does remote hearing and interpreting guarantee a fair trial?

Keywords: right to fair hearing, online trial, online hearing, digital courts, EU, Council of Europe, Pandemic

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1. Introduction: digital developments in justice administration

1.1. The topicality of online hearing or telehearing

Digitalisation has developed significantly in the European Union in the years leading up to the pandemic. This process was radically accelerated during the pandemic. Today, we are witnessing a hybrid reality: while preserving the benefits of digital developments, personal relationships and processes have been reintroduced.

The European Union and the Council of Europe encourages digitalisation in every field. In particular, procedural law is an area where the use of digital tools represents a major step forward in terms of efficiency. One of the most spectacular developments has been the implementation of online hearings in Hungary, which the state started to implement before the outbreak of the COVID-19 pandemic, but the development has been significantly accelerated by the introduction of the lockdowns in 2020.

In parallel, there has been significant irregular border traffic at Hungary's Schengen border since 2014, which has led to a higher incidence of several criminal activities, such as unauthorized border crossing or human trafficking. In these types of crimes, the interpreter who conducts the hearing is essential, however, the number of interpreters was often less than the number of procedures they were supposed to be involved in. It was not clear how the interpreter could be in different parts of the country in one day, when the time for negotiations and hearings could often not be determined in advance.

This study examines the emergence of telehearing in criminal proceedings in Hungary, whether an interpreter was used and whether these procedures complied with procedural principles. Overall, did these procedures ensure the right to a fair trial?

1.2. European Union landscape of the digital justice administration

In 2022 the European Commission published the tenth edition of the *2022 EU Justice Scoreboard*, an established annual overview providing comparative data on the efficiency, quality and independence of justice systems in the Member States.[1] This year for the first time the Scoreboard also includes data on the effects of the COVID-19 pandemic on the efficiency of justice systems, which has a great impact on our topic.

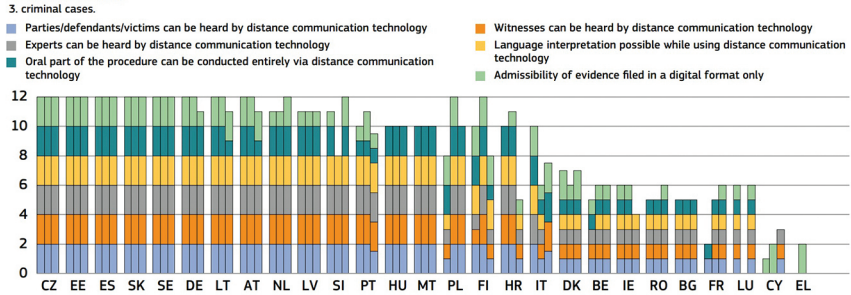
Among the key findings of the Scoreboard it states that this year we can observe a room for improvement in the digitalisation of justice systems. Several Member States adopted new measures to ensure the regular functioning of courts, while also guaranteeing the continued and easy access to justice for all. It states that in 2021, a large number of Member States continued their efforts to further improve the effectiveness of their justice systems. In 2021, procedural law continued to be an

[1] *The EU Justice Scoreboard.* Publications Office of the European Union, Luxembourg, 2022. https://bit.ly/4bRAma3 (Hereinafter: Scoreboard)

area of particular focus in many Member States, with a significant amount of ongoing or planned legislative activity. A number of Member States were in the process of introducing legislation for the use of information and communication technologies (ICT) in their justice systems. The COVID-19 pandemic has also created new challenges that highlighted the importance of accelerating reforms to digitalise the justice system. In this context, several Member States adopted new measures to ensure the regular functioning of courts, while guaranteeing the continued and easy access to justice for all, in particular through the adaptation of procedural rules.[2] One of these tools is the telehearing, which means the usage of ICT directly in the core of the legal procedure: the hearing.

The following figure shows the scores related to the rules of digital tools in proceedings.[3] We can see that half of the EU member states (EU MS) opened their procedural laws to digital tools both in civil, criminal and administrative proceedings. However, admissibility of evidence in digital format is one of the most problematic issues. But still, digital hearing the parties or the defendant or the victim is quite self-evident in EU MS. At the same time, beyond digital-ready procedural rules, courts and prosecution services need to have appropriate tools and infrastructure in place for distance communication and secure remote access to the workplace. Adequate infrastructure and equipment is alsoneeded for secure electronic communication between courts, prosecution services and legal professionals and institutions.

Figure 42 Procedural rules allowing digital technology in courts in civil/commercial, administrative and criminal cases, 2021 (*) (source: European Commission ([77]))



(*) For each Member State, the first column presents procedural rules for civil/commercial cases, the second column for administrative cases and the third column for criminal cases. Maximum possible: 12 points. For each criterion, two points were given if the possibility exists in all civil/commercial, administrative and criminal cases, respectively (in criminal cases, the possibility of hearing the parties was split to cover both defendants and victims). The points are divided by two when the possibility does not exist in all cases. For those Member States that do not distinguish between civil/commercial and administrative cases, the same number of points has been given for both areas. ***EL****: none for administrative and criminal cases.* ***LU****: none for administrative cases.*

1.3. Council of Europe and digital developments in justice administration

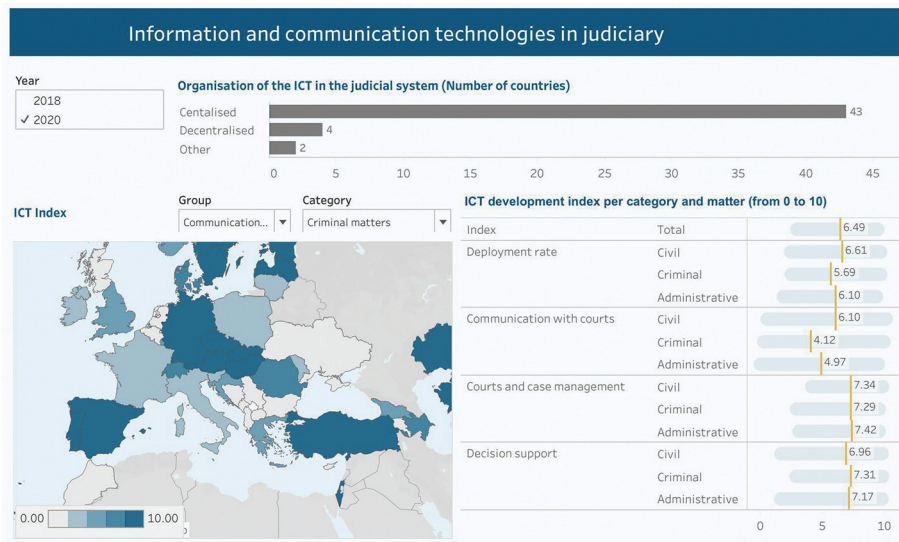
European Commission for the efficiency of justice (CEPEJ) is the Council of Europe's advisory body, which aims to be an innovative body for improving the

2 Scoreboard, 7.

3 Scoreboard, 32.

quality and efficiency of the European judicial systems and strengthening the court users' confidence in such systems. It analyses the functioning of judicial systems and orientate public policies of justice, promotes the quality of the public service of justice, facilitates the implementation of European standards in the field of justice, and supports member states in their reforms on court organisations.[4]

The CEPEJ also measures ICT in the judiciary. Using the member states' data it clearly shows that by 2020 the European region digitalisation is a general phenomenon in justice administration. Focusing on the communication with courts, civil matters are almost a third more frequent then administrative or criminal matters. Figure below shows the digital availability in criminal proceedings among the Council of Europe's member states.[5] We see that criminal proceedings prefer the personal interactions to online as the civil and even the administrative procedures are more open to online communication. Later we will see some possible reasons behind this.



The other major body of the Council of Europe dedicated to judiciary is the *Consultative Council of European Judges* (CCJE), which is an advisory body on issues relating to the independence, impartiality and competence of judges. Every year, the organisation adopts recommendations that cover common European issues related to the functioning and organisation of the court. These opinions have no binding force and are not even soft law. These are important tools of communication and cooperation of European top leadership of the judiciary.

[4] See more on https://www.coe.int/en/web/cepej/home

[5] See data on https://public.tableau.com/app/profile/cepej/viz/ICTEN/Development

In 2011 the CCJE adopted the opinion titled *"Justice and information technologies (IT)"*.[6] It states that the "use of IT should not, however, diminish the procedural safeguards (or affect the composition of the tribunal) and should in no event deprive the user of his/her rights to an adversarial hearing before a judge, the production of original evidence, to have witnesses or experts heard and to present any material or submission that he/she considers useful." (Para 28) Moreover, it also clarifies the same place, that the judge must also retain, at all times, the power to order the appearance of the parties, to require the production of documents in their original form and the hearing of witnesses. Security requirements must not be an obstacle to these possibilities.

Relating to our focus, the opinion highlights that "video-conferencing may facilitate hearings in conditions of improved security or the hearing remotely of witnesses or experts. It could, however, have the disadvantage of providing a *less direct* or accurate perception by the judge of the words and reactions of a party, a witness or an expert. Special care should be taken so that video-conferencing and adducing evidence by such means should never impair the guarantees of the defence." (Para 30)

These all mean that the CCJE supports online communication with courts, even telehearing, but these tools shall not violate procedural rights at any time. The role of IT should remain confined to substituting and simplifying procedural steps leading to an individualised decision of a case on the merits. IT cannot replace the judge's role in hearing and weighing the factual evidence in the case, determining the law applicable and taking a decision with no restrictions other than those prescribed by law.

Parallel to the judicial advisory body, the *Consultative Council of European Prosecutors* (CCPE) composed of high level prosecutors of all member States has in particular the task to prepare opinions for the Committee of Ministers on issues related to the prosecution service, to promote the implementation of the two main Council of Europe (CoE) recommendation on the role of public prosecution in the criminal justice system[7], and to collect information about the functioning of prosecution services in Europe.

In 2012, a year after the above mentioned CCJE opinion, the CCPE adopted Opinion Nr. 7 on the management of the means of prosecution services. This document reaffirms that European prosecution services are "encouraged to enable prosecution services to use IT equipment in their daily work, by introducing e-justice tools, electronic case management and data exchange systems with the bodies in charge of the application of law that prosecutors are in contact with when carrying out their tasks. This would enable ensuring a more efficient case management, reducing the length of proceedings and guaranteeing the application of data protection and confidentiality measures." (Para 43)

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6 CCJE Opinion No. (2011) 14. of the CCJE.

7 Recommendation Rec (2000) 19. and Recommendation Rec (2012) 11.

To sum up, European consultative bodies encourage the use of IT tools in criminal proceedings if these tools help fulfilling procedural and human rights.

2. Digital Developments in the Hungarian Justice Administration

2.1. First steps of to digital courts

The overall purpose of the project is the reduction of bureaucracy. As a result of the planned developments, the clients can deal with their cases faster and cheaper. The administrative burden of the courts will decrease too and this leads to a more efficient work performance.

The Hungarian digitalization reforms dates back to 2008 when the company registration procedures turned exclusively electronic at the first-instance. It was extended to second-instance procedures in 2012. Two years later, in 2014 in certain cases digital communication became mandatory in company registry cases.[8]

Digital communication in civil litigations at regional courts acting as court of first instance has been set out as an option since 2013. As of 1 July 2015, digital communication with courts became available at all courts in the country, including district courts and regional courts both in first-instance and second-instance cases. In 2016 digital communication with the court became mandatory for parties acting via a legal representative, business entities and administrative bodies in civil litigations as well as administrative and labour cases. We note that at this time the Parliament adopted the landmark Act CCXXII of 2015 on the General Rules of Electronic Administration and Trust Services (hereinafter referred to as: E-administration Act), which directly supported the digitalization of state services.

Full-scale electronic administration was introduced regarding court proceedings in 2018. From this year, the National Office of the Judiciary and the courts – as bodies providing for electronic administration – are obliged to allow for the electronic administration of all cases within their scope of responsibilities and authority for the clients. Implementing Section 9 of the E-administration Act, besides civil and (company) registry cases, online communication became available in non-litigious enforcement proceedings, non-litigious civil, economic, public administration and labour proceedings, proceedings for administrative offences, presidential administrative cases, and criminal proceedings. Electronic liaising remains optional for natural persons acting in person in litigious and non-litigious court cases and presidential administrative cases.

2.2. Four pillars of the reform before the pandemic

As we have seen, the decade between 2008 and 2018 has seen a significant evolution in the digital accessibility of courts and the digital support of their operations.

[8] See more on the Hungarian Judicial Office's site at https://birosag.hu/en/electronic-procedures

Subsequent reforms have aimed to improve interoperability and accessibility, while speeding up procedures. The reforms were built around the following four pillars.[9]

1. *Development of the publication and anonymization of judicial decisions.* The state developed an extended search engine of the Collection of Judicial Decisions for the optimization of the browsing of the anonym judicial decisions and of the search process. Moreover, the reform supported the automation of the anonymization of the judicial decisions.
2. *Digitalization of the documentation of the judicial proceedings (E-folder).* This element of the reform guaranteed the digitalization of all documents of the judicial files, the electronic availability of the documentation for the judges, and ensuring online inspection of the files for the clients anywhere, anytime.
3. *Establishing a secure connection and establishing electronic administrative services.* By this reform, specialised judicial bodies could connect to the Central Governmental Service Bus that meant a secure, fast and accessible digital background to the administration of justice. Security and data-preserving was a major issue while the National Office of the Judiciary introduced speech recognition and transcription software in the daily work of the judges. Speech-to-text software at the courts could facilitate compliance with the deadlines relating to the obligation of putting decisions and minutes into writing and would also result in more efficient use of the working time by reducing the time required for transcription.[10]
4. *Via Video project: creating the tool for remote hearing.*[11] For our focus, this element of the reforms is probably the most important. In 2018–2019, starting the development of the telehearing or remote hearing tool, Hungary prepared for the pandemic lockdowns even without knowing it. First, the aim was to improve the timeliness and increase the transparency of proceedings. To achieve this, National Court Office introduced a nationwide telehearing and courtroom audio-video development project, in which the prosecution service was also involved.[12] The connection of courtrooms suitable for remote hearings with international bodies, domestic partner institutions and other courts should be facilitated and realized with technical devices that meet the contemporary requirements.

The tools are suitable for guaranteeing the safety of the persons participating in the procedure, and for reducing the time and costs incurred by the citizens in appearing before the court, thus strengthening the service nature of the courts.

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9 See in detail: https://birosag.hu/en/digital-court-project-e-folder

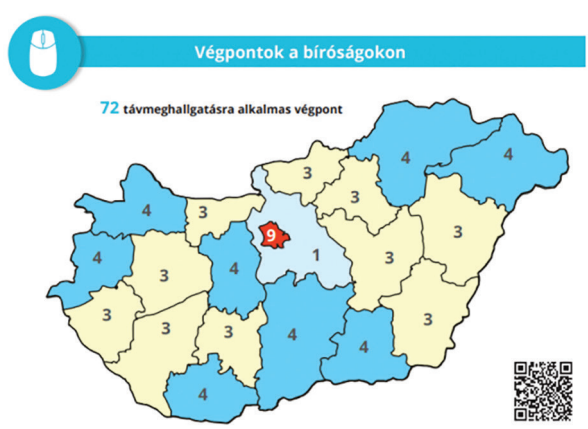
10 See more at https://birosag.hu/en/speech-recognition-and-transcription-software. We note, that LITHME Working Group 2 on Language and Law organized an expert seminar with the participation of judges, prosecutors and stakeholders on the digitalization on legal language, 8th September 2021. https://ereky.jak.ppke.hu

11 https://birosag.hu/en/video-project

12 Parliamentary report of the Prosecutor General, 2019.

Video and audio recording in the courtroom facilitates accurate, realistic documentation of what happened at the trial. The recording of negotiations with video and audio recordings can on the one hand replace the classic record-keeping work, thus greatly speeding up the adoption of decisions, and on the other hand, it can guarantee accurate documentation of the negotiations, which is available at any time if necessary. As the Parliamentary report underlines "one of the most important advantages of the Via Video system is the reduction of time and costs associated with the appearance of clients in court. Based on the operation of the current system, it can be stated that the telehearing system contributes in the long term to the improvement of the timeliness indicators of the court proceedings and to the increase of the transparency of the proceedings. In addition to all this, the security risks associated with transporting prisoners can be greatly reduced, and the safety of the persons to be protected can be guaranteed."[13]

In 2022 remote hearing endpoints have been set up at 202 court locations throughout the country.[14] That means not every single courtroom has such equipment, only some designated in every court building. Consequently, if a trial needs to be held (at least partly) online, it should be moved to the designated courtroom. The following figure shows the 72 endpoints that were set up in the first year of the project (2018). Further 112 endpoints were created in 2019, so that every district court, tribunal, sentencing panel and Kúria has at least one courtroom equipped with telecommunication devices, with which all courthouses can be accessed via video conference.[15] Basically these were the instruments the Hungarian justice administration faced the COVID pandemic in 2020.



[13] Parliamentary Report of the National Office of the Judiciary 2019. Para 1.3.

[14] According to the National Office of the Judiciary's announcement: https://tinyurl.com/58baf37c See source of the figure on the same page.

[15] Parliamentary Report of the National Office of the Judiciary 2019. Para 1.3. https://www.parlament.hu/irom41/13547/13547.pdf

2.3. Legal environment supporting remote hearing

After the technical conditions, let's look at the legal environment, which should guarantee the legality of the procedure even when the participants interact only by digital means.

Remote hearing is used in civil procedures when interviewing a party or other litigant, interviewing a witness, interviewing an expert, conducting an examination. In criminal procedures remote hearing is used mostly at a procedural act involving a person requiring special treatment, an interrogation of a detained person, a procedural act requiring the presence of a witness or a defendant under personal protection or participating in a Protection Program, an investigative judge's procedure (session held on the subject of maintenance and extension of coercive measures affecting personal freedom), or proceedings by a sentencing judge.

The XC Act of 2017 on the Criminal Procedure (hereinafter referred to as Be.) saves an individual chapter (Chapter 20) on the use of a telecommunication device. It declares that "for those who are obliged or entitled to be present at the procedural act based on this law, their presence can also be ensured by means of a telecommunication device." (Section 120 para 1) As a main rule, use of digital tools is ordered by the court *ex officio* or upon a motion submitted by a person who is obliged or entitled to be present at the procedural act. (Section 121 para 1) However, if the technical conditions for the use of the telecommunication device are met, these tools must be used in the case of a procedural act requiring the presence of the victim requiring special treatment, and in the case of a procedural act requiring the presence of a witness or defendant who is in custody, under personal protection or participating in a Protection Program. (Section 122 para 1)[16] This second condition is the one that I will examine in the research I will present later.

A Section 123 of the Be. declares, only the following persons may be present at the digital audio-video equipped courtroom (the law uses the terminology "isolated location") when using telecommunication device: (a) the person whose presence is ensured via the telecommunications device, (b) the defender or assistant, (c) a member of the investigative authority, the prosecutor (including trainees and juniors), the judge (including trainees and juniors), the court administrator, (d) in the case of a detained person, an employee of the institution implementing the detention authorised to establish the identity of the detained person, (e) in the case of a detained person, the person guarding him, (f) the expert, the consultant and (g) personnel ensuring the operation of the telecommunications device.

The interpreter is traditionally treated as an expert in procedure laws that means the interpreter is authorised to be present during the use of remote hearing. However, the law is silent on the fact that whether the interpreter may connect to the hearing

[16] According to para (2)–(5) of the same section, several exceptions exist reflecting the procedural action or the subject's personal circumstances.

from a distance or not. The term "isolated location" does not exclude,[17] therefore remote interpreting is not forbidden by the law.

As for the procedural guarantees, the Be. declares that the use of the telecommunication device does not affect the exercise of the rights of questioning, commenting, making motions and other procedural rights of persons participating in criminal proceedings. (Section 124 Para 2) In relation to the right to defence, the accused or the person reasonably suspected of having committed the crime and his or her counsel may be able to consult at least through electronic audio means. (Section 124 para 3)

The hearing must be recorded (Section 125 para 2), except some cases such as the consultation between the accused and the defender, which will be one of the turning points in our research.

2.4. Impact of the COVID-19 pandemic on criminal proceedings

Hungary was hit by the coronavirus epidemic in March 2020. Similar to other European countries, Hungary has also used lockdown as a social protection tool. A special legal order was put in place, which empowered the government to issue a time-bound regulation. By Government Decree 40/2020 (11 March) the Government declared a "state of danger" in the entire territory of Hungary "for the elimination of the consequences of the human epidemic endangering life and property and causing massive disease outbreaks, and for the protection of the health and lives of Hungarian citizens."

The legal basis was the constitutional rule, the Article 53 of the Fundamental Law that defines the "state of danger" as a special legal order caused by armed conflict, war, humanitarian catastrophe, natural disaster or industrial accident. The government decrees remain in force for fifteen days, but the Parliament can extend the time limit.[18]

By the end of March 2020, the Government adopted a decree on the special rules for legal procedures. The Government Decree 74/2020. (III. 31.) of certain Procedural Instruments during the Pandemic declares that "if a procedural act involving the personal presence of persons participating in criminal proceedings would entail a violation of the rules of epidemiological isolation, surveillance, sealing or control, and the procedural act cannot be postponed, the court, the prosecution and the investigating authority shall ensure the presence of the persons participating in the

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[17] See Section 120 para (2) definition for "isolated location": In the case of using a telecommunications device, the directness and reciprocity of the connection between the location of the procedural act designated or designated by the prosecution or investigative authority and the different location (hereinafter: isolated location)
a) image and sound recording, or
b) continuous sound recording
transmission is ensured.

[18] We note that this constitutional framework has been amended after the pandemic in 2022. See text in the national legal registry: https://njt.hu/jogszabaly/en/2011-4301-02-00

procedural act by means of telecommunication" (Section 50 para 2). Moreover, the prosecutor was entitled to join the hearing online by stating "if the technical conditions are met, the presence of the prosecutor shall be ensured primarily by means of a telecommunication device during the procedural act." (Section 50 para 4)

In this new situation, the importance of procedural forms that made it possible to reach a judicial decision without personal involvement, primarily on the basis of the documents, necessarily increased. The rules of procedure, within the framework provided by permanent and temporary regulations – in cooperation with the judiciary at both national and local levels –, had to be elaborated to ensure the fundamental right to life and physical health, without compromising the right to a fair trial.[19] By these rules above, the criminal procedure (as well as the civil and administrative court procedures) were turned online within two weeks after the first lockdown. Using the previously mentioned endpoints, judges, prosecutors, witnesses, defenders and accused persons joined the hearing and all other act online. Moreover, other forms of communication turned online too as the rules also made it possible for the case file to be delivered primarily to the addressee's electronic mail address or other electronic way.[20]

According to the statistical numbers published in Parliamentary report of both the judiciary and the prosecution service, the use of digital tools in the procedures rose rapidly. In 2018 the number of telehearing was only 294 as the system was set up in the autumn of the year. In 2019 the number increased to 6426 and a year later it was 20569. It seems that these tools fulfilled the expectations.

3. Remote Hearing with Translation in the Pandemic – Conclusions of a Survey

In the months of May and June 2022, I conducted in-depth interviews at the Hungarian prosecution service. My aim was to find out what the prosecutors' experience was during the period of the coronavirus epidemic of online hearings in cases where an interpreter was used for the procedural act.

In selecting the subjects, I took into account that the telehearing proceedings I studied required the presence of four main actors: the judge, the prosecutor, the accused and the defence. In special cases, when the accused was foreign and did not speak Hungarian, the interpreter was present as a fifth actor. I have chosen the prosecutor for my interviews because, in cases where it is necessary to hear a detained person, the prosecutor takes the initiative and is in fact a bridge between the other participants in the proceedings.

To conduct the interviews, I have selected four areas of the country where, according to criminal statistics from recent years[21], there have been a higher number of

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19 Parliamentary report of the Prosecutor General, 2020 https://ugyeszseg.hu/wp-content/uploads/2022/10/ogy_beszamolo_2020.pdf

20 Parliamentary report of the President of the National Office of the Judiciary, 2020. https://www.parlament.hu/irom41/17332/17332.pdf

21 See prosecution stat.

proceedings involving foreigners – and therefore, as expected, more experience in the use of interpreters in remote hearing. Thus, I contacted the Chief Prosecution Offices of the Capital (Central), Csongrád-Csanád County (South), Hajdú-Bihar County (East) and Győr-Moson-Sopron County (West), as well as two district prosecutors' offices recommended by the heads of these Chief Offices. The prosecutor's offices in the above areas also matched the research in terms of jurisdiction: the Chief Prosecution Office of the Capital (Budapest) has several exclusive jurisdictions in cases where the use of an interpreter may arise (e.g. transmission or extradition), our southern and eastern border is partly a Schengen border where statistics show significant number of illegal border crossings also committed by foreigners. And Hungary's western border is on the route of human smuggling.[22]

I conducted five in-depth interviews where I used the same set of questions:

1. In which type of procedure did you use remote hearings?
2. How often did you participate in remote hearings?
3. How was the venue set up (which actors attended the meeting from where)?
4. How were the participants in the remote hearing identified?
5. Was there any consultation between the detained person and the defence during the hearing and, if so, how was it conducted?
6. Were there any technical difficulties during the procedural steps?
7. Were there any legal difficulties during the procedural steps?
8. What possibilities for improvement do you see and do you see the possibility of using the remote hearings (even with an interpreter) beyond the pandemic era?

In the previous chapters, we have seen that during the coronavirus pandemic (31 March 2020 to 17 June 2020), all procedural acts were digitalised by law.[23] Following the lifting of the first and most severe state of emergency, videoconference-based long-distance connection was maintained in certain proceedings, despite the fact that criminal proceedings have essentially reverted to the on-site form.

The majority of prosecutors participating in the research (except in the capital, due to its exclusive jurisdiction) participated in online hearings in cases where the accused was in custody. They were unanimous in their opinion that remote hearings can still be used with good results, particularly in cases of simple adjudication or intermediate acts, such as the order to use coercive measures, the extension of the period of application of coercive measures or the extension of the investigation period. Despite the fact that digital tools have been used in criminal proceedings much higher since the pandemic than before 2020, my respondents clearly see that procedural acts are again being used primarily in the on-site form. This is in line with the EU's dashboard presented above, which showed that criminal proceedings much prefer in-person presence to online hearings. In particular, my interviewees

[22] See also prosecution stat + parliamentary report.

[23] Decree 282/2020 (17.VI.) of the Government of the Republic of Slovenia on the lifting of the state of emergency declared on 11 March 2020.

highlighted that the body language, facial expressions and metacommunication of the person being heard through online means are much more difficult to discern, and that non-verbal means of communication are less applicable.

For remote listening, typically at least two locations were connected. The defendant was in the penitentiary or in police custody with a prison guard. The judge, the prosecutor and the defence (except at the full-lockdowns) attended the meeting in the courtroom. Procedural acts were also reported by my subjects when the defender was also in the penitentiary. The interpreter was usually present in the courtroom (hybrid remote interpretation). Compared to the previous exceptional case, there were even fewer cases where the interpreter was also present in the courtroom from a penitentiary. In fact, there were only one or two cases in the research where the interpreter was also involved remotely (remote interpretation).

Perhaps the most interesting aspect of the procedure for the purposes of this research is the defence consultation. Typically, the defence attorney and the accused communicated by telephone, which the defence lawyer, if he or she was present in court, conducted outside the courtroom (usually on the corridor). However, it is also common for the defence consultation to take place via video conference call. In this case, the judge turns off the video call recording function and the prosecutor and other court staff leave the courtroom for the duration of the consultation. The interpreter is always with the defence in such cases. This solution is not precluded by law and is technically feasible, so there is no doubt that it is correct, even if it may cause difficulties or inconvenience either for the judge or the prosecutor.

Practically all the prosecutors interviewed highlighted the technical difficulty of video conference endpoints being busy and congested. There are only a few endpoints in a court, and they are used by many. This also means that appointments to use these facilities can only be requested well in advance. If a procedural act is delayed for whatever reason, it also delays subsequent procedural acts. If a procedural act is not available for a day due to congestion, it is only possible to re-book a lane for a distant date. The practice during the coronavirus pandemic period was that if the connection broke down and the video call was lost for technical reasons, the procedure was suspended until the connection was re-established. As a further technical observation, the prosecutors interviewed noted that the use of a mask did not cause any disruption to the intelligibility of statements. Likewise, the use of a mask in the video call did not interfere with the interpreter's assistance.

I have seen different ways of identifying participants. The detainee was identified usually by the guard accompanying him, while identification in the courtroom was done in the usual way, with an ID card. There were also locations where a separate digital camera (document reader) was available to transmit all documents to the online meeting. With this device, not only the documents could have been submitted for the hearing, but also the identification cards used for identification could be seen and recorded in good quality.

In terms of legal problems, few obstacles were reported by the interviewed prosecutors. The main issue highlighted was the vulnerability of the principle of immediacy. In the case of remote hearings, the intentions of the person heard and the ability to ascertain them were often made difficult by the limited intelligibility of non-

verbal communication channels. The interviews showed that the accused typically preferred the telehearing because it was easier for them to attend the hearing in most cases (either because of the lack of travel or the strain of the personal relationship with the judge or prosecutor). In fact, the telehearing avoids the need for the accused to travel, which is a significant help in terms of both energy and costs.

4. Conclusions

Both the legal and the technological framework for online hearings and the use of an interpreter during such hearings have evolved considerably during the coronavirus epidemic for unavoidable reasons. Although Hungary was in the process of developing a videoconferencing system when the pandemic close downs occurred, the judiciary had to react very quickly and switch to online access in court proceedings.

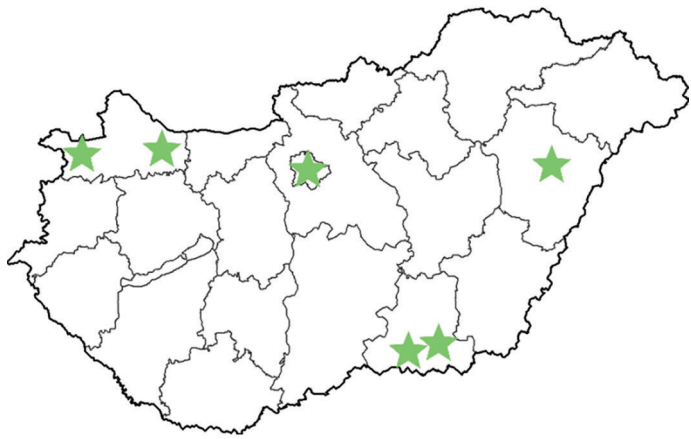
During the in-depth interview research conducted, I confirmed that the legal regulations do not specify the technical issues of videoconferencing. This is, of course, understandable, since it is not a question of normative issues but of technological ones. That is why local solutions are given more scope. This decentralisation is closely linked to the fact that the technological toolbox (ICT) is evolving faster than the legal environment can keep up. However, it was a surprising experience for my interviewees that the use of online tools did not speed up procedures radically.

The undoubted advantage of online tools – and this was underlined by the prosecutors in all interviews – is that they greatly reduce procedural costs. The most significant item is the travel of the accused, but in several cases the ability to participate meaningfully in the proceedings remotely via a secure channel has also reduced the costs for the defence and the interpreter. Remote hearings also reduce administrative burdens by giving participants (in particular the defence and the interpreter) greater choice as to where they participate in the procedural act (with the defendant, in court or at a third location, online).

However, it was clear from the research that direct personal communication is limited in remote hearing proceedings. The balance between verbal and non-verbal communication channels was broken. Even though the statements of the accused can be understood through the online channel, the small but important metacommunication signals that contribute to the smoothness of the presentence hearing – often in an unconscious way – are lost.

Overall, the (technological) requirements emphasised by the European Commission and the (legal) requirements emphasised by the consultative bodies of the Council of Europe in relation to the use of digital tools in court proceedings such as remote hearing are in line with the practice in Hungary. The view of the consultative bodies of the Council of Europe has been confirmed by the Hungarian procedural practice in the context of the coronavirus pandemic: the use of online and other electronic means is appropriate and necessary if it supports the legality and timeliness of the proceedings.

Location of interviews on the map



DOI: 10.55019/plr.2023.1.87-106

Pázmány Law Review
X. 2023. • 87–106

(LEGAL) LANGUAGE IN LEGALTECH

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Abstract

Legal terminology empowers words and expressions with specific meanings. Legal language used by lawyers is just like another language, with special wording, jargon and there are special legal instruments behind of the terminology. Using technology in the legal domain is not coding the law, tech engineers and lawyers should cooperate to let LegalTech tools work in full capacity with their effectiveness. In this way lawyers can be backed by technology, and in return for this their clients will receive enhanced customer experience. Lawyers can't be substituted, but the legal tasks can be speeded up, and costs can be decreased. Large Language Models and Blockchain technology will be the next generation of LegalTech tools, just lawyers need to be careful until the tech achievements will be accurate and accountable enough for the quality legal work. This chapter gives a detailed presentation of how current LegalTech tools can support legal tasks, and what are the risks of next generation of technology.

Keywords: LegalTech, large language models (LLM), ChatGPT, AI, machine learning

1. Language, Law, LegalTech

Legal terminology empowers words and expressions with specific meanings. Legal activity is just like using a special language[1]. The law with special wording and specific jargon creates special legal instruments. The Law + Technology Theory[2] aims to use the Code as Law Approach when programmers go hand in hand together

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1 Heikki Mattila: Comparative Legal Lingusitics. In: Ződi, Zsolt: *Jogi technológiák.* [Legal tecnologies] Budapest, Ludovika, 2022. 23.

2 Thibault Schrepel: *Law + Technology.* Stanford CodeX Working Paper, 2022.

with lawyers. They should cooperate, lawyers will not understand technology, tech people will not understand legal rules. Language in the legal domain creates the law, language and law can be backed by technology. Language, Law, Legal Technology, let's see in this Chapter how it works in practice!

The fact is that lawyers study legal terminology at universities for years. In Continental Law Legal Systems law schools start to teach the Roman Law. Students must understand the logic of how law regulates the society, how legal instruments worked in an ancient age. After years at the University, students would have learned the law of a certain jurisdiction. They start to work in practice and see how legal issues can be solved. Junior lawyers have to pass special exams to work independently. Some lawyers can go for further specializations on post graduating courses (Master of Laws – LLM).

After such a long learning curve, there are still legal issues about certain terms between lawyers. Like the term of 'Agent' can mean different positions of rights and obligations, when we consider it within tax, civil, financial law. There are again different aspects within a certain branch of law. Like in financial law, the standpoint of a bank, of an insurance company, of a financial institution, of a fund should be different. How can lawyers decide upon a certain legal text, what meanings and legal instruments should be used? We even were not talking about different national jurisdictions, EU or International levels of law. How can a lawyer adapt legal rules in irrational human behaviours? How can a LegalTech tool support the lawyer?

Let us see first, what a LegalTech tool is. A LegalTech tool is developed to support the legal operation. Such legal operation can be document automation, legal chatbot communication, legal research, online dispute resolution, contract lifecycle management, case management, and document evaluation. In some cases,[3] machines perform better than humans, like in a study when 20 trained lawyers had to evaluate legal documents. They were scored as an average 87.56%, whilst the machine was scored 94.55%. The lawyers completed the task within 92 minutes as an average, while the machine finished it in 26 seconds. Some say it is time for lawyers to "unfurl the sails and not let technology currents guide too far"[4]

What solutions can support lawyers? There are many types of categorizations of LegalTech tools, one of them[5] represents legal marketplace, document automation (text generation), practice management, legal research, legal education, online dispute resolution, e-Discovery, analytics, compliance.

This chapter will present some hands-on practical insights of LegalTech tools which help lawyers to create documents (text generation), support legal professionals to evaluate documents, enhance the communication with clients, demonstrate how

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3 Yonatan Aumann: *Artificial Intelligence vs. Human in the Legal Profession*. The legal revolutionary, Bar Ilan University, 2018.

4 Gregoire Miot: From Innovation Frenzy to Productivity Steadiness. In: Susanne Christhi – Sophia Adams Bhatti – Akber Datoo – Dr Drago Iljic*: The Legaltech Book*. Wiley, UK, 2020. 244.

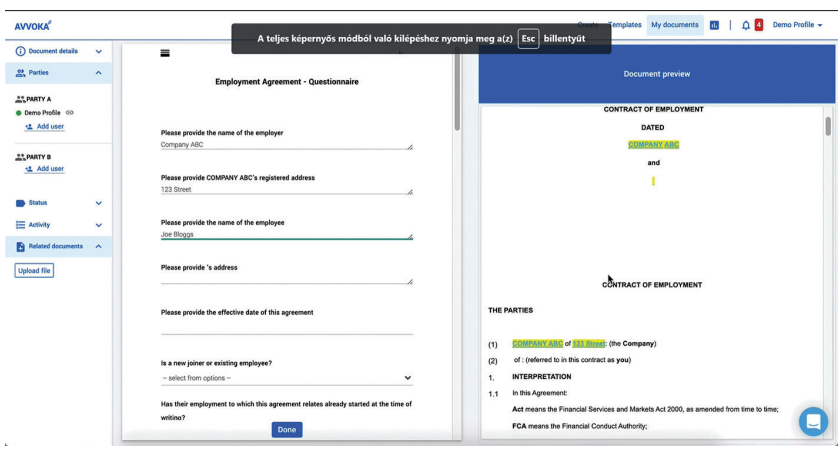
5 Lucy Bassli: *The Simple Guide to Legal Innovation*. Chicago, Illinois, USA, American Bar Association, 2020. 66.

legal design can widen access to law. Also, the chapter will showcase how next generation of technology can be used by lawyers and what are the dangers of it and will hint at smart contracts and blockchain technology.

2. Legal text generation

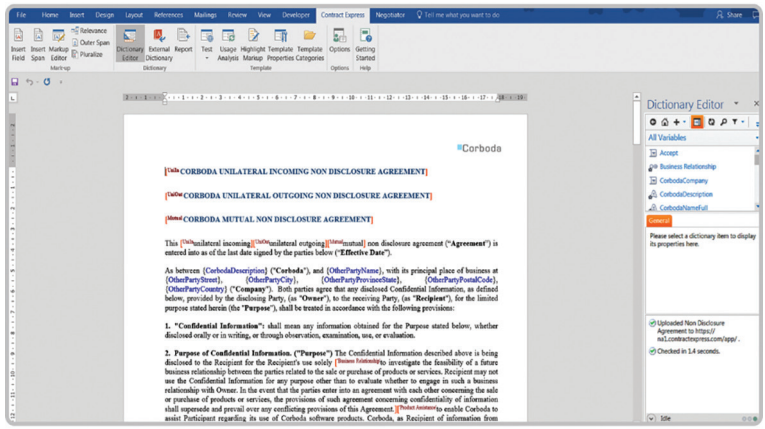
It is not always obvious how lawyers can benefit from technology. Therefore, lawyers first need to do research within the office or department, list the most frequently used documents, consider if such a document has many variables so by automatizing it lawyers can save significant time. This process is the so called 'mapping[6]'. Part of the mapping the time spent on document generation must be measured as a base of the changes. In this way they can calculate the return of investment (ROI) if such an innovation happens, how much they could save in time and human's costs. Investing in such tools is profitable for larger law firms or legal departments with full coverage of legal services or even for smaller law offices. Or for single lawyers if they are specialized in certain legal activities and create lots of contracts regarding property sale purchase, lease, labour, corporate law or draft policies for certain industry players of finance, consumer protection, data protection.

Second step of the innovation project is to determine which type of solution will be the best support for the office or department. There are system needs of document templates as a pattern. So, lawyers need to draft templates first, and fix all the fields of variables in it. The data field could stand for names, addresses, tasks, prices, expenses, taxes, terms of transport, etc. The fields then can be filled in with the help of a questionnaire, and in this way a prefixed template can be generated by non-legal staff as well within an HR, a public procurement, a marketing, or sales department.



Source: https://avvoka.com/

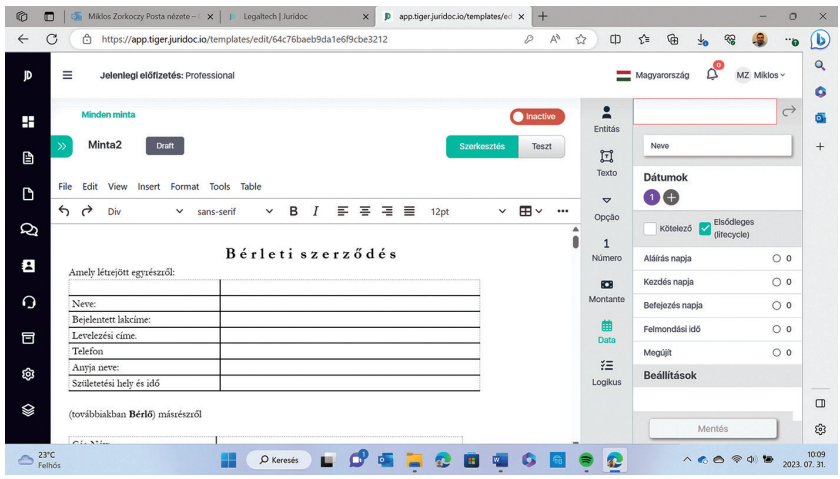
6 Bassli op. cit. 226.



Source: https://www.thomsonreuters.in/en/products-services/legal/contract-express.html

Other types of document generation systems can be used in law offices or legal departments when they do not create templates in advance. This time lawyers can upload their clauses and set up their clause library. The system will use the original documents as patterns, and once the lawyer starts to draft a lease agreement, it will show certain parts of the original pattern in a small window on the screen, like terms of termination, conditions of fulfillment, late payment fees and interests, processes in a *'vis maior'* case. This type of system is good when a third-party contract should be reviewed. The system can be easily embedded into MS Word as an add-in, so users need not use different platforms. It is still the lawyer who drafts the contract, the system just recommends clauses which had been uploaded previously.

There 'are low code, no code' systems and systems that need 'legal engineers' to do the coding of such templates, tagging the data fields, insert options and buttons into the questionnaire. You can build your skeleton of document templates and the questionnaire of it. In this way you can generate large number of documents personalized for specific transactions.



Source: https://www.juridoc.com.br/en/

None of the document automation systems understand the language, the context, the logic, this is simple just building data fields and then merge it with the documents.

3. Legal text evaluation

In terms of understanding of legal documents ('evaluation'), there are two types of tools which can support humans. One is when a legal professional needs support to read, understand and evaluate documents. The other is when clients, and specially consumers want to understand the legal wording in relevant documents. Which is not easy in many times, because of the jargon, legal clauses and complex abstract terms. We would cover in section 5 of this chapter the legal design tools, but first let us focus on document evaluation systems.

LegalTech tools support lawyers to raise efficiency of legal operation and save time and money for the clients. What tasks can be supported by the machine evaluation? Like an Audit, an M&A transaction, in a company valuation case, evaluating court files, tax issues. You can use it for non-legal purposes as well. You can use it in every case where there is a huge number of documents. Investing for such tools is profitable for larger law firms or legal departments with full coverage of legal services or even for smaller law offices (or single lawyers) if they are specialized for certain legal activities and do audits, due diligence reports.

What is document evaluation? How would you start a document evaluation work? Let us say 15-20 years ago if an M&A transaction happened, lawyers had to go through on all the documents to find risks and had to minimize risks of the transaction. During the due diligence process lawyers had to judge ongoing legal disputes and had to go through on the available documentation word by word.

Imagine a so-called data room. It was usually a meeting room booked for lawyers, auditors, tax advisors, specialists. In the room there were all the company files, like

contracts, court files, outstanding debts, tax declarations, so all the documents must have been checked word by word.

It took weeks to evaluate all the documents. All the team members had to read almost all the documents to recognise their expert group issues. They had to make notes to remember the findings before drafting the final report of the due diligence.

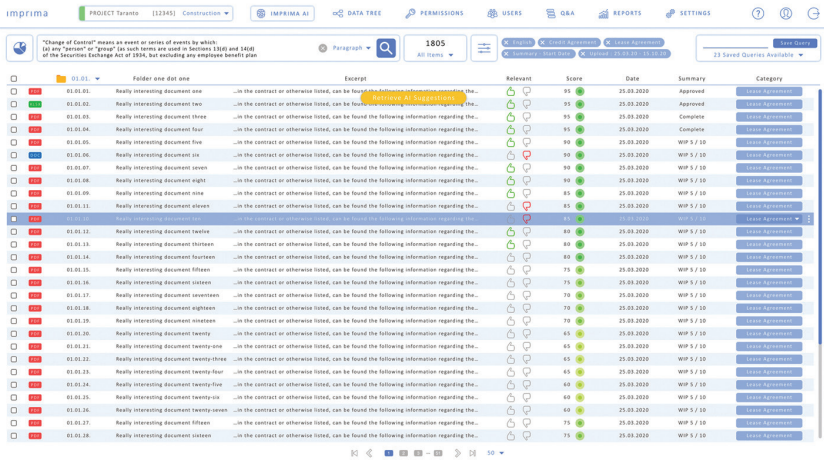
Now the time needed for such a due diligence report has been radically decreased from weeks to days. What has changed in the recent 15 years? Nowadays we have data, which are digitalized, so a machine in a database can be trained to classify and to organize them in a certain way. The structured database then can be easily evaluated by the machine. But how does it work? Can a machine understand the legal text? How can I train a machine without coding it? There are systems that work for languages like English, Spanish, German, Italian and it can detect Hungarian characters, Polish, Czech, and Bulgarian language. Can a machine understand all these languages? Mostly the systems available on the market do not understand the language, the text, the content, the context. They do not know the semantic relation. They only recognize characters. Characters are data. Data can be classified, structured, calculated with data science.

A system can be trained to do it in a very fast, and effective way, so the user can save time and money. They are very fast and effective to find patterns. Human gives the system patterns. Like if I wanted to find data privacy related content in the document, I would show patterns to the machine to find it. This is pure Big Data, there are algorithms that can classify patterns.

Like an SVM (support vector machine) algorithm which uses vectors in many dimensions. It is almost unimaginable for humans, to examine hundreds of dimensions at the same time. Each dimension is a word. Or there is a K Nearest Neighbour (KNN) algorithm that finds the similes among the data.

All the documents (files in pdf, word format, or images) must be uploaded to a virtual data room. The client is the one who uploads the files to the data room. So we have all the documents in a structured database. The files are readable for the systems by OCR (optical character recognition). The machine will see the metadata of the files, which again are not measured by a human. Then you can see relevancy, and score, after the date you see the summary column and category. The next step is to train the machine and organize the documents into categories. What is a document category? You will have categories like corporate law documents, labour records, civil court cases, data privacy notices and registers, etc…

There you can see a long list of documents on the screen. So you open a file on the list, if it is a lease agreement, then you would mark it as a contract. If it is an 'article of association', you would mark it as corporate. If you had marked 20 documents on the list, click on the AI button, and the system would mark another 100 on the list. Once you checked the relevancy and the score of each line, you would have 120 checked documents on the list.



Source: www.imprima.com

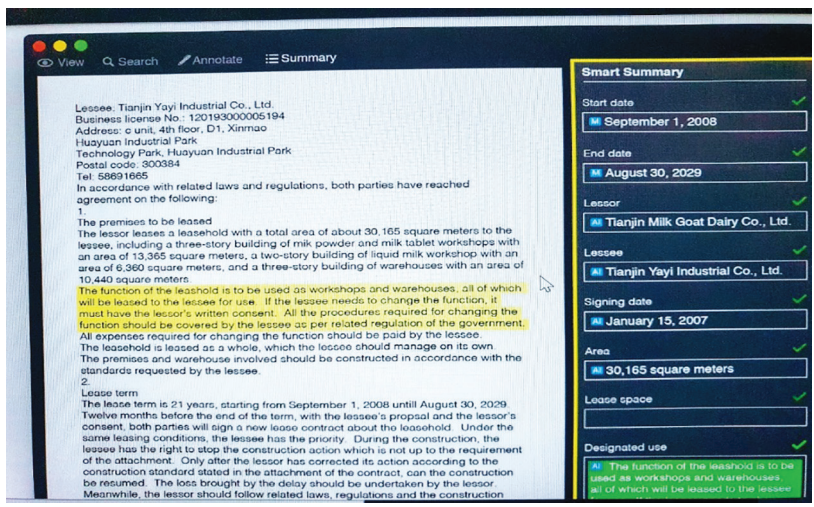
Then click the AI button again, and the system will learn your feedback again. This concept is called the supervised learning. It will give relevancy and a score for all the remaining documents on the list, and a human should approve or dismiss the results. The percentage stands for the probability. If the probability was around 90%, it would be very sure, that the category given by the system was right. If the rate was below 50%, it would be a low possibility. So you need to open the file, and a human must classify it. If a mark given by the computer was right, you would tick the green mark and the system would learn your reaction. If the mark given by the computer was false, you would give them a red mark to train the system in this way. And it learns time after time.

Just to sum up: Having marked another 100 documents on the list, you need to push the train AI button again, and all the remaining documents will be marked by the system. So what do we have now? We have now a structured database, files in directories. All the corporate, litigation, labour, tax, data privacy documents are vetted and classified. Why is it important? Imagine a group of lawyers, who work in practice groups. Like corporate practice group, labour law practice group, French speaking practice group, EU competition law practice group, etc. With the help of the machine, you can delegate tasks easily to practice groups. It is not necessary to spend human chargeable hours on reading all the documents and classify them one by one. It does not matter for the machine, if there are 100s or 1000s of documents, the speed and efficiency of the machine work will be on an incredibly higher level, than humans. This is time and cost saving.

Step No 2 is to evaluate the content. We now have a structured database, tasks delegated to practice groups, so we can filter now the findings given to the machine. Like, if I wanted to deliver a data privacy audit, I need to find all the data protection related clauses. I need to search for clauses mentioning data subjects' rights, personal data, sensitive data, data processor, data controller, etc… These are the patterns. And

the machine will list all the findings. So next step is to open the files on the list, what the machine had searched for you upon your instructions.

You now need to check the findings of the machine if the system was right with the findings or not. If yes, you give a tick in the box. If not, you delete it. Imagine it also supports the collaboration with your colleagues. You can make notes, can annotate the document, put a stamp on it if it had been reviewed.

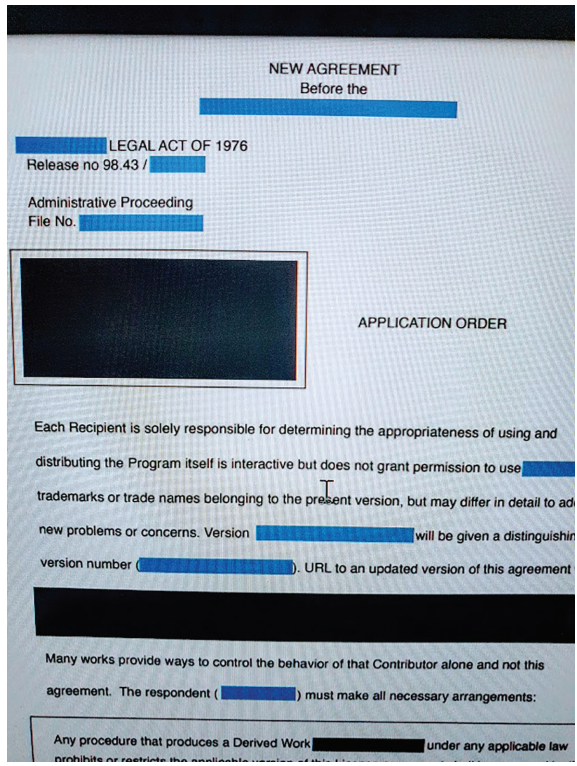


Source: www.imprima.com

At the end, we will have an extract in an excel, or word file. Then, we can attach this extract to the due diligence report. Why is it important to attach the extract? In this way we prove and demonstrate all our comments, statements, and findings. What else a machine can do for us?

Like in cases where there are some special issues to be considered. In this case you need a specialist. If there is no such specialist in your team, you need to find and mandate a tax advisor, a physician, an accountant. But they need documents to be judged. How do you share confident information with the external specialists? You need to erase all the personal data and anonymize the documents. You need to redact the confidential information.

The machine can do it for you, it will remove all the personal information from the documents, so you can easily generate anonymized documents to share them with your external specialists. There is also some statistics of the work you finished or to be done and still due. You can see a chart, what categories you had, how many documents need to be reviewed, how many had processed, the languages covered by the evaluation.



Source: www.imprima.com

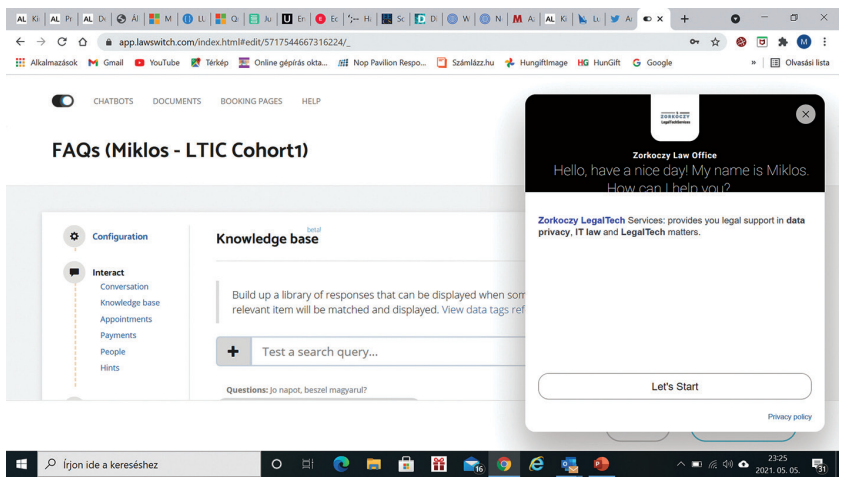
In a use case there was a data privacy audit for a Company Group which had 10 affiliates. The companies had numerous and lengthy ISO documentation. There were lots of contracts and declarations for cross border transactions including non-EU member countries. Without the machine learning solution, the work would have been 3 weeks to read and evaluate the paperwork. In this project all the relevant clauses in the contracts and documents, what was needed for the due diligence report were found in 2 days.

4. Client communication

Many comments in professional social media groups found that lawyers are fed up with being available 24/7. They don't like to be disturbed by client's calls and messages during National Holidays, Christmas Holidays, or Sunday afternoons or in their spare time. At the same time, clients are expecting to communicate when they have an issue or question, since they are accustomed to do it in all their activities in e-commerce, shopping, online case management. Even inhouse lawyers are expected to be available during working hours for their internal clients. It does not matter for the inquirer if lawyers are working on complex legal issues. When the phone rings, they must answer it. Such questions about booking dates, availability of commonly

used documents on the company share point, and other non-legal related calls disrupt lawyers thinking about their difficult cases. After the call they need to go back to the complexity of the matter, until the next incoming call happens. This should not be so when chatbots can substitute highly qualified lawyers and specialist with high HR costs in non-legal matters.

The next tool is a chat bot system. Lawyers use it as a chatbot, but basically this is an automatised and interactive FAQ (frequently asked questions). The questions and answers must be given in advance. So how it happens? The law firm or the legal department need to map the client communication first. What are the questions mostly asked by clients? What are the possible answers? Lawyers need to feed the system's knowledge base.



Source: www.lawswitch.com

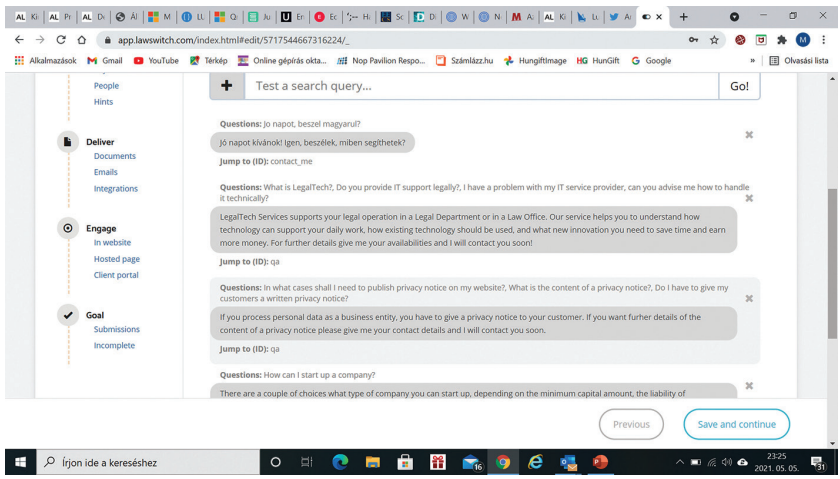
Once the system is trained by all the frequently asked questions (FAQ) and possible answers, we have the patterns for the machine to recognize. The question is a pattern. The system generates answers given by lawyers in advance. When clients start to ask questions, the machine will find the best pattern fitting to the text given by the client. If the system does not find the most possible pattern, it will send an e-mail to the lawyer about the question and tell the client that he or she would be contacted directly by a human. This feature can be set in the conversational panel of the system. The lawyer can freely determine the content and the way of the communication.

The lawyer will then check his or her emails at the end of the day, or at the beginning of the workday and will call or email the client. In this way, the collaboration within the organization also can be enhanced, since not all the lawyers have to deal with the case, just the specialist or the practice group leader need to communicate with the client. And all the other colleagues can deal with their complex matters.

The system can book appointments for the client, fill in a power of attorney, help client onboarding when asking data from the customer, and provide some general

information about the specialities of the law office, like contact details of practice groups, opening hours.

The system recognizes only the English and the German alphabet. It is independent from the spoken language since it just recognizes characters and the formula of characters. The solution can be coded to make the conversation bilingual.



Source: www.lawswitch.com

It means, that the system will not recognize characters with stress on the top of it, or other special characters like the Hungarian ones. The answers can be given in the special characters just like the Hungarians (ö, ü, ú, á, é, í), but if the client uses them, the system will not understand the message and will direct him or her to a human contact. Anyway, the client can be told not to use special characters. There are no choices for Hungarian lawyers, since they cannot find legal chatbots developed with Hungarian characters.

5. Design legal information

The idea of Legal Design comes from engineering. First do some research, and the producers and the designers have to imagine and invent the purpose, the persona, the functions, the style of their business activity. Legal domain is a business activity as well, where lawyers have their own customers. The lawyer's performance is usually a legally binding document. Clients are consumers and they do not want to read lengthy and difficult wordings in the legal documents. They want user experience.

Like the privacy paradox[7] is just one issue among others. In everyday life, people do a lot of online shopping, and they do care about their privacy rights. But do they

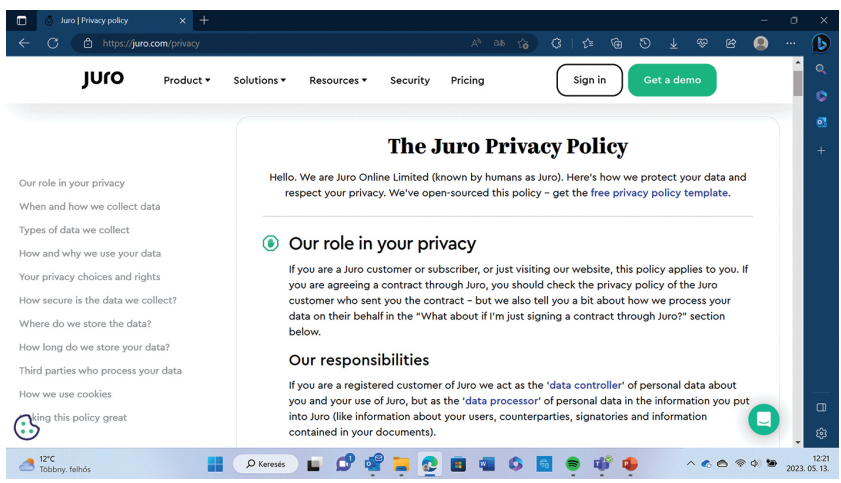
[7] Susanne Barth – Menno D.T. de Jong: The privacy paradox. *Telematics and Informatics*, vol. 34., no. 7. (2017), 1038–1058. https://doi.org/10.1016/j.tele.2017.04.013

care for lengthy General Terms, or Privacy Policies? No, they do not, if they want to buy something, or just want to finish the process quickly, they do not read the legal text, just tick the box proving that he or she had read it and agreed with it. But data privacy laws had been issued for people to get protected against data privacy problems. How come, that companies are forced to create legal documents by the law, and people do not care about them?

Legal design could be a good answer for this problem. To make information more visible for people, by visualizing data, preparing them for their decisions, is just democratizing the law and the access to law. It seems that visualization fosters understanding the legal language for non-native speakers,[8] which shows that legal design makes people understanding their rights and obligations at the same level as their better educated mates. "*Legal design is increasingly used as a tool to design better processes that increase access to justice*."[9]

There is a good initiation, a lengthy privacy policy can be summarized on a one pager with the help of bullet points, links, infographics like in Juro's case.

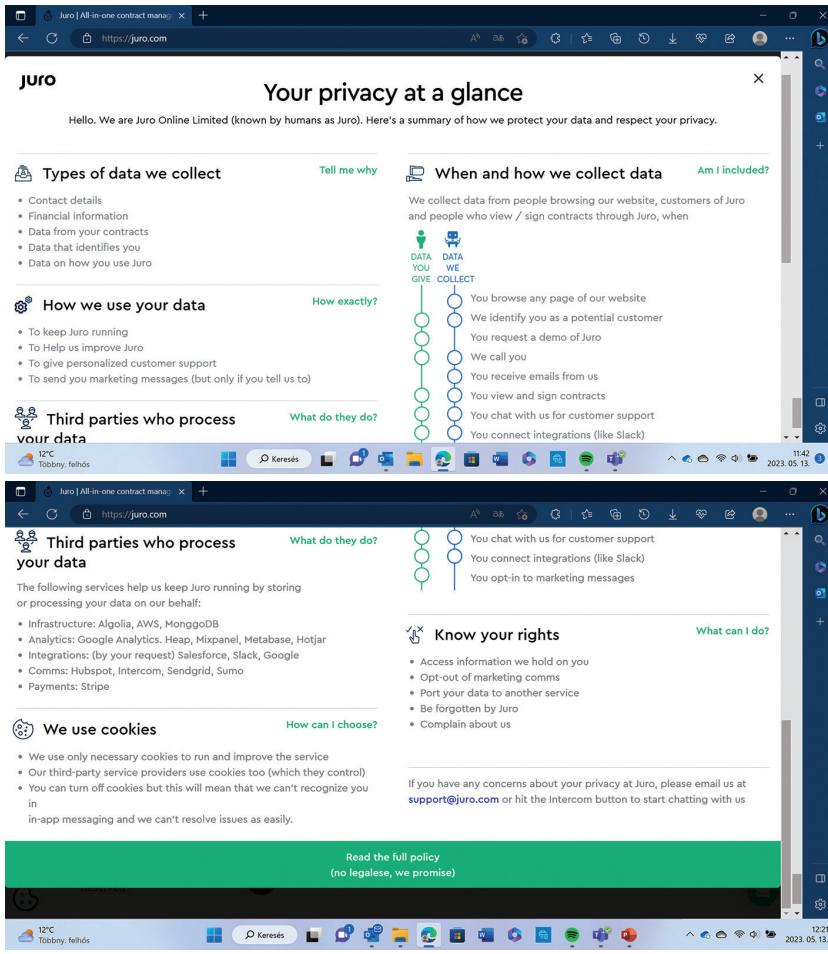
Legal design can make legal information visible to clients, in this way without spending lot of time with analysing legal texts, the client will see the relevant information for him or her. If there is a data privacy policy, there are your rights and obligations in bullets, data processors, what cookies they use, how your data will be used, how had they collected, and so on.



Source: https://juro.com/ privacy policy

[8] Stefania Passera: *Beyond the wall of contract text.* Aalto University publication series, Doctoral Dissertations, 134/2017, Helsinki, 2017. 173.

[9] Astrid Kohlmeier – Meera Klemola: *The Legal Design Book*. 2021. 12.



Source: https://juro.com/ privacy policy

6. Large Language Models (LLM) and legal language

Large Language Models can be the next generation of LegalTech tools. Chat GPT is an NLP[10] technology, which means that machines can understand and process language like humans do. "*They are built with artificial neural networks, (pre-) trained using self-supervised learning and semi-supervised learning, typically containing tens of millions to billions of weights*"[11] Developers of large language models broke down the language into smaller pieces like words, phrases, sentences, and trained machine to understand them. In this way machines can mimic human

10 NLP: https://en.wikipedia.org/wiki/Natural_language_processing

11 LLM: https://en.wikipedia.org/wiki/Large_language_model

tasks like analysing how people feel about a topic, translating languages or generating new text. "The basic concept of ChatGPT is at some level rather simple. Start from a huge sample of human-created text from the web, books, etc. Then train a neural net to generate text that's 'like this'. And in particular, make it able to start from a 'prompt' and then continue with text that's "like what it's been trained with"[12].

Prompting is a set of instructions and guidelines for language models. Legal prompting is about how lawyers can be backed by large language models. Lawyers can prompt ChatGPT easier than learn some Python coding language and create a code for LegalTech purposes. There are some examples how lawyers can use ChatGPT.

6.1. Text generation

Lawyers can create legal documents he or she could use it to generate contracts, policies that he or she had never ever had drafted before. They must be careful, it is not an accurate system, and they still need to check the outcome word by word, but lawyers do not need to work on it from scratch. The system can be trained on previous versions or templates, in this way the quality of the prompted text generation will be better.

Lawyers can train the system and easily change a style of a letter, like first, second or last reminder to pay an outstanding debt. ChatGPT can modify previously prompted lengthy contracts since it can change the terms, or the pricing of it, or change the content according to different jurisdictions. It is easy to do it if lawyers had built prompt libraries. The outcome should always be reviewed. The model can generate client informing letters about recent changes of law, can personalize industrial changes for specific clients, can break lengthy documents into tables showing financial results or can collect figures of a certain documentation. The system can set up project plans of a transaction, can visualize certain tasks, deadlines, responsibilities for a team.

LLM systems like the 'Chat GPT' have changed the situation of text generation. The 'build or buy dilemma'[13] has not been decided yet, but many people (not only lawyers) can now generate legally relevant texts in many languages, and in the case of using the ChatGPT 3.5 version it is for free. Therefore, using such model-generated documents, it is very risky in legal terms, if it is binding for the contracting parties without having any legal review. LLM systems can be very convincing for non-legal professionals. The system is not an intelligent creature[14]. Still does not have any 'intelligence' in terms as humans have, this is just a predictive system based on

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[12] Stephen Wolfram: *What Is ChatGPT Doing ... and Why Does It Work?* Wolfram Media, Inc. Kindle Edition, 2023. 108.

[13] Philipp Gerbert – Sylvain Duranton – Sebastian Steinhäuser – Patrick Ruwolt: The Build-or-Buy Dilemma in AI. *Boston Consulting Group* 2018/1. https://tinyurl.com/4ph47vdu

[14] Blaise Agüera y Arcas: Do Large Language Models understand us? *MIT Press Daedalus,* vol.151. no. 2. (2022,) 183–197. https://doi.org/10.1162/daed_a_01909

datasets built before 2021. The dangers of using such systems without legal control will be highlighted later in this chapter.

When building a model, there is always a human who makes decisions what algorithms to use for what purposes. When creating a dataset, someone needs to abstract the reality, abstraction is not neutral, AI is a model of the reality, and not the reality.[15]

All the AI systems carry the risk of bias relating the human behaviour. Just like the automation bias[16] when a system designed by engineers and treated as artificial intelligence, it is representing a deterministic technology, and human users represent the natural intelligence as an indeterministic reality. People trusting in systems beyond any doubt will result systems which learn humans' actions and behaviour without any control.

6.2. Text Evaluation

Lawyers can upload lengthy legal documents to find relevant content in a very effective and fast way. They need to be careful with the confidential information, so first they need to clean the database. It can take a lot of time, but OpenAI is a third party, it may be trained on the text and prompts given by the lawyers, so confidentiality of business secret is not warranted. It can summarize long articles, collect information from studies.

Lawyers can use it to search for references. Even if they have a short summary, they can expand the text and try to find out what was the original content.

It is good if lawyers want to make the legal document bilingual, but they still need to check the wording, check the jargon. Or this way lawyers can understand the brief content of documents written in a third language.

6.3. Other practices

Lawyers can create smart contracts for themselves in the future, they do not need software developers anymore. In case of dispute, the model can be asked what the meaning of the program code was, how it worked, where potential risks were in software codes. It can be an interpreter between human and machine. Also, texts and content in other languages can be traced, even lawyers can send personalized letters to their clients using their native language.

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15 Mark Coeckelbergh: AI Ethics. *MIT Press, Cambridge, MA,* 2020. 91.

16 Stefan Strauss: Deep Automation Bias: How to Tackle a Wicked Problem of AI? *Big Data and Cognitive Computing,* vol. 5., no. 2. (2021), 18.

6.4. ChatGPT Guidelines and Ethics

Some say that 'ethics starts where the law ends'[17] and machine ethics is the basis of human trust. If we do not trust in machines, we do not find them secure and safe, we will not use them. Therefore, we need trustworthy AI systems, which are transparent, accountable, explainable and de-biased (fair) databases. There is an AI Act[18] proposal in the EU legislation pipeline, until acceptance of it, we do not even have a single definition for AI systems. What we have is codes of ethics[19], guidelines of international institutions[20], and some existing regulations like data protection act (GDPR)[21].

Using generative AI under the 'Acquis Communautaire' lawyers need to check IP and Copyright risks, Data Protection (Privacy) issues, security risks. Contract terms of AI solutions must be checked before the start of the usage. After a certain test period, validation must be done which must be monitored continuously, and users must be trained, policies should be in place to say that liability rules remain on human decision makers. There are huge potential risks on trusting the system without any control, like the training dataset of ChatGPT only contains information what was found before September 2021. So, you cannot find any information regarding 2022, and the system is not in a position to give accurate answers, it is just a statistical probability given in a very convincing way.

Keep the business secrets confidential! Never ever upload any personal data, or business secret, the system watches you, learns about you. You need to generate content without specific data. You need to summarize documents which do not contain business secrets, you need to redact the content before uploading it to the system and clean the database.

The system sometimes creates information, which was false, like authors who were not existing, facts and explanations which were not true. It is called the hallucination of the system.

Lawyers should remember to notify people that he or she used AI. In this way lawyers remain transparent. Lawyers should be aware that in most countries only human can be an inventor, author. [22]

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17 Christoph Bartneck – Christoph Lütge – Alan Wagner – Sean Welsh: *An Introduction to ethics in Robotics and AI. Springer*, SpringerBriefs in Ethics, 2021. 22.

18 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 21.4.2021. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206

19 Law Society LawTech and Ethics Principles, 2021. https://tinyurl.com/4affp49y

20 OECD Recommendation of the Council on Artificial Intelligence 22.05.2019. https://legalinstruments.oecd.org/en/instruments/oecd-legal-0449#mainText

21 Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons 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) OJ L 119, 4.5.2016, p. 1–88.

22 'Consumer-facing uses of our models in medical, financial, and legal industries; in news generation or news summarization; and where else warranted, must provide a disclaimer to users

The capacity of ChatGPT 3.5 chat is about 4500 words. If lawyers want to create larger documents or evaluate larger datasets, they need to break them down into smaller units.

Lawyers need to save their prompts and export the data. Sometimes ChatGPT just clears the previous chats.

Sometimes the system just stops working without any previous notice, in that case just run the last prompt again. Sometimes it slows down, and since the model is running on different servers of the world, the outcome will not be the same even if they run it the day after, result will not be the same.

Lawyers should treat it as a tool which must be controlled. The logic is easy, the interface is simply to learn by anyone, so it will be very popular for non - legal people and everyone will use it for their own legal purposes. [23] Lawyers must be careful if they receive drafts, third parties may say and also clients may say that they had received the draft from a lawyer, which was not true.

The 'forget everything what you learned' prompt will help you to build up your own background, so the system will not be biased. Unless your uploaded data is not biased. You can clear all chats and content what you had uploaded in the system.

Lawyers should build your own prompt library and recycle prompts that were used before. Do not forget to export data since it might be lost. You can ask if the prompt you had given was clear for the system?

The home page of ChatGPT shows limitations of the system like:

- it may occasionally generate false information,
- it may generate biased content,
- it has a limited knowledge,
- it may produce inaccurate information about people, places, or facts,
- Save new chats on the browser to the history and allow them to be used to improve their models. Unsaved chats will be deleted from our systems within 30 days.
- It does not sync across browsers or devices.

The prompts are just like codes, just lawyers do not have to create them, the words and sentences will be the codes. Lawyers need an accurate and legally relevant content. They can achieve better accuracy if they create quality prompts. The more precise they are, the more specific they are, the clearer their prompts will be, the more usable outcome they will have.

informing them that AI is being used and of its potential limitations.' – OpenAI usage policy. https://openai.com/policies/usage-policies

[23] 'Disallowed usage of our models: Engaging in the unauthorized practice of law, or offering tailored legal advice without a qualified person reviewing the information. OpenAI's models are not fine-tuned to provide legal advice. You should not rely on our models as a sole source of legal advice.' – OpenAI usage policy. https://openai.com/policies/usage-policies

6.5. Example of Legal Prompting

Lawyers need to give the context first as a guideline how the machine should generate the content.

{You (ChatGPT) is a teacher, with several years of legal background. You are working in a law school. You are teaching law for second year students. The University is in England. }

This context created the background, all the sources which the ChatGPT needs to work from are given in this way. The English legal structure should be used in this task, the English jurisdiction and legal structure should be used.

So now we have the story, let us create a task, what the outcome should be.

{Create an abstract and list chapters of a legaltech e-book. You need to write it for educational purposes }

The prompt needs to clarify the outcome we needed. As a result, it will draft Chapters of an e-book.

6.6. Prompting legal letters

Drafting letters to clients, drafting letters on behalf of clients are key tasks of lawyers. If we need to generate legally relevant content, we need to use further instructions other than just context, like we should give further restrictions, decide the format of the letter, train the system with examples, and raise the accuracy of the system in this way. Lawyers can save it as an example in the code library and can use it in other situations as well. Where is the magic if lawyers can save it as a template and can use it any time just as they do it now? What are the benefits of ChatGPT? The benefit will occur in the following case, when a second reminder should be sent, or a final, since ChatGPT can change the content, the style, the persona, the recipient within seconds. Even if the recipient is not the client, but the client's customer, ChatGPT can adapt the changes within seconds.

6.7. Contract Drafting

In the case of not having any previous patterns, templates in the lawyer's practice, it is a very fast and effective way to have a first draft instead of creating a completely new document from scratch. Once we have the prompt for contract generation, we can use it in other cases as well, recycling comes here again as a benefit of ChatGPT.

The future of the LLM technology for lawyers will be if lawyers can use such systems embedded in their existing tools, such as Microsoft Word, Excel, Outlook, Bing which is already happening in test phase and in case of the online version of these applications in MS 365.

7. Contracts in blockchain

Imagine a sale purchase transaction, when a buyer pays in cash and the delivery of the goods occurs the same time. They need simple contracts. If it happens online – which is very common in the current business ecosystem – it is not possible to deliver the goods and pay in cash at the same time, so parties need at least a courier to transport the property and probably a bank to pay the deposit. This is still a simple transaction, but we already have 4 parties in the performance of a contract, or contracts. How can technology enhance the performance, the safety and security of the online transaction?

A smart contract does not contain lengthy terms and conditions, it is written in codes which executes itself once the money is paid, and the property had been handled over to the buyer. The longer the code is, the more expensive the transaction fee is. How come, that valuable things can change owners online, without legal wording? The reason is the work of proof, it happens several times, people trust in the system, since it is secure.

A smart contract 'Once completed, the transactions are trackable and irreversible. Smart contracts permit trusted transactions and agreements to be carried out among disparate, anonymous parties without the need for a central authority, legal system, or external enforcement mechanism.'[24]

Smart contracts lack of detailed legal terms, so lawyers use hybrid contracts when a complex transaction occur. The reason for that is the codes do not respect equity, when a late delivery happens and a third party is liable for it, or even does not reflect to *vis maior* cases, or partial performance, or does not have general principles when fulfilling obligations like acting in good faith, cooperation, doing the best what can be expected from the other party, etc. Therefore, one part of the legal documentation is still in traditional contract format. And the special part of the transaction will be distributed on the blockchain as a pledge, warranty, escrow, bail, caution, collateral, safeguard, assurance, bond, security.

8. Conclusions

The focus of this chapter was to give a detailed description of how LegalTech tools could support the lawyers when using legal language. It seems that technology is changing rapidly, and next generation of technology can enhance and widen the use of LegalTech tools. This will be in favour of practitioners and their clients. Smaller law offices and single lawyers will have a chance to be as competitive as larger international law firms are, since they can invest in high technology solutions and became faster and cheaper than their competitors. Smaller entities can form legal cooperations of offices to buy or lease software and start to do specialization for certain legal tasks. Before that adoption, service providers need to make sure that all

[24] Jake Frankenfield: What Are Smart Contracts on the Blockchain and How They Work? *Investopedia,* 2023/5. https://www.investopedia.com/terms/s/smart-contracts.asp

the risks and dangers are managed so people can trust in technology. According to a study,[25] 'legal professionals on departments are increasingly pressured to do more with limited resources. LegalTech tools in the future need more human control since generative AI tools and language models will be built in the systems. Complex legal issues could not be solved solely by machines in the near future. The next generation of law offices or legal departments will have hybrid resources of human and machine, and lawyers will work together with smart tools, which will enhance the customer experience of their clients.

[25] Wolters Kluwer: The 2021 Wolters Kluwer Future Ready Lawyer. *Survey Report*, 2021. 10.

DOI: 10.55019/plr.2023.1.107-111

Pázmány Law Review
X. 2023. • 107–111

CURRENT ISSUE

WHAT ROMAN LAW TEACHES US: MODERN PROBLEMS, ANCIENT IDEAS

Pázmány Summer Law School 2023

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From July 17th to 28th 2023, the Faculty of Law and Political Sciences of Pázmány Péter Catholic University in Budapest hosted a Summer School on Roman Law, whose title and motto was: "What Roman Law Teaches Us: Modern Problems, Ancient Ideas". It brought together 20 undergraduate and graduate students from 10 countries: Canada, the Czech Republic, France, Georgia, Kenya, Poland, Slovenia, Spain, the United Kingdom and the United States. Classes were held daily in some of the most beautiful halls of the Faculty in the heart of historic Pest.

The organisers opted for a workshop format for the Summer School's classes, due to the varying level of knowledge of Roman law among the participants and their different legal backgrounds, coming from countries of common or civil law tradition. With this in mind, the choice of topics for the course, which aimed to look at contemporary issues of interest through the prism of Roman law and the European legal tradition, proved important. This diversity of legal experiences proved to be a cause for participants to ask themselves the most fundamental questions concerning not only Roman law, but also the history, theory and axiology of law. For the participants, the Summer School thus became an arena not only for acquiring knowledge, but also for exchanging experiences and broadening their legal perspectives.

The opening class of the Summer School was given by Professor Viola Heutger, Rector of the University of Aruba, titled "Bi-lingual education and student exchange in the past". In this way, participants were introduced to ancient methods of teaching law. A particular emphasis was placed on the example of the Constantinopolitan school of law in the fourth and fifth centuries AD, as described by imperial constitutions from the Theodosian Code or those contained in Justinian's compilation

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(C. Th. 14,9,3pr–1, C. 11,19,1–4). It was not difficult to see that there were clear points of commonality between the way the law is taught today and the past examples cited. These can be boiled down to three issues: 1) the student-teacher relationship, 2) the library and 3) the analysis of written texts. Various changes in the way law is taught, technological advances and the nationalisation of higher education have only modified, but not removed, these three anchor points for a good law school. Indeed, thee participants themselves confirmed that this was the case based on their own experiences, noting that despite the vast differences in the organisation of higher education in their countries, these points are indeed common to all.

The lecture of the Summer School's second day of the Summer School was conducted by Assoc. Prof. Grzegorz J. Blicharz of the Jagiellonian University in Krakow., with the subject: „Sharing Services in Platform Economy and Roman Law: Dignity of Work". The participants were exposed to a wide range of source texts, dating from both Roman and contemporary times, selected and organised in a way to analyse them by a comparative method and to understand similarities between contemporary and past issues. The main fragments of the Digest discussed were D. 16,3,1,9 (Ulp. 30 *ad ed*) and D. 38,1,25 (Iulian. 65 *dig.*). First of all, Professor Blicharz sought to demonstrate that parallels can be drawn between the situation of freedmen in Roman law and workers employed via modern online platforms, the most popular of which are used to deliver food and provide transport services. Indeed, the freedman's somewhat intermediate status (with regards to the prestation of *operae* to his *patronus*) between a free man letting his services and a slave working for his master was used as a possible model of comparison to distinguish the status of a contractor working for a digital services platform from that of a true independent contract and an employee. The two situations, despite being separated by almost two thousand years and involving drastically different societal and human values, still have the following in common: first, the value of freedom and independence in the prestation of work as well as in the choosing of the means to perform that work; and second, the extent of protections and norms to safeguard the worker's security and dignity. The conclusion of these reflections was that technological developments do not absolve the need to weigh up the dignity of the human person, particularly in the context of employment. This also became the basis for looking at the development of the concept of dignity in philosophy and law.

The third day of classes was devoted to a historical perspective on the issue of slavery. The class, entitled "Slave Labour in Ancient Rome", was led by a retired professor from the University of Trier, Elisabeth Herrmann-Otto. Participants had the opportunity to structure their knowledge of slavery in ancient Rome. The ways of falling into slavery and the possibility of being freed were presented from the point of view of Roman law, more specifically as laid down by Marcianus in fragment D. 1,5,5,1. A strong emphasis was placed on the philosophical definition and justification of ancient slavery by Greek and Roman philosophers, especially Aristotle and Seneca. Moreover, the differences between slavery in ancient Rome and that which occurred later, particularly in the United States, were noted and discussed. In addition to the theoretical introduction, Professor Hermann-Otto brought the participants to work with various source texts, not only juridical, but also historical and philosophical,

concerning slavery in Ancient Rome, which was an opportunity to come into direct contact with the thought of the ancients.

The final day of the content classes of the first week of the Summer School was held under the title: "Recycling the Roman Law by moral theologians, circa AD 1500", given by Professor Jeroen Chorus, Professor Emeritus of the University of Leiden and judge of the Dutch courts. The class introduced participants to a little-known area of reception of Roman law. While it is well known that *Ecclesia vivit lege Romana*, i.e. that canon law took over the rules and principles of Roman law and based a large part of its solutions on it, it is not such common knowledge that moral theology also made use of Roman law in order to resolve moral questions, outside of the ambit of legal obligations. To illustrate this phaenomenon, Professor Chorus usedanalysed examples from the *Quaestiones quodlibeticae* of Adrian of Utrecht, a Dutch moral theologian of the Renaissance period who was later elected Pope Adrian VI. Two particular questions were analysed: the first one was whether a judge could pronounce a sentence based not only on facts alleged and proved at trial, but also on what his own conscience dictated (especially in cases where the judge had a certain personal knowledge regarding the case) (*sexta quodlibetica*); the second one was whether it was moral for a judge to accept remuneration for the performance of his services (*decima quodlibetica*). It was not only curious, but very fascinating to learn how the XVIth century moralists used Roman law sources to corroborate their arguments, but using their *legal* and *authoritative* value by virtue of them being the law in force, but rather appealing to their persuasive and logical value, complementing passages from Sacred Scripture and the *Corpus iuris canonici.*

On the first day of the second week of classes, Summer School participants had the chance - via an Internet connection - to be guests of the University of St. Thomas, Minnessota. That day's lecture was given by Professor Charles J. Reid, who focused on the concept of state and law in the thought of the ancient philosophers, particularly Plato and Cicero. Professor Reid delved in-depth in the constitution of the Roman state both throught a historical analysis of its development, as presented by Cicero, more particularly in his treatise *De republica* (and by Livy in the first books of his *Annales ab Urbe condita*, to a lesser extent), as well as Cicero's moral judgement on the virtues and the harmony that sustained the Roman state. The class concluded by a case study of the moral reforms of Emperor Augustus that concerned family relations, specifically the Emperor's underlying moral and practical causes, his desired goals in pursuing such reforms, and their significance for the nature of family relations which were the basis of the Roman state. The class was an opportunity for participants to learn not only about the broad perspective underlying legal thought in antiquity, but also about the way classes are conducted at universities in the United States. Attention was drawn to the large number of supporting materials and source texts provided by Professor Reid, but also to the interactive way in which the classes were conducted, even in an online format.

Next day's class was held under the title: "Philosophy and Practice. The Role of rerum natura in Roman Legal Thinking", led by Professor János Erdődy from Pázmány Péter Catholic Univeristy. The first part of the lecture was devoted to the role and importance of Roman law for the modern world. Participants had the opportunity

to consider why Roman law was so successful that it became global law, next to public international law and canon law. Professor Erdődy also explained the metaphoric importance of three hills – Acropolis, Capitol and Golgotha for European culture and civilisation. He further offered an impressive overview of the birth, development and culmination of Roman law, from the foundation of Rome to Justinian's time, explaining the origins of various Roman magistrates, the distinction between *ius civile* and *ius praetorium*, the Proculean and Sabinian schools, and the evolution of the nature of the Roman state, from kingdom to republic to empire. In the second part of the course, the concept of *rerum natura* was dealt with: what does it actually mean that things have a nature? The participants tried to answer this question using the experiences of their own cultures and using the thoughts of various philosophers and lawyers, based on selected excerpts of their works, with a focus on the fragments D. 22,1,28,1 (Gai. 2 *rer. cott.*), D. 39,3,2pr (Paul. 49 *ad ed.*) and D. 8,5,8,5 (Upl. 17 *ad ed.*).

The theme of natural law was continued on the next day by professor Nadja el Beheiri, also from the Pázmány Péter Catholic University. The title of her lecture was: "Gender and the Roman Legal Tradition". The basis for the discussion about gender in law was the concept of natural law. The participants learned about different ways of thinking about what natural law is. The history of the understanding this concept was presented in a systematic way, which allowed the participants to create the broadest possible picture: starting from Plato and Aristotle, professor el Beheiri offered a succinct, yet very rich and copious overview of the history of ideas surrounding natural law, namely reason, nature, and *idea*, and explained the main contributions of Saint Bonaventure, Okham, Francisco de Victoria in this area, ending with Hans Kelsen, thus bringing the discussion into the juridical field. Thanks to this very informative outline, it was easier to understand how the concept of gender, intrinsically linked to the idea of nature, was understood at different times. The participants understood how dangerous it is to incur the mistake of anachronism in the study of history of law and philosophy. The very title of the course turned out to be a great example of why some legal topics are used today to achieve political or ideological goals, and why those same uses are simply dishonest from a scientific point of view.

The last day of Summer School classes was held under the title: "How different ideas on personhood influence rights thinking in Africa". Classes that day were led by Professor Cecil Abungu Abungu from the Strathmore Law School in Nairobi. He showed the participants that in African countries the theory and philosophy of law brought by the colonisers is still under the influence of the old African philosophy. This most often manifests itself in the most basic issues, such as the concept of humanity and personality, or rights and duties. The participants were acquainted with the thought of the most important African philosophers who dealt with indigenous local philosophy – Kwame Gyekye and Ifeanyi Menkiti. This perspective allowed for a broader look at the reception of the European legal tradition in different legal orders.

In addition to the main academic activities as summarised above, the participants had the opportunity to attend two so-called lunch time lectures. The first one was conducted by Professor Bastiaan David Van der Velden from the Open University of the Netherlands. Professor Van der Velden presented the history of legal justification of slavery in the ealy-modern era in the Netherlands, as well as the contemporary

legal solutions in force in the Kingdom of the Netherlands for pressing issues that remain after slavery and the old colonial regime were abolished, with particular attention payed to the status and the legal systems of overseas territories, and he explained how difficult it was to create a harmonious and well-functioning legal order for such diverse societies. The second of the additional lectures was given by Dr. Amit Upadhyay from the O.P. Jindal Global University. It concerned the differences between common law and civil law with particular emphasis on the Indian perspective. It was also an opportunity to exchange experiences between those participants who came from common law countries: Canada, Great Britain, Kenya and the United States.

In addition to workshops and lectures, participants also took part in a Moot Court, which was based on a passage by Gaius – D. 41,1,7,7 – regarding specification. This experience turned out to be very instructive, because on the one hand, the participants had to prepare themselves in the field of Roman law to solve the case, but on the other hand, they were also asked to prepare solutions according to their native legal orders. This made it possible to understand how legal thinking developed in different areas of the world. Furthermore, this experience allowed the participants to realise that the vast majority of modern legal solutions are firmly grounded in Roman law.

The didactic process within the Summer School ended with a written exam, in which the participants faced the tasks of creative answers to a few open questions regarding the influence of Roman law in contemporary law. After checking the written submissions by the examiners, a final ceremony took place, where participants werepresented with certificates of participation in the Summer School.

The organisers of the Summer School also made sure that, in addition to the didactic classes, the participants could get to know themselves and the country in which they lived for two weeks. The occasion for this were three organized trips. The first of them allowed to get to know Aquincum, the ruins of a Roman city located in today's Budapest. The participants were shown around the city, saw the authentic Roman urban layout, preserved memorabilia, including wonderful sarcophagi and a reconstructed Roman house. The dedicated guide brought the Roman history of Pannonia closer to everyone, but also the history of the discovery of Roman remains and their conservation in Hungary.

Another organized trip allowed the participants to get to know Visegrád, the late medieval capital of Hungary. It was an opportunity to learn about the history of Hungary as well as the history of cooperation between Central European countries, for which the city is symbolic due to the fourteenth-century Congress of Visegrád. The last trip took place after the certificate awarding ceremony and allowed the participants to spend the last day together at Lake Balaton.

Pázmány Summer Law School 2023 was an informative and integrating event, which made possible to make many long-lasting academic friendships and gain plenty of fresh and enriching experience. Gathering participants from so many different legal orders and with very different levels and backgrounds in Roman law could have seemed to be a risky endeavour. At the end of the day, however, it is clear that the experiment was resoundingly successful, and, as we hope, will provide inspiration for similar future events in the field of Roman law!

DOI: 10.55019/plr.2023.1.113-149

Pázmány Law Review
X. 2023. • 113–149

ARTICLES

LEADERSHIP AND INTEGRITY: THE CITADELS FOR CONSTITUTIONALISM IN KENYA

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Abstract

Chapter 6 of the Constitution of Kenya, 2010 provides for the modicum of constitutionalism that state officers ought to espouse in exercising public authority. Kenya has a robust legal and institutional framework that is mandated to implement the provisions of Chapter 6 of the 2010 Constitution in remedying historical accounts of corruption among state officials. This article appraises the strides made and the notable roadblocks faced since the promulgation of the 2010 Constitution. In doing so, it primarily employs a doctrinal research methodology analysis. It is argued that an obscured definition of leadership and integrity and insufficient institutional capacity have slowed down the implementation of Chapter 6. This article proposes minimum statutory penalties, a harmonised understanding of the standards of integrity to be attained and the security of tenure of offices such as special magistrates.

Keywords: Constitutionalism, Leadership and Integrity, Constitution of Kenya, Public authority, Discretionary powers.

1. Introduction

27 August 2010 is a date that will remain forever etched in the minds of Kenyans; it has all the makings of an Independence Day. On that day a new constitution was promulgated, bringing to an end the near two decades journey of the constitutional reform process. The 2010 Constitution captures the aspirations of all Kenyans "for a government based on the essential values of human rights, equality, freedom,

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democracy, social justice and the rule of law".[1] It is definitely not sufficient to promulgate a good constitution: concrete and steadfast steps must be taken to ensure that the hard-earned provisions are fully implemented in order to consummate the noble aspirations of the citizenry. Learning from the history of Kenya, it is clear that the repealed Constitution was not implemented properly and, on many occasions, it was violated blatantly leading to a near breakdown of the rule of law. The reason for such a pitiable outcome was identified by Hastings Okoth-Ogendo in his seminal academic piece entitled 'Constitutions without Constitutionalism: an African paradox'.[2] The thrust of his argument is that it is not enough to promulgate a constitution: a culture of constitutionalism ought to be cultivated and espoused by the country's leadership in particular and by its citizenry in general.

This manifested in numerous instances of corruption to the point that Kenya's Parliament noted that corruption was almost acceptable, almost legal since most people engaged in corrupt practices knowing that nothing could be done.[3] This may be tracked from the Report of the Public Service Structure and Remuneration Commission 1970-71, popularly known as the Ndegwa Commission Report which allowed senior civil servants to engage in private business ventures.[4] This move sowed the seeds of a conflict of interest that Parliament would recognise 30 years later. Hon. Omingo Magara, then the Member of Parliament (MP) for South Mugirango Constituency advised the Minister of Finance on 27 June 2002 that allowing civil servants to do business would mismanage Kenya's economic development since influential people formed companies and looted the nation.[5] The spread of this wanton looting was one of the major catalysts that sparked the dire need for constitutional reforms.

Against the backdrop of this history, Kenya embarked on a two-decade-long quest for constitutional reform culminating in 2 reports. The first was the 2005 report by the Constitution of Kenya Review Commission (CKRC)[6] and the second was the 2010 report by The Committee of Experts (CoE)[7] which succeeded the former. Both reports reflected the general consensus of Kenyans to hold their leaders accountable

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1 Preamble. *Constitution of Kenya* (2010).

2 Hastings Wilfred Opinyo (H.W.O) Okoth-Ogendo:'Constitutions without Constitutionalism: Reflections on an African Political Paradox'. In: Daugles Greenberg – Stanley N. Kartz – Melanie Beth Oliviero – Steven C. Wheatley (ed.): *Constitutionalism and Democracy Transitions in the Contemporary World*. New York, Oxford University Press, 1993.

3 Parliament Hansard Report, 20th April 1972. These remarks were made by Hon Nthenge during the debate on the motion to approve the Report of the Select Committee on Stock Theft.

4 Parliament Hansard Report, 20th April 1972. This remark was made by Hon Gichoya in the debate on the motion to approve the Supplementary Estimate No. 1 of 1971/72 – Recurrent. In that debate, it came out clearly that the Ndegwa Commission Report had not been approved by Parliament and that the House only got a chance to question it substantially when the Supplementary Estimate was presented to it as it carried several expenditure items arising from the implementation of that Report.

5 Parliament Hansard Report, 27th June 2002. Remarks by Hon Omingo Magara.

6 Constitution of Kenya Review Commission (CKRC), *Final Report*, 2005. 219.

7 Republic of Kenya, *Final Report of the Committee of Experts on Constitutional Review,* 2010. 111.

for their actions based on a code of conduct established under the new constitution to mitigate the prevalent cases of corruption that occurred at very high levels of society. This informed the establishment of an independent and constitutionally protected anti-corruption body which would investigate the powerful members of the Executive and be an important means of checking the exercise of executive power.[8]

The modicum of constitutionalism is captured in Chapter 6 of the Constitution premised on leadership and integrity. The Constitution sets out an integrity threshold for state officers at the point of appointment or election and to maintain that threshold whilst in office. A key hindrance in the implementation process has precisely been the identification, election or appointment of leaders who espouse the provisions of Chapter 6 on leadership and integrity which is grounds for removal from State Office. These provisions also extend to judges at Kenya's Judiciary, the principal enforcers of Chapter 6, who ought to not only adhere to them but also be persons of high moral character and integrity.[9] These provisions aim to solidify proper checks and balances between and among the three organs of Government, Parliament, Executive and Judiciary) to ensure accountability of the Government and its officers to the people of Kenya.[10]

The question then is whether, on the tenth anniversary of the promulgation of the Constitution (27 August 2020), Kenya has managed to foster the requisite levels of constitutionalism for the implementation process. Has the country managed to have holders of State Offices who meet the minimum threshold of integrity established by Chapter 6? This article examines the challenges faced with the implementation and the adequacy of the current mechanisms that facilitate the implementation of Chapter 6 accordance with the wishes of the drafters and the Kenyan populace who approved the 2010 Constitution by way of referendum.

Therefore, this article clarifies essential terms, analyses the relevant legal provisions, assesses the institutional arrangements in place to deal with leadership and integrity and scrutinises relevant judicial decisions on this matter. In doing so, the article adopts the following four-part roadmap. The first part analyses the concepts of leadership and integrity and their relationship to constitutionalism while the second part inspects the constitutional and legal framework on leadership and integrity in Kenya under the 2010 Constitution. The third part entails an exposition of the nature and dynamics of various institutions constitutionally and statutorily mandated to enforce legal provisions on leadership and integrity. The paper concludes in the fourth part with a summary of key findings from the watershed court cases on the implementation of the provisions on leadership and integrity

8 Committee of Experts (CoE), *Final report*, 2010. 111–112.

9 Article 166 (2) (c) *Constitution of Kenya* (2010).

10 Constitution of Kenya Review Act (2008), s. 4 (c).

2. A Constitutionalism premised on leadership and Integrity

2.1. Constitutionalism

The traditional conception of constitutionalism opines that government can and should be legally limited in its powers and that its authority depends on it observing these limitations.[11] It is assumed that these powers are assigned and delineated in a constitution be it written or not. Constitutionalism thus conceived must of necessity piggyback on the separation of powers doctrine. Importantly, this perennial view has attracted critique from scholars such as M.J.C. Vile who posit that the absolute separation of powers is not only impossible but has never been achieved.[12] Apart from showing that the three arms of government as traditionally conceived frequently exercise all the three functions of government, Vile asserts that there is a fourth function which is discretionary in nature and thus 'largely free from pre-determined rules'.[13] Thus if constitutionalism is limited to government abiding by laid down rules, a big gap would arise simply because in practice not all governmental actions are amenable to legal control.

This conception of constitutionalism is opposed to the one formulated by de Smith in which rules curb the arbitrariness of discretion.[14] However, it is in keeping with the perennial view that a middle path must always be sought between a discretion 'too wide for safety on one hand, and too narrow for convenience on the other'.[15] Failure to provide for this discretion may make the exercise of power inflexible and intricate hence increasing the risk of mischance.[16] Besides, it is practically impossible to have a set of rules that envisage every possible situation given that society is dynamic and hence law follows life.

Whether the 'discretionary function' will be exercised reasonably and in good faith in favour of the common good and not in favor of other interests largely depends on the integrity of the prevailing leadership (be it a judge, a legislator or an administrator). True constitutionalism would consist in the reasonable and *bona fide* exercise of discretion by the country's leadership and this is based on the commitment to 'nurturing and protecting the well-being of the individual, the family, communities and the nation' contained in the preamble of the 2010 Constitution. This conceptualization of constitutionalism augurs well with the view expressed

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11 See "Constitutionalism," In: *Stanford Encyclopedia of Philosophy.* San Francisco, Stanford University, 20 Feb 2007. http://plato.stanford.edu/entries/constitutionalism/

12 Maurice John Crawley Vile: *Constitutionalism and Separation of Powers.* (2 ed.) Indianapolis, Liberty Fund, 1998. 347.

13 Ibid. 358.

14 Stanley de Smith: *The New Commonwealth and Its Constitutions.* London, Stevens & Sons, 1964. 106.

15 Maurice John Crawley Vile: *Constitutionalism and Separation of Powers.* (2 ed.) Indianapolis, Liberty Fund, 1998. 347

16 Stanley de Smith: *The New Commonwealth and Its Constitutions.* London, Stevens & Sons, 1964. 106.

earlier on by Okoth-Ogendo that the essence of constitutionalism lies in the 'fidelity to the principle that the exercise of state power must seek to advance the ends of society'.[17] Additionally he asserted that the mere promulgation of a constitution does not of itself produce the optimal balance between 'the few on whom the constitution confers power and the majority for whose benefit it is supposed to be exercised'.[18] Constitutionalism accordingly would only flourish if the right 'social, economic, cultural and political' conditions are present.[19]

The 2010 Constitution secures constitutionalism as conceived by introducing requirements as to leadership and integrity on the part of State officials. This is because the State officer will exercise public authority in serving the people, rather than the power to rule them'.[20] The power and authority of the Government is thus channelled towards serving the people rather than placed within confines in order to protect the people from abuse. The 2010 Constitution is thus not only a 'power map' but also a 'basic law' that directs the exercise of authority towards the achievement of stated and desired societal goals. It clarifies the common good to be pursued by clearly laying down national values and principles of governance which must be adhered to by any person who interprets and applies its provisions and remedies the often elusive, unwritten and unstated spirit of the law.[21]

It further empowers the superior courts to decide questions and disputes regarding constitutional application and interpretation with finality. Hence, the Judiciary must assert itself in its role of adjudicating disputes and developing rules to ensure that the 2010 Constitution achieves its intended purpose. The Judiciary literally breathes the spirit into the law and judges ought to exercise wide discretion in a proper, appropriate and opportune manner. Judges should not simply exhibit 'readiness to acquiesce in governmental and administrative acts' which subvert the common good.[22] They must exhibit courage and vigilance to ensure that the power entrusted to the Government by the people is exercised in good faith and not arbitrarily in pursuit of obscure interests. On the other hand, the exercise of judicial discretion is often limited by political actions that are beyond judicial control. For instance, Parliament may pass legislation overturning a judicial decision contra to administrative action.[23]

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17 Hastings Wilfred Opinyo (H.W.O) Okoth-Ogendo:'Constitutions without Constitutionalism: Reflections on an African Political Paradox', 79.

18 Ibid. 80.

19 Ibid.

20 Article 73 (1) (b), *Constitution of Kenya* (2010). This implies a service leadership as opposed to a domineering or ruling leadership. There is almost a Copernican revolution introduced by the 2010 Constitution in that state officers are no longer servants of the crown but of the people.

21 Article 10 (1), *Constitution of Kenya* (2010).

22 Maurice John Crawley Vile: *Constitutionalism and Separation of Powers.* (2 ed.) Indianapolis, Liberty Fund, 1998, 352.

23 Ibid.

2.2. Leadership and Integrity

Leadership presupposes a fiduciary relationship between a leader and those being led, where the leader exercises their authority in good faith solely for the benefit of the community of followers and never for any other selfish or obscure purposes. Those being led hold their leader accountable and once their integrity disappears, the led (followers) could initiate mechanisms to depose the leader by any means possible or declare allegiance to another leader to whom they can entrust their causes to. The authority and legitimacy of the leader ultimately flows from the connection with those being led. Alejo Sison, for instance, argues that a leader's exercise of power is legitimised by their beneficial moral influence over the followers.[24] The leader must be honest enough to place the interest of the people above all other interests.[25]

A negative point of departure may be useful in comprehending the concept of leadership: nobody in their right senses desires to be subject to a bad leader or to be misled. Leadership therefore connotes something positive and noble. The Oxford Advanced Learner's Dictionary defines the verb 'lead' as 'to show the way' or make someone go in the right direction.[26] These definitions imply that the leader should not mislead and thus should have rectitude or integrity. To guide in the right direction presupposes integrity: a person without integrity is unlikely to lead others in the right direction. And what is this right direction? In this context, the right direction must mean the achievement of the purposes and objects of the 2010 Constitution which generations of Kenyans fought for.

Integrity, in the context of constitutional implementation, encompasses the unified possession of certain traits which capacitate the leader to direct and guide the citizens under their care towards the achievement of the purposes of the 2010 Constitution. Since leadership is a relationship between a leader and followers, the first trait of necessity is justice. The leader must be prepared at all times to give the followers what is due to them and on the flip side the leader must not exert from the followers more than what is just. Secondly, the leader must possess prudence which is a trait that enables one to apply practical reason in assessing and devising the means necessary to achieve various ends or objectives. The Court of Appeal of Kenya alluded to this trait in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, when it stated that in fashioning a judicial test to determine constitutionality of appointments on grounds of integrity, the rationality test is equally controlling 'if properly applied in terms of the means-ends analysis'.[27] All leaders must grapple with

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[24] Alejo Sison: *Moral Capital of Leaders: Why Virtue Matters.* Edward Elgar Publishing, *Cheltenham, UK,* 2003, 37.

[25] This sentiment was expressed by the people of Kenya during the constitutional review process as evidenced by the commentary by the Constitution of Kenya Review Commission (CKRC). At page 217, the final report reads: 'Integrity…plays an important role in ensuring that leadership remains focused on the interest of the people and desired by the people'.

[26] Albert Sidney Hornby: *Oxford Advanced Learner's Dictionary*. 8th edition. Oxford, OUP, 2010.

[27] (2013) eKLR (Kenya Law Reports – online database), paragraph 60.

the means-end analysis if they are to rightly and appropriately achieve the goals and purposes of the societies they are responsible for.

The other two traits (self-control and courage) that the leader must possess may be glimpsed from the provision of Article 73(1)(b) of the 2010 Constitution which states that the authority assigned to a State officer 'vests in the State officer the responsibility to serve the people, rather than the power to rule them'. The desire to rule, exercise power and to be served by the people is a strong one by any standards and a leader must possess a good dosage of self-control. Self-control aids a leader in putting their human desires in check and consequently enables them to use their office for its established purpose. Since it is harder to serve than to be served, it is also necessary for the leader to demonstrate courage.[28] Courage is a trait that enables one to achieve difficult objectives and overcome obstacles. And yes some of the objectives contemplated by the 2010 Constitution will be difficult to achieve and will encounter many obstacles. For example, the implementation of Chapter 6 is itself fraught with difficulties and resistance from the old order. The modicum of courage required is perhaps best expressed in the words of John Kennedy who stated that 'a man does what he must in spite of personal consequences, in spite of obstacles and dangers and pressures and this is the basis of all human morality'.[29] Leaders must then do what they ought to do in order to achieve the ends of the community of persons under their care.

Having summarised the traits necessary for one to lead with integrity, it is then necessary to clarify one common error about integrity: that integrity is only about justice and incorruptibility. This notion may be fuelled by the 2010 Constitution's preoccupation of eradicating corruption, which is by no means a small feat.[30] However, from a keen reading of Chapter 6, integrity of the leaders is concerned with the welfare of society as a whole and not just financial rectitude of those in public office. This position is supported by the guiding principles of leadership and integrity outlined in Article 73(2) which include: 'selfless service based solely on the public interest'; and 'discipline and commitment in service to the people'.

Be that as it may, one would be remiss to conclude that the foregoing analysis of the terms is conclusive. The definition of the terms leadership and integrity defy easy definition as expressed by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others*[31] in the quoted judgement:

> (59) We wish to reiterate, having disposed of the issue of separation of powers, that leadership and integrity are broad and majestic normative ideas. They are the genius of our constitutional fabric. However, their

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28 Constitution of Kenya Review Commission (CKRC). 217. Courage was identified in the *Final Report of the Constitution of Kenya Review Commission,* 2005. 217. as one of the values required of a leader.

29 John F. Kennedy: *Profiles in Courage.* New York, Harper Collins, 1955. Quoted in David Wright: *America in the 20th Century, 1960–1969.* (2 ed.) New York, Marshall Cavendish, 2003. 885.

30 Articles 75–77, *Constitution of Kenya* (2010).

31 (2013) eKLR.

> open-textured nature reveals that they were purposefully left to accrue meaning from concrete experience. Restated, whereas these concepts germinate from the ground of normativity, they grow in the milieu of the facticity of real experience. Their life blood will therefore be our experience, not merely the abstract philosophy or ideology that may underlie them. (Emphasis supplied.)

Perhaps the Court of Appeal may be faulted for its decision since a case filed before the courts is part of that 'milieu of the facticity of real experience' within which the concepts grow. It may very well be that the Court of Appeal abdicated its responsibility of defining with finality what integrity and leadership means. Instead, the Court of Appeal diffused responsibility and stated that the function of advancing the frontiers of the emerging jurisprudence on integrity belonged to the courts, other organs of government and the people.[32] It is not lost to observation that the people and other organs of government look forward to the courts for guidance when the law is ambiguous. This is a constitutional matter and if there is ambiguity, the courts ought to supply an answer. As shown later in this chapter, the High Court, whose decision was the subject of the appeal, had done a laudable job with regard to advancing the frontiers of this emerging jurisdiction. Since the 2010 Constitution provides for leadership and integrity prominently, Kenyans must continue labouring to decipher these provisions and gain full advantage of them.

2.3 The premising

The nexus between constitutionalism, leadership and integrity could not have been expressed better than Rajendra Prasad's following statement uttered at the time of the adoption of India's Constitution in 1949:

> Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way the country is administered. That will depend upon the men who administer it… If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a Constitution, like a machine, is a lifeless thing. It acquires life because of the men who control and operate it…[33]

It is thus clear that if the country's leadership is not composed of persons of character and integrity, then the constitution however brilliantly conceived would not help the country at all. With these definitions well captured, this article further

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[32] (2013) eKLR, paragraph 88.

[33] Dr. Ranjendra Prasad, quoted in B. L. Wahedra: *Public Interest Litigation (Dr. Ranjendra Prasad Quoted)*. 2 ed. New Delhi, Universal Law Publishing, Co. Pvt. Ltd, 2009. 8.

explores Chapter 6 of the 2010 Constitution and the Kenya's statutory efforts aiding its implementation.

3. The Constitutional and statutory provisions on leadership and integrity

3.1 Constitutional provisions

Chapter 6 of the 2010 Constitution boasts six novel provisions to ensure accountability of state officials exercising public authority beginning with the Establishment of service leadership and authority as a public trust. Leadership is a fiduciary entrusted with public office to serve the people and it does not accord a leader the chance to rule over them. The 2010 Constitution then must not be viewed as a power map: it is a service charter.

Secondly, there is the delineation of principles of leadership and integrity.[34] These cover matters such as the selection to public office should be based on integrity and competence in free and fair elections. The proviso raises the question whether elected persons should or should not possess integrity and competence. It would seem that these are applicable to leaders who occupy appointive positions as opposed to elective ones. The standard of service that the leader is supposed to serve selflessly with discipline and commitment in line with the public interest.[35] Decision making should be done with objectivity, impartiality and accountability.[36]

Thirdly, is the primacy of public interest over all other interests. Chapter 6 specifically forbids conflict of interest and requires State officers to place public interest above all other interests. State officers are to achieve this through the declaration of any private interest that may conflict with public duties[37] in all aspects of their lives and to avoid conflict between personal interest and official duty.[38]

Fourthly is the prohibition of specific conduct. Chapter 6 also goes on to take the format of a code of ethics and conduct by proscribing and prescribing specific conduct such as delivery of gifts given to State officers on official occasions,[39] prohibition from maintaining foreign bank accounts,[40] prohibition against soliciting or accepting personal loans and benefits in circumstances that may compromise the integrity of public office[41] and the restriction of full time State officers from holding other gainful employment and of appointed officers from holding positions in political parties.[42]

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34 Article 73 (2) (a) *Constitution of Kenya* (2010).

35 Ibid. Article 73 (2) (c & e).

36 Ibid. Article 73 (2) (b & d).

37 Ibid. Article 73 (2) (c–ii).

38 Ibid. Article 75 (1) (a).

39 Ibid. Article 76 (1).

40 Ibid. Article 76 (2).

41 Ibid. Article 76 (2).

42 Ibid. Article 77.

Breaching any of these provisions exposes the State officer to disciplinary procedures established for the relevant office which may include dismissal or removal.[43]

Moreover, state officers are required to take the prescribed oath or affirmation before assuming State office.[44] These oaths, contained in the Third Schedule, bind the respective deponents to obey, respect and uphold the Constitution, a further manifestation that leadership and integrity are necessary for constitutionalism in the 2010 dispensation.

Lastly, Chapter 6 obliges Parliament to enact legislation with a twofold purpose. Firstly, Article 79 provides for enactment of statute establishing an independent ethics and anti-corruption commission. From this Article, it is clear that the commission has to be independent and besides dealing with corruption, it ought to promote ethics. Secondly, Article 80 requires Parliament to legislate on leadership tackling the procedures and mechanisms of effectively administering the provisions of Chapter 6, the prescription of additional penalties that may be imposed for contravention of Chapter 6 and the Application of Chapter 6 with requisite modifications to public officers.[45]

The legal provisions in place to implement Chapter 6 could be categorised into two: statutes that pre-existed the 2010 Constitution and statutes made pursuant to it. With regard to pre-existing statutes, it is important to note that they ought to be re-examined to ensure that they are consistent with the 2010 Constitution: otherwise, the 2010 Constitution will suffer the same fate as the Repealed Constitution which was made subservient to a monolithic body of statutes of colonial origin.[46] The relevant statutes are briefly discussed below.

3.2 Statutory Provisions

3.2.1 Ethics and Anti-Corruption Commission Act of 2011

The Ethics and Anti-Corruption Commission Act (EACC Act) establishes the Ethics and Anti-Corruption Commission (EACC) as required by Article 79 of the 2010 Constitution. Unlike its predecessors, the EACC is ontologically different on two accounts. First, it is a constitutional commission with status and powers of similar commissions established under Chapter 15 of the 2010 Constitution.[47] Second, the EACC is supposed to deal with ethics and not just corruption. KACA and KACC

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43 Ibid. Article 75 (2) and 76 (2). The disciplinary procedures for specific state offices are not contained in the constitution and therefore unless there are statutes with clear disciplinary procedures for various state offices, this particular constitutional provision may be rendered nugatory.

44 Ibid. Article 74.

45 Chapter 6 is applicable primarily to State Officers who are holders of any of the state offices listed under Article 260 of the Constitution. All other persons performing functions within state organs and who hold public offices which are not categorised as "State offices" are the public officers referred to in Article 80.

46 Okoth-Ogendo op. cit.

47 Articles 249, 252 and 253, *Constitution of Kenya* (2010).

were simply anti-corruption commissions and played minimal or no role in the cultivation of ethics in public service.

The EACC Act of 2011 provided for a chairperson and two members.[48] This number was then raised to five vide section 2 of the EACC (Amendment) Act of 2015. This followed Article 250 of the 2010 Constitution which requires constitutional commissions to consist of at least three members.[49]

Section 11 of the Act provides for EACC's functions which include the:

- Development of a code of ethics, standards and best practices in integrity and anti-corruption for State officers. In addition, EACC is to exercise oversight in the enforcement of codes of ethics prescribed for public officers.
- Reception of complaints on breach of codes of ethics by public officers.
- Investigation of any acts of corruption, economic crimes and violation of code ethics. Upon investigations, the EACC may make recommendations for prosecution to the office of the Director of Public Prosecutions (DPP).

Institution and carrying out of court proceedings for purposes of the recovery or protection of public property, or for the freezing or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.

The EACC plays a key role in both the recruitment and removal processes of state officials in ensuring that public offices are occupied by persons of integrity. At the recruitment stage, applicants for State offices are required to seek clearance from the EACC in order to qualify for vetting.[50]

The last two additional functions are essential in preparing EACC for the efficacious execution of its mandate. The Act does not give EACC prosecutorial powers: it is to depend on the DPP. This has been criticised given the inefficacious of previous anti-corruption bodies due to lack of prosecutorial powers and constitutional mandate. The 2010 Constitution does not bar the granting of prosecutorial powers and Article 157(12) vests Parliament with discretion to enact legislation conferring powers of prosecution on authorities other than the DPP. This could be an indication that the fight against corruption is yet to be given the requisite amount of attention for it to bear lasting results. EACC is also required to apply the Anti-Corruption and Economic Crimes Act of 2003 in its functions.

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48 Ethics and Anti-Corruption Commission Act, s. 4, *Laws of Kenya*.

49 Article 250, *Constitution of Kenya* (2010).

50 See Leadership and Integrity Act (2012), s. 13 (2). This section requires persons who wish to be elected into any State Office to submit a self-declaration form to the Independent Electoral and Boundaries Commission. The original Act was amended and Section 12B was added requiring persons intending to be appointed to a State Office to submit the self-declaration form to EACC (this was done through the Statute Law (Miscellaneous Amendment) Act (No. 18) of 2014). The Form is set out in the First Schedule of the Leadership and Integrity Act. Thus the requirement for an ethical clearance now applies to both appointive and elective positions.

3.2.2 EACC's appraisal as an institution concerned with leadership and integrity

The EACC may institute civil proceedings in line with its power to sue and be sued granted by dint of its incorporation under Article 253 of the 2010 Constitution. The EACC has so far made use of this provision and has instituted a number of civil cases for the recovery of assets stolen from the public and in others for the freezing of assets pending investigations. In the 2017-2018 year, EACC recovered assets in form of cash and immovable properties worth 352 million Kenya shillings through 17 civil cases that were settled through both adjudication and by out-court negotiations.[51] Earlier on, in the 2014-2015 year, EACC recovered assets worth 140 million shillings and also instituted 12 civil cases for the recovery of illegally acquired public assets and for the preservation of property.[52] The flip side of this provision is that the EACC has also been sued and it has had to defend several civil suits in the form of constitutional references and judicial review filed against it by various public ecogners whom it has sought to investigate or prosecute.

In the 2014/2015 year alone, it had to defend a record 68 suits filed against it by various public officers and interested parties who sought a wide range of remedies which included injunctions stopping the EACC from conducting investigations, compensation for malicious prosecution, orders of mandamus in respect of property and certain reports in its possession, conservatory orders restraining the EACC from initiating prosecution, and even damages for defamation.[53] In the 2017-2018 year, the agency faced a further 67 suits of a similar kind.[54] The multiplicity of these cases serve to slow down the pace of the EACC and further constrain its resources as it has to spend time and money defending these civil suits.

3.2.3 Leadership and Integrity Act of 2012

This Act was enacted pursuant to Article 80 of the 2010 Constitution and in essence it is bound to the Ethics and Anti-Corruption Commission Act discussed above, principally because its enforcement is entrusted with the EACC. Section 4(3) of this Act allows the EACC to request the assistance of other State organs in the execution of its mandate to enforce the Act and Chapter 6 of the Constitution. This request for assistance may sound like a soft one but in essence, the EACC may apply to the High Court in case a State organ fails to comply with its request.[55]

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[51] See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2017–2018*. Kenya, EACC, 2018. 39–40.

[52] See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2014–2015*. Kenya, EACC, 2015. 41–42.

[53] See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2014–2015*. Kenya, EACC, 2015. 43–48. In the 2014–2015 year, EACC faced 68 suits challenging its actions and mandate.

[54] See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2017–2018*. Kenya, EACC, 2018. 35–38.

[55] Leadership and Integrity Act (2012), s. 4 (5) *Laws of Kenya*.

One of the key purposes of this statute is the establishment of procedures and mechanisms for the effective administration of Chapter 6. It has been argued that the statute is weak and lacks sufficient mechanisms to back the enforcement of the constitutional provisions on integrity.[56] The bulk of the statute deals with the general code of ethics for State officers in Kenya. Besides the general code, the statute requires each public entity to put in place a specific code for its State officers.[57]

The Leadership and Integrity Act mirrors the structure of the Public Officer Ethics Act of 2003, which is incorporated into the general code of ethics by virtue of Section 6(3). The main difference between the Leadership and Integrity Act and the Public Ethics Officer Act is that under the former, the EACC is the responsible commission while under the latter, responsibility for ethics is diffused in several commissions.

3.2.4 Anti-Corruption and Economic Crimes Act of 2003

This is arguably one of the most comprehensive and forward-looking pieces of legislation enacted in the history of Kenya to combat corruption. The Act has several laudable provisions which include a very clear definition of corruption,[58] bribery [59] and economic crimes. Section 3 of the Act involves a bold step as it provides for the appointment of special magistrates to hear and determine cases concerning corruption, economic crimes and related offences. Basically, the Act does not stop at descriptions of proscribed conduct: it goes the whole length by providing for detailed mechanisms of investigations,[60] collection of evidence, determination of cases[61] and recovery of public assets. Part V of the Act further outlines the offences for which a person may be investigated, arrested and charged in court. The offences include: bribery, conflict of interest, bid rigging, abuse of office etc. Section 48 of the Act goes ahead to stipulate the penalties applicable for the offences under Part V of the Act. However, the shortcoming is that the penalty is stated as a ceiling rather than a floor

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56 Juliet Okoth: "The Leadership and Integrity Chapter of the Constitution of Kenya 2010: The Elusive Threshold." In: Morris Kiwinda et al (ed.): *Human Rights and Democratic Governance in Kenya: A Post–2007 Appraisal*. Pretoria, Pretoria University Law Press, 2015. 296.

57 Leadership and Integrity Act (2012), s. 37 *Laws of Kenya*.

58 Leadership and Integrity Act (2012), s. 2 *Laws of Kenya*. Corruption is defined to include not just bribery and embezzlement of funds but also matters such as abuse of office and breach of trust. This augurs well with Article 73 of the 2010 Constitution which defines authority of state officers as a public trust.

59 Anti-Corruption and Economic Crimes Act (2012), s. 39. *Laws of Kenya*. It covers both the giver and the recipient of the bribe.

60 Ibid. s. 23 (4). It extends police power to EACC investigators to enable them investigate and in fact they are accorded the power to arrest persons in the like manner that police do it in section 32 of the Act.

61 Part II of the Act provides for the appointment of special magistrates and their jurisdiction. Section 5 (1) even confers on them the power to grant full amnesty to any person who makes full and true disclosure of the circumstances of the offence in question.

i.e. a maximum of shillings one million or ten years imprisonment.[62] This grants the courts wide discretion in sentencing which could lead to very lenient penalties being imposed and which in return would not serve to inhibit corruption. In spite of the foregoing, this statute is quite detailed and although it predates the 2010 Constitution, it is a very useful tool for implementing the requirements on financial probity of State officers outlined in Chapter 6 of the 2010 Constitution. The statute also recognises that corruption has for long been considered part of 'business culture' in Kenya and thus under Section 49 it acknowledges that bribery is a customary practice in any business, profession or calling.

3.2.5 Bribery Act of 2016

This Statute was enacted to provide for the prevention, investigation and punishment of bribery by both private and public entities. The EACC is the agency entrusted with the enforcement of the new statute. Part II of the Act gives elaborate details as to what entails bribery as well as the culpability of givers, recipients and third parties. Part II of the Act further requires private and public entities to put in place adequate procedures for the prevention of bribery and corruption. Part II of the Act also mandates the EACC to assist such entities in the formulation of procedures. Part V of the act prescribes stiff penalties which include: imprisonment; fines equivalent to five times the value of the bribe; disqualification from holding State or Public Office; and disqualification from being a partner or a director in private entities. Part VI of the Act finally makes provisions for the protection of whistleblowers and witnesses.

EACC developed the draft Corruption Prevention Guidelines and Regulations in the 2017-2018 year under the Bribery Act.[63] EACC also commenced implementation of the Act by undertaking investigations into complaints of bribery though not without hurdles. For instance, in 2018, it had to defend a judicial review application in which some Members of County Assembly (MCAs) sought an order of Prohibition to prevent it from summoning them for investigation "over alleged bribery allegedly undertaken in the course of performance of their duties within the precincts of Nairobi City County Assembly."[64] The MCAs argued that actions done within the precincts of the County Assembly were protected under the County Assemblies Powers and Privileges Act and could only be investigated by the Committee on Powers and Privileges. The Anti-Corruption and Economic Crimes Division of the High Court in Nairobi determined this application in favour of EACC and among

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[62] Anti-Corruption and Economic Crimes Act (2012), s. 48 *Laws of Kenya*. This gives the courts wide discretions which means that they could impose very lenient penalties which would not serve to inhibit corruption in light of the cost-benefit analysis.

[63] See, Ethics and Anti-Corruption Commission (EACC), *Annual Report 2017–2018.* Kenya, EACC, 2018. 42.

[64] Republic vs Ethics and Anti-Corruption Commission: Ex parte Margaret W. Mbote & 8 others (2018) eKLR.

other things recognised that under section 3 of the Bribery Act, EACC has the mandate to implement the Act[65]. The Court in its ruling, noted that

> "Bribery is an offence which must be investigated and no privilege should bar such an investigation. I add that the Powers and Privileges Act is there to enable Hon. Members of the National and County Assemblies to conduct the business of the house in a conducive environment and not to perpetuate or cover up criminal activities.[66]

The full implementation of this new statute will only be on course once EACC commences investigations of private entities involved in bribery. The cases decided so far only point to officers serving in public offices. The effect of this statute is yet to be seen given that after its enactment, the incidence of bribery rose sharply from 46% in 2016 to an astounding 62% in 2017[67].

4. Institutional framework concerned with leadership and Integrity

Three institutions are charged with promoting leadership and integrity. Firstly, the EACC discussed prior, which is the body constitutionally mandated to enforce and ensure compliance with the provisions of Chapter 6.[68] Secondly there are constitutional commissions and independent offices established under Chapter 15 with the mandate to promote constitutionalism and ensure that all State organs adhere to democratic values and principles, among other things.[69] Finally there is the Judiciary, which cuts across all spectrums of leadership and integrity in its adjudicatory, advisory and interpretative role. This section inspects the Independent Commissions and Offices and the Judiciary.

These institutions are not supposed to be superimposed one on the other but they should blend and arrange themselves in due relation to each other in order to converge towards the same end i.e. the achievement of the purposes of Chapter 6 of the 2010 Constitution. It cannot be over-emphasised that Chapter 6 is the soul of the 2010 Constitution.[70]

4.1. Commissions and independent offices

The Commissions and Independent offices established by the 2010 Constitution play a key role in determining who joins the public service: for instance the Judicial

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65 Ibid. paragraph 24.

66 Ibid. paragraph 34.

67 Ethics and Anti-Corruption Commission (EACC), *Annual Report 2017–2018*. Kenya, EACC, 2018. 58.

68 Article 79, *Constitution of Kenya* (2010).

69 Ibid. Article 249 (1).

70 Okoth op. cit. 288.

Service Commission is mandated with the selection of persons to be appointed judges and it also appoints magistrates;[71] the Independent Electoral and Boundaries Commission plays an important role in determining who qualifies to vie for elective posts.[72] Besides this role of selecting potential leaders, the commissions are required to enforce codes of ethics amongst the public servants under their jurisdiction.[73] Finally, the commissions also execute a disciplinary role and often are mandated to initiate the removal process of State officers who may have breached the provisions of Chapter 6.[74]

Among the commissions and independent offices established under the 2010 Constitution, it is important to single out the offices of the Auditor General and Ombudsman in light of the endemic and systematic nature of corruption as well as mal-administration in Kenya's public service.

4.1.1. Auditor General

The Auditor General plays a key role in unearthing misuse of public funds and instances of abuse of office by leaders.[75] Since the Auditor General has to investigate and audit the accounts of all Government organs, the office should be independent and free from control or direction by any person.[76] Unlike in the Repealed Constitution, the independence of the office of the Auditor General is bolstered by constitutionally guaranteed tenure. The Auditor General's term of office is eight years (non-renewable)[77] and the incumbent can only be removed from office in accordance with the stringent provisions of Article 251 of the 2010 Constitution. Article 251 specifies

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71 Article 172, *Constitution of Kenya* (2010).

72 Under Elections Act (2011), s. 74 *Laws of Kenya*, the IEBC is empowered to resolve disputes arising from nominations. These include decisions regarding disqualification under section 24 and 25 of the Elections Act. This mandate was emphasised by the High Court in the case of the *International Centre for Policy and Conflict & others vs The Attorney-General and 4 others* [2013] eKLR, in which the suitability of Uhuru Kenyatta and William Ruto to contest for state office in Kenya was investigated. A five Judge bench of the High Court held that the IEBC and the EACC were the organs bestowed with the power to inquire into the integrity of those aspiring to be elected into State Office (paragraph 137).

73 Public Officer Ethics Act (2003), s. 5 (1) *Laws of Kenya*. This is also alluded to in Leadership and Integrity Act (2012), s. 37(1).

74 This can be gleaned from Article 80 (c) of *the Constitution of Kenya* (2010) read with the Leadership and Integrity Act (2012), s. 52(1) and (2). The Act provides that Pursuant to Article 80 (c) of the Constitution, the provisions of Chapter Six of the Constitution and Part II of this Act except section 18 shall apply to all public officers as if they were State officers. The relevant public entity recognised or established pursuant to section 3 of the *Public Officer Ethics Act* No. 4 of 2003, *Laws of Kenya* shall enforce the provisions of this Act as if they were provided for under the *Public Officer Ethics Act* (2003), *Laws of Kenya*. Under the *Public Officer Ethics Act* (2003), s. 30. *Laws of Kenya,* it is notable that commissions are required to investigate conduct that contravenes the Code of Conduct and Ethics. It may then take disciplinary action if it has the power to do so.

75 Article 229, *Constitution of Kenya* (2010).

76 The independence of the office of is also guaranteed in the Article 248 (3) *Constitution of Kenya* (2010).

77 Article 229 (3), *Constitution of Kenya* (2010).

the grounds of removal and the applicable procedure. In a nut shell, the removal of the Auditor General can only be sanctioned by a tribunal appointed by the President at the request of the National Assembly.

It is mandatory that the Auditor-General audits the accounts of all State organs and Government agencies[78] to 'confirm whether or not public money has been applied lawfully and in an effective way'.[79] The recipients of the audit reports are Parliament and the relevant county assembly which should consider the reports and take appropriate action.[80] The audit questions costs such as unsupported expenditure, pending bills, un-surrendered imprests and excess expenditure and the audit reports usually induces the EACC to investigate specific matters.[81] For instance, the auditor-general's report on the County Assembly of Nairobi City noted that the financial statements did not present fairly, the financial performance of the County Assembly as at June 30th 2018 in accordance with the International Public Sector Accounting Standards (Cash Basis), the Public Finance Management Act of 2012 and the County Government Act of 2012.[82]

Within the Ministry of Health, the auditor general raised a total of 25 audit queries[83] in the financial year of 2013/2014, 18 in the financial year 2014/15 and 13 in the financial year of 2015/16.[84] This questions pertained to transactions involving Kshs 17.5 billion in the financial year of 2013/14, Kshs 13.88 billion and Kshs 17.72 billion in the financial year 2014/15 and in the financial year of 2015/16 respectively.[85] In comparison to the actual spending for the entire Ministry, the queried amounts represented 63%, 36% and 42% for the three consecutive years.[86] The Ministry of Health was notably found on the spot following the 'Afya House Scandal' where the Office of the Auditor General raised a query over Ksh.10.9 billion that could be accounted for in the financial year that ended on June 30th 2018.[87] This, along with preceding scandals in the same docket, elicited the concern of the Ethics and Anti-

78 Ibid. Article 226 (3).

79 Ibid. Article 229 (6).

80 Ibid. Article 229 (7 and 8).

81 Transparency International Kenya, *Strengthening Public Audit Accountability in Kenya: A Baseline Survey Report,* 2019, 20 https://tikenya.org/strengthening-public-audit-accountability-in-kenya/ accessed on 4th August 2020.

82 Office of the Auditor General, *'Report of the Auditor-General on the Financial Statements of County Assembly of Nairobi City For the Year Ended June 30th 2018'* (Auditor General 2018) 8.

83 These are questions raised by the auditor general with regard to compliance with financial rules and regulations.

84 Institute of Economic Affairs, 'An Analysis of the Auditor General's Reports on the Financial Statements of National Government', 2019. 17.

85 Ibid. 18.

86 Ibid.

87 Francis Gachuri: 'Another Afya House scandal as Auditor General unmasks Ksh.10.9B scam'. *Citizen Digital*, July 4th 2019 https://tinyurl.com/52pst3rc/

corruption Commission which has failed to make any clear progress on the matter despite its intent on directing the investigations.[88]

While these reports have raised glaring anomalies, there is a concern that they are often left unheeded.[89] Furthermore, most of the questioned costs in public audit reports are reportedly of a recurring nature owing to the lack of an effective follow-up mechanism on the implementation of the recommendations given. This breeds delays in the preparation and dissemination of the public audit reports by the Office of the Auditor General (OAG) to audit accountability.[90]

4.1.2. Commission on Administrative Justice (CAJ)

Although the Commission on Administrative Justice (CAJ) is not listed as a commission or an independent office under Chapter 15, it enjoys equivalent status and powers by dint of Article 59(4) and (5) of the 2010 Constitution, which grants Parliament the discretion to restructure the Kenya National Human Rights and Equality Commission into two or more separate commissions with the status and powers of commissions under Chapter 15. Pursuant to this provision, Parliament enacted the Kenya National Commission on Human Rights Act, 2011 which established the Kenya National Commission on Human Rights (KNCHR). It also enacted the National Gender and Equality Commission Act, 2011 which established the National Gender and Equality Commission and the Commission on Administrative Justice Act of 2011 which established the CAJ.

The stated mission of the commission is 'to enforce administrative justice and promote constitutional values by addressing mal-administration through effective complaints handling and dispute resolution'.[91] The functions of CAJ, outlined in the Act include investigating any alleged misconduct in public administration by any State organ or State officer in National and County Governments.[92] Such misconducts extends to complaints of abuse of power, unfair treatment, manifest injustice and oppressive conduct within the public sector. From these inquiries, the CAJ submits a biannual report to the National Assembly and publishes periodic reports on the status of administrative justice in Kenya. The commission may also give remedial actions and also provide advisory opinions including legislative review. The CAJ is also mandated to build institutional capacities in the public sector to promote Alternative Dispute Resolution mechanisms and appropriate remedies to resolve

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88 See Ibid. and Stellar Murumba and Obed Simiyu: 'EACC investigators storm Afya House over Sh5bn scandal'. *Business Daily*, October 28th 2016. https://tinyurl.com/tetup39t

89 See Kepha Muiruri: 'IEA – Parliament not taking Auditor General's reports seriously'. *Citizen Digital*, March 22nd 2019 https://tinyurl.com/3sbnrwep accessed on August 4th 2020; and David Ogindе: 'It's time we took the office of Auditor General seriously'. *The Standard*, September 1st 2019 https://tinyurl.com/339w95ta

90 Transparency International Kenya, *Strengthening Public Audit Accountability in Kenya: A Baseline Survey Report,* 2019. 20 https://tikenya.org/strengthening-public-audit-accountability-in-kenya/ .

91 The Commission on Administrative Justice, *Annual Report* Nairobi, Republic of Kenya, 2016.

92 Commission on Administrative Justice Act (2011), s. 8 *Laws of Kenya*.

disputes against administrative bodies. This extends to promoting public awareness of these mechanisms and requires close collaboration with the KNCHR in promoting human rights in public administration.[93]

The scope of the matters CAJ investigates is limited by Section 30 of the Act which aims at avoiding overlap of jurisdiction. For instance, the CAJ cannot investigate criminal offences or any matters pending before the courts and if such matters were to be brought before it, it can only advise the complainant on the right forums for relief.[94]

Article 249 of the 2010 Constitution mandates constitutional commissions to promote constitutionalism. The CAJ discharges this mandate through a multifaceted approached which includes the promotion leadership and integrity. For instance, in 2014, the CAJ intervened on allegations of breaches of principles of leadership and integrity. In its 2014 annual report it stated thus:

The interventions related to issues such as non-compliance with the law on appointments and promotions to public offices, misuse of public resources, disobedience of court orders, abuse of power, and unethical, improper or unlawful conduct.[95]

Since its establishment, the CAJ has been quite active in discharging its mandate including handling a total of 111,505 new cases, out of which 100,720 cases were resolved, resulting to a resolution rate of 85% in the year 2016.[96] Most of the cases received and dealt with concerned maladministration, delay, abuse of power and unfair treatment.[97] From this, the CAJ issued numerous advisory opinions on various issues of public importance including ten advisory opinions in 2015. Some of these advisory opinion concerned the restructuring of the Ethics and Anti-Corruption Commission, the vetting of Cabinet and Principal Secretaries nominees and the boundary disputes between the County governments.[98]

It has also been involved in other initiatives in order to engender good public governance such as the promotion of alternative dispute resolution and through public interest litigation despite the financial good will from the Exchequer.[99] Furthermore, while the CAJ can make decisions and recommendations on the conduct of public institutions, these cannot be enforced without their good will to comply with the

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93 Ibid.

94 Ibid. 30.

95 The Commission on Administrative Justice, *Annual Report,* 2014. 87.

96 The Commission on Administrative Justice, *Annual Report,* 2016. VIII.

97 Ibid.

98 For other Advisory Opinions See The Commission on Administrative Justice, *Annual Report,* 2015. X. Examples include the Advisory Opinion on the Directive to County Commissioners regarding the co-ordination and delivery of Comprehensive HIV/AIDS Services to Counties; Advisory Opinion on the Framework for Co-operation between the Senate and the Council of Governors; Advisory Opinion on the Parliamentary Service Bill, 2015; Advisory Opinion on the Proposed Amendment to the Independent Policing Oversight Authority Act, 2011.

99 The Commission on Administrative Justice, *Annual Report,* 2015. 82.

same.[100] As a result, it is difficult for the Commission to meet the high expectations from members of the public to quickly address various aspects of maladministration that continue to manifest in the public sector.[101]

Hence, in order to deal with unresponsiveness, the CAJ resorted to the use of a citation register and performance contracting where ministries, departments and agencies are certified and rated on compliance based on the 'Resolution of Public Complaints Indicator' which was introduced in the National Government Performance Contracting System.[102] The indicator requires all public institutions, including the CAJ, to promptly address and resolve public complaints lodged with and against them.[103]

The CAJ maintains a citation register records unresponsive institutions and officers based on five criteria including the public body's failure to respond to inquiries on complaints (by the CAJ), failure to implement any determination CAJ without any reasonable cause, failure to honour summons, improper conduct during investigations and lack of appeals from public officers found guilty of abuse of office.[104] In 2014, it cited 31 public officers and one institution under this register.[105] This register could supplement performance appraisals of the affected public officers with the effect that they may be forced to either improve or face removal from office for incompetence.

4.2. The Judiciary

As earlier stated, the Judiciary is the fulcrum upon which the entire leadership and integrity project hinges. It is now accepted universally that without an independent and accountable judiciary, a constitution would be mere hortatory if not dead letter law. The Judiciary therefore plays the key role of adjudicating disputes with finality regarding qualifications for public office and in particular determining whether a candidate fulfils Chapter 6 requirements in the fight against corruption.

However, the Judiciary cannot intervene on its own motion; it must be moved by a party to pronounce judgement and so the extent and quality of its intervention in matters of leadership and integrity is as good as the causes that are brought before it. If no matters are brought before it, then it has no way of exerting influence and if matters brought before it are poorly prosecuted, then its influence will be poor and ineffectual.

Judicial mandate may be invoked to deal with matters of leadership and integrity through public interest litigation any member(s) of the public may institute suits

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100 These decisions and recommendations are not legally binding on public institutions. See The Commission on Administrative Justice, *Annual Report,* 2016. 59.

101 The Commission on Administrative Justice, *Annual Report,* 2015. 85.

102 The Commission on Administrative Justice, *Annual Report,* 2014. XIV.

103 Ibid. 2014. 67.

104 Ibid. 2014. XIV.

105 Ibid.

challenging constitutionality of laws and of appointments to public office.[106] The public may also participate by lodging complaints with the EACC against incumbent officials whom they suspect of breaching integrity provisions. However, such complaints may or may not end up before the Judiciary for determination since the EACC investigates and decides on whether to forward the matter to the DPP, who has the discretion to prosecute or not.[107] This introduces an intricate interplay between the EACC, the DPP and the Judiciary.

From the table below it is clear that there is a hitch as indicated by the fact that in any given year over 30% of cases forwarded by EACC are not accepted for prosecution by the DPP. Therefore, it is necessary to interrogate why such a huge number of cases is rejected or returned to EACC for further investigations: this should guide the interventive measures devised to ensure that the maximum number of cases are accepted for prosecution.

Table 1. Cases forwarded by EACC to the DPP

	2014/15	**2015/16**	**2016/17**	**2017/18**	**2018/19**
Total Cases forwarded to DPP	117	167	143	183	234
Cases accepted for prosecution	74	117	89	113	77
Cases returned for further investigation	12	14	13	18	59
% of cases accepted for prosecution	63.24%	70.05%	62.23%	61.74%	32.90%

Source: Kenya National Bureau of Statistics, Economic Survey, 2020 (Table 17.7: Files forwarded to the office of the Director of Public Prosecutions and Action Taken, 2014/15 -2018/19), page 309.

In the 2018/19 year, a record 51 cases were awaiting the DPP´s action which is quite high given that in the previous years reported in the table above, the number of such cases was either zero or a single digit. The Judiciary also seems to be suffering from inadequate capacity in its High Court Anti-Corruption Division at Milimani as shown in the table below depicting the number of pending cases:

Table 2. Cases pending before the Anti-corruption Division of the High Court

	Criminal	**Civil**	**Total**
Filed Cases 2018/2019 year	98	119	217
Resolved Cases 2018/2019 year	49	47	96
Pending cases as at 30th June 2019	93	108	201

Source: State of the Judiciary and the Administrative of Justice Report of 2018/2019(pp 42-44).

106 See Article 10, *Constitution of Kenya* (2010) on the value of public participation. See also Article 259 *Constitution of Kenya* (2010) on the right of every person to institute court proceedings claiming that a constitution provision has been violated or has been threatened with violation.

107 Leadership and Integrity Act (2012), s. 43 (3) *Laws of Kenya*.

It is clear from the table above that the rate at which cases are being filed in the Anticorruption division of the High Court greatly exceeds the rate at which they are being resolved. The case backlog is indicative of a need to increase the capacity of the division to dispose of matters expediently. In the 2018–2019 year, the division had only two judges, one of whom doubled as a judge in the family division as well[108]: effectively it had one full time judge who was expected to handle 217 cases filed in that year alone as depicted in the table above. Further the anticorruption division does not have a designated deputy registrar like other divisions which further debilitates its capacity to dispose of cases[109].

A similar trend of case backlog is at play in the Milimani anti-corruption Magistrate Court as depicted in the table below. However, the situation in the Magistrate Court needs further evaluation given that the Court has six magistrates assigned to it and hence the distribution of caseload per magistrate is lighter than at the High Court Level[110].

Table 3: Cases pending before the Anti-corruption Magistrate Court

	Criminal	**Civil**	**Total**
Pending cases as at 30th June 2018	148	0	148
Filed Cases 2018/2019 year	58	0	58
Resolved Cases 2018/2019 year	44	0	44
Pending cases as at 30th June 2019	162	0	162

Source: State of the Judiciary and the Administrative of Justice Report of 2018/2019(p. 77).

One notable thing is that the anti-corruption courts (both Magistrate and High Court) are only based in Milimani, Nairobi despite the fact that corruption is not simply a city phenomenon: it is rife in the devolved governments as well. The resolution of anti-corruption cases could be expedited by setting up anti-corruption courts in County headquarters

5. Watershed court cases: Judiciary as the pacesetter

Many citizens and advocacy groups have taken the cue for public participation and there is a surfeit of cases dealing with leadership and integrity as demonstrated by the following discussion of watershed cases. The first two cases deserve a special

[108] See, State of the Judiciary and the Administrative of Justice Report of 2018/2019, 357. Hon. Lady Justice Grace Mumbi Ngugi was the only judge assigned to the anticorruption division on a full-time basis while Hon. Mr. Justice Onyiego John Nyabuto was supposed to serve in this division as well as in the family division.

[109] Ibid. 362. The Registrars of the various divisions are listed and it is clear that the anti-corruption division has no registrar.

[110] Ibid. 363. The Milimani Anti-Corruption Court had 4 Chief Magistrates and 2 Senior Principal Magistrates in the 2018/2019 year.

mention as they arose soon after the Constitution was promulgated and they sought to challenge both the law and the institutions set up to deal with leadership and integrity. The first one sought to have the appointment of the Chairperson of the EACC nullified by the court while the second one sought to have the Leadership and Integrity Act declared unconstitutional.

5.1. Threshold for integrity in public office: the Trusted Society for Human Rights Alliance case

The case of *Trusted Society for Human Rights Alliance v the Attorney General & others,*[111] challenged the constitutionality of the appointment of Mr Mumo Matemu as the Chairperson of the EACC. The crux of the argument was that he should not have been appointed because he did not meet the integrity threshold established by the 2010 Constitution due to unresolved allegations of financial impropriety committed while he was the legal officer of a public institution.[112] The judgment was novel as it entailed an extensive discussion not only as to what integrity means but also as to the threshold of conduct which may support a finding that a certain person lacks integrity.

The High Court stated that 'a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution'.[113] From this statement, the High Court seems to suggest that, for the purposes of the 2010 Constitution, integrity is mainly focused on financial probity and specifically on being free of corruption or of unresolved allegations of corruption. It further stated that the constitutional test of integrity is that 'there are sufficient serious, plausible allegations which raise substantial unresolved questions about one's integrity'. In other words, the conduct in question need not rise to the threshold of criminality.[114]

Although the High Court found that the appointee failed the suitability test, the Court of Appeal later on overturned its findings and held that he had been validly appointed by whittling down the definition of integrity set down by the High Court.[115] The court stated thus:

> …that leadership and integrity are broad and majestic normative ideas. They are the genius of our constitutional fabric. However, their open-

111 [2012] eKLR

112 Trusted Society for Human Rights Alliance versus the Attorney General & others, (2012) eKLR, paragraph 40.

113 Ibid. paragraph 107.

114 Ibid.

115 Mumo Matemu vs Trusted Society of Human Rights Alliance and 5 others (2013) eKLR, paragraph 59.

> textured nature reveals that they were purposefully left to accrue meaning from concrete experience.

Three years later the appointee resigned in the face of fresh allegations against him which led Parliament to vote on his removal after which the President suspended him from office and formed a tribunal to investigate the allegations.[116] However he chose not to face the tribunal and resigned before the veracity of those allegations could be legally determined.[117]

Although the High Court decision was overturned by the Court of Appeal, the jurisprudence emanating from that decision on the threshold for integrity for appointment to public office has been adopted in other decisions. The most significant case to adopt that jurisprudence was the *International Centre for Policy and Conflict & others -v- The Attorney-General and 4 others* [2013] eKLR[118], which concerned the suitability of Uhuru Kenyatta and William Ruto[119] to contest for state office in Kenya as President and Deputy President respectively. In interpreting the constitutional provisions on integrity, the judges stated that they were in agreement with the definition of the High Court in the *Trusted Society for Human Rights Alliance* and quoted from it verbatim.[120]

5.2. Constitutionality of Leadership and Integrity Act case

In the case of *Commission for the Implementation of the Constitution (CIC) v Parliament of Kenya and 5 others*,[121] the CIC sought to have the Leadership and Integrity Act of 2012 declared unconstitutional on the ground that it fell short of the constitutional threshold required of the leadership and integrity law contemplated by Article 80 of the 2010 Constitution. CIC argued that the Leadership and Integrity Act did not contain specific procedures and mechanisms for the effective administration

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116 Parliament of Kenya, The National Assembly, Official Record (Hansard), Wednesday 22nd April, 2015, 11–46. At page 11 of the Hansard, the reasons given for his removal are: serious violation of the Constitution; the Ethics and Anti-Corruption Commission Act, Anti-Corruption and Economic Crimes Act and the Penal Code. Parliament also found that besides being incompetent, there was gross misconduct in the performance of his functions.

117 See online media reports. hhttps://tinyurl.com/3treap5s and https://tinyurl.com/5n897sha

118 Nairobi High Court Petition No. 552 of 2012.

119 The two were allowed to contest and they became the President and Deputy President respectively of the Republic of Kenya following a hotly contested presidential election in March 2013. The petition challenged the integrity of the two aspirants on the basis that they had criminal cases against them pending before the International Criminal Court (ICC). The charges were subsequently dropped. The High Court distinguished this case from the *Trusted Society for Human Rights Alliance case* by finding that the Court was not the right forum to undertake an assessment of the integrity of persons presenting themselves for public office (at paragraphs. 137–138).

120 International Centre for Policy and Conflict & 5 others vs Attorney General & 4 others Nairobi High Court Petition No. 552 of 2012 (2012) eKLR, paragraph 132.

121 (2013) eKLR.

of Chapter 6 of the 2010 Constitution.[122] Prior to the enactment of the Leadership and Integrity Act, the CIC, in an advisory opinion to the chairperson of the Departmental Committee on Justice, Legal and Constitutional Affairs, had identified three shortcomings in that the then Leadership and Integrity Bill failed to provide for the following:

- Way(s) for the comprehensive administration of Chapter 6 as required by Article 80(a) of the 2010 Constitution;
- Disciplinary mechanisms and penalties as required by Articles 75 and 80(b) of the 2010 Constitution; and
- A mechanism that would allow the EACC to prosecute cases of breach of Chapter 6 where the DPP refuses to prosecute without good cause as Article 79 contemplates.[123]

The High Court found that the Leadership and Integrity Act was constitutional and, in its judgment, outlined its various provisions showing that are procedures for the administration of Chapter 6. The High Court seemed to suggest that the mainstay of the procedures and mechanisms provided by the Leadership and Integrity Act is the leadership and integrity code.[124] The High Court highlighted specific mechanisms and procedures provided in the Leadership and Integrity Act.[125] These include:-

- Each public entity is obliged to prescribe a specific leadership and integrity code which should include the provisions of the General Leadership and Integrity Code under Part II of the Act. The specific codes should be submitted to the EACC for approval.
- Enforcement of the code is provided for under Part IV of the Act, which requires each State officer to sign and commit to the specific code issued by the public entity in which he or she belongs at the time of taking office and not later that seven days of assuming office. Further, an officer who breaches the code may be subjected to disciplinary procedures which may include removal or dismissal.
- Lodging of complaints and their investigation is also provided for. Upon investigation, the causes of action include referral to the EACC or the AG in regard to civil matters and to the DPP if the allegations are criminal in nature.
- The EACC is mandated to make regulations for the better carrying out of the Act.

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122 Article 80 (a), *Constitution of Kenya* (2010).

123 Commission for the Implementation of the Constitution vs Parliament of Kenya & 5 others (2013) eKLR, paragraph 9.

124 Ibid. paragraph 54. Part II of the Act provides for a General Leadership and Integrity Code which incorporates the provisions of Chapter 6 of the Constitution and those of the Public Officer Ethics Act, No. 4 of 2003 in so far it not inconsistent with the Act.

125 Ibid. paragraphs 55–60.

The High Court also dealt with the question of the effectiveness of the mechanisms envisaged under Article 80(a) of the 2010 Constitution. The High Court adopted the plain and ordinary meaning of the word 'effective' as employed in that article and held that it had been demonstrated that the Act provided a means of achieving the objectives of Chapter 6.

Finally, the Court looked into the issue of whether the Act provided for penalties for infractions of integrity provisions. It concluded that these were provided for in Part V of the Act and in the Public Officer Act of 2003. The High Court highlighted the fine and prison term provided under Section 46 of the Public Officer Act (for the offence of hindering or obstructing any person undertaking duties under this Act); the forfeiture of property obtained in breach of the Public Officer Act under Section 49; and the disciplinary procedures for breach of the code.[126]

5.3. The Waititu appointment and election Cases

There are two High Court cases concerning Ferdinand Waititu which depict a duality of standards of integrity applicable to appointed and elected State officers. In one case, their appointment to chair the board of a parastatal was nullified in one case while in another case he was cleared to vie for a parliamentary seat. In *Benson Riitho Mureithi v JW Wakhungu & 2 others*,[127] the High Court held that Ferdinand Waititu was not appointed to chair the Athi Water Services Board validly because due regard was not paid to the question of integrity and character as Chapter 6 requires. Barely a year later, Waititu sought to contest for a parliamentary by-election, upon which two cases were filed challenging his suitability to serve as an MP. The High Court consolidated the cases into one which is the *Godffrey Mwaki Kimathi & 2 others v Jubilee Alliance Party & 3 others*[128]. The High Court dismissed the petition thereby allowing the aspirant (Waititu) to vie for the vacant parliamentary seat. The High Court did not consider the substantive issue of the aspirant's integrity and character but determined the case on procedural issues finding that the petitioners should have addressed the matter to the Independent Electoral and boundaries Commission (IEBC) prior to the litigation.

These two cases send mixed signals with regard to whether there is a homogenous set of standards for all State officers regardless of whether they are elected or appointed. It is also not clear why the High Court in the first case went into the substance of the petition while in the second one it restricted itself to administrative/procedural issues and simply shelved its jurisdiction unless and until the IEBC had pronounced it on the matter. Be that as it may, the progression of life forced a determination of the matter as the protagonist proceeded to vie and garner the Kiambu Gubernatorial seat in the 2017 elections but he was soon thereafter removed from office by impeachment

126 Ibid. paragraphs 64–67.

127 Benson Riitho Mureithi vs JW Wakhungu & 2 others (2014) eKLR (High Court Nairobi, Petition 19 of 2014).

128 Godffrey Mwaki Kimathi & 2 others vs Jubilee Alliance Party & 3 others, (2015) eKLR.

for several reasons including gross violation of the Constitution of Kenya 2010, The County Government Act 2012, the Public Finance management Act of 2012 and the Public Procurement and Disposal Act of 2015[129].

5.4. The Swazuri Case on suspension from office

In *Muhammad Abdalla Swazuri & 16 others v Republic (2018)* the Anti-Corruptions and Economic Crimes Division of the High Court was approached with yet a different issue. The former chairperson of the National Land Commission Mohammed Swazuri had been charged with anti-corruption and economic crimes related offences.[130] In the case of *Nairobi Chief Magistrate's Anti-Corruption case no 33 of 2018*, he was granted bail on condition that he would be denied access to his office unless he had 'prior authorization from the Secretary or Chief Executive Officer (CEO) of the EACC to ensure minimised contact with witnesses who are expected to testify against them and the relevant evidence.[131]

Muhammad Swazuri challenged this decision on grounds that Constitutional officers like him were exempted from such a ruling under Section 62 (1) as read with Section 62 (6) of the Anticorruption and Economic Crimes Act (ACECA).[132] Section 62 (1) provides that a public officer or State officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge until the conclusion of the case. Section 62 (6) provides that suspension on account of a charge of corruption or economic crime does not apply with respect to an office, if the Constitution limits provides for the grounds upon which a holder of the office may be removed or circumstances which the office may be vacated.[133] According to Muhammad Swazuri, the conditions for his removal from office were already provided for in Article 181 of the Constitution of Kenya 2010.[134] Furthermore, Section 10 of the National Land Commission Act already provided for conditions upon which his office would become vacant, none of which contemplate a charge of a corruption or economic crime.[135]

The High Court agreed with the Applicant's (Muhammad Swazuri) reasoning finding that Constitutional office holders like the Applicant are indeed exempted from suspension by virtue of section 62(6) of ACECA.[136] The High Court therefore set aside the order in Nairobi Chief Magistrate's Anti-Corruption case no 33 of 2018 and substituted it with 'an order directing the Applicant to make an undertaking not to

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129 Parliament of Kenya, The Senate, Official Record (Hansard), Wednesday 29th January, 2020.

130 Muhammad Abdalla Swazuri & 16 others vs Republic (2018) eKLR, paragraph 4.

131 Ibid. paragraph 4.

132 Ibid. paragraph 8.

133 Section 62 (1) and 62 (6), Anti-corruption and Economic Crimes Act (Act no. 3 of 2003).

134 Muhammad Abdalla Swazuri & 16 others vs Republic (2018) eKLR, paragraph 8.

135 National Land Commission Act (2012), s. 10 provides for death, resignation, absenteeism, removal or expiration of their term.

136 Muhammad Abdalla Swazuri & 16 others vs Republic (2018) eKLR, paragraph 35.

interact and/or interfere with the witnesses at his work place or any other witness.[137] He would also undertake not to interfere with the records and/or documents relevant to the case at hand.'[138]

5.5. County Governors barred from accessing offices

The Anti-Corruption and Economic Crimes Division of the High Court in *Moses Kasaine Lenolkulal v Director of Public Prosecutions* [2019] eKLR addressed a similar issue to that of the *Muhammad Swazuri case*. Moses Kasaine Lenolkulal, Governor of Samburu, was charged in *ACC No. 3 of 2019: R vs. Moses Lenolkulal and 13 others* with four counts under the Anti-Corruption and Economic Crimes Act (ACECA): the offence of conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48(1) of ACECA, the offence of abuse of office contrary to section 46 as read with section 48(1) of ACECA, the offence of conflict of interest contrary to section 42(3) as read with section 48(1) of ACECA and the offence of unlawful acquisition of public property contrary to section 45(1) (a) as read with section 48(1) of ACECA.[139] While he was granted bail, one of the conditions was that he be barred from 'accessing the Samburu County Government Offices without the prior written authorization from the CEO of the Investigative Agency (EACC) who would put measures so as to ensure that there is no contact between him with the prosecution witnesses and preserve the evidence until the Court issued further orders.[140]

He sought to challenge this decision and invoked Section 62 (6) of the ACECA which would protect him from suspension from office by the EACC given there were already conditions outlined in Article 181 and 182 of the Constitution on removal from office.[141] He also urged the High Court to be guided by the decision in the *Mohammed Swazuri case*.[142] Judge Mumbi Ngugi instead cited Justice Majanja in *Thuita Mwangi & 2 others v Ethics & Anti-Corruption Commission & 3 others (2013) eKLR,* that a purposive approach be employed in interpreting Section 62 (6) and Chapter 6.[143] The Court noted that the people of Kenya, having promulgated the Constitution of Kenya 2010 containing the National Values and Principles of Governance, could not have intended to pass legislation (in the form of the ACECA) that allowed state officers to ride roughshod over the integrity required of leaders and still continue to enjoy the trappings of their office.[144]

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137 Ibid. paragraph 43.

138 Ibid.

139 Moses Kasaine Lenolkulal vs Director of Public Prosecutions (2019) eKLR, paragraph 1.

140 Ibid. paragraph 4.

141 Ibid. paragraph 6.

142 Ibid. paragraph 9.

143 Ibid. paragraph 34.

144 Ibid. paragraph 47.

She was of the view that Section 62 (6) violated the letter and the spirit of the Constitution and if it is to protect the applicant's access to his office, then conditions must be imposed that protect the public interest as done by the trial court in *ACC No. 3 of 2019: R vs. Moses Lenolkulal and 13 others* where the court mandated the the applicant to obtain authorisation from the CEO of EACC before accessing their office. This did not amount to a removal from office as provided in Article 181 or 182 of the Constitution of Kenya, 2010 but merely suspended certain rights pending determination of the trial.[145]

This decision was upheld by the Court of Appeal which considered that the entire matter arose from a bail application in the trial court which granted bail conditions under Article 49 (1) (h) of the Constitution.[146] While Section 62 (6) prohibits application of section 62 (1) in the case of a constitutional office holder charged with a corruption offence where the Constitution already provides a method for removal, these provisions, when considered against Article 49 (1) (h) which allows for imposition of reasonable bail terms, clearly address two disparate circumstances.[147] One the removal from office and two, the imposition of bail.[148] Hence the Court of Appeal agreed with the decision in the High Court that limiting the governor's access to the County offices whilst he is facing trial for corruption offences cannot be construed or equated to a removal from office. It instead safeguards public interest which is an essential requirement in such a case. [149]

The High Court in *Ferdinand Ndungu Waititu Babayao & 12 others v Republic [2019] eKLR* was guided by the decision *Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR*. Governor Waititu was charged with conflict of interest contrary to Section 42 (3) of the Anti-Corruption and Economic Crimes Act under which an agent of a public body who knowingly acquires a private interest in any contract connected with the public body is guilty of an offence.[150] One of the contested issues regarded the imposition of stringent bail conditions against the Governor of the County Government of Kiambu and further barring him from setting foot into the County offices pending the hearing and determination of the trial.[151] The Governor urged the court to depart from the decision *Moses Kasaine Lenolkulal* and to instead adopt the decision in the *Muhammad Swazuri case.*[152] Justice Ngenye in this case, like Justice Mumbi Ngugi, departed from the decision in the *Mohammed Swazuri case* stating that 'the drafters of the Constitution intended to ensure that corruption did not infiltrate public offices; and in there lies an indication that accountability is a key tenet of leadership and integrity. Governor Waititu had

145 Ibid.

146 Ibid. para 9.

147 Ibid.

148 Ibid.

149 Ibid. para 11.

150 Ferdinand Ndung'u Waititu Babayao & 12 others vs Republic (2019) eKLR, paragraph 2.

151 Ibid. paragraph 18.

152 Ibid. paragraph 22.

been charged in court because of the doubt the public has on his integrity. Until such a time that he is vindicated or convicted, he is yet to fulfil his duty to account for the alleged breach of the public trust entrusted in him under Article 73 of the Constitution. Absurdity would reign in if the court allowed him to go back to the office to continue executing his duties.'[153]

The Court of Appeal upheld this decision since section 62 (6) of ACECA had no application in the matter that was before her given that their holding did not purport to remove or suspend the appellant from office of Governor, Kiambu County.[154] The Court of Appeal suggested that the appellant had not been suspended from his office, he would still be the Governor of Kiambu County; and he would still be entitled to his full pay, not half.[155]

5.6.Supreme Court´s missed chance to streamline integrity cases

The Supreme Court has also been called upon to make determinations regarding leadership and integrity. This was the case in *Stanley Mombo Amuti v Kenya Anti-Corruption Commission* [2020] eKLR which concerned civil forfeiture of assets where a public officer cannot account for the assets in their possession or ownership as per section 55 of the ACECA.[156]

This case dates back to 9th July 2008 when the Respondent issued a Notice under Section 26 of the ACECA requiring the Applicant to furnish a statement of his property given 'his various assets were disproportionate to his salary (being his only source of income at the time).[157] The Applicant complied with the notice and gave an explanation for his wealth and assets.[158] The Respondent, being dissatisfied with the explanation, filed an application by way of originating summons claiming that the Applicant had unexplained assets liable to forfeiture.[159] A decree was issued in the High Court that the appellant was liable to pay the Government of Kenya the sum of Kshs. 41,208,000/=.[160] The Applicant appealed against this decision and the Court of Appeal upheld the decision of the High Court in its entirety.[161] The Applicant then appealed against the decision of the Court of Appeal to the Supreme Court pursuant to Article 163 (4) of the Constitution.[162]

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153 Ibid. paragraph 37.

154 Ibid. paragraph 44.

155 Ibid.

156 Anti-Corruption and Economic Crimes Act (2003), s. 55 *Laws of Kenya* provides for the civil forfeiture of assets where a public officer cannot explain or account for the assets in possession or ownership.

157 Stanley Mombo Amuti vs Kenya Anti-Corruption Commission (2019) eKLR, paragraph 6.

158 Ibid. paragraph 9.

159 Ibid. paragraph 9.

160 Ibid. paragraph 11.

161 Ibid. paragraph 89.

162 Stanley Mombo Amuti vs Kenya Anti-Corruption Commission (2020) eKLR, paragraph 2.

A preliminary objection was filed seeking an order that the appeal be dismissed on the ground that the Supreme Court lacked the requisite jurisdiction to determine the appeal on merit.[163] Article 163 (4) (a) allows appeals to the Supreme Court from the Court of Appeal as of right in any case involving the interpretation or application of the Constitution.[164] Hence the Respondent argued that what the High Court and Court of Appeal did was to interrogate the applicability of Sections 26 and 55 of ACECA and their constitutionality in the context of any Article of the Constitution and that was never an issue.[165] The Applicant contended that the Court of Appeal determined, as one of its issues, whether the High Court misdirected itself on Articles 40 and 50 of the Constitution and Section 55 of ACECA as to the threshold on forfeiture of property.[166]

Indeed the Court of Appeal found that the provisions of Section 26 and 55(2) of the ACECA did not violate the right to property as enshrined in Article 40 of the Constitution.[167] Yet, the findings of the Court of Appeal were not enough to trigger the Supreme Court's jurisdiction. The Supreme Court stated that where the interpretation or application of the Constitution has only but a limited bearing on the merits of the main cause, then the jurisdiction of this Court may not be properly invoked.[168] Hence, the Court of Appeal rendered itself in passing only and the bulk of its Judgment was saved to an evaluation of the evidence on record in the context of Sections 26 and 55 of ACECA and not the Constitution *per se*.[169]

Against the background of these and other cases, the Kenya National Commission on Human Rights (KNCHR) sought an advisory opinion from the Supreme Court pursuant to the provisions of Article 163 (6) of the Constitution of Kenya 2010, which allows for an advisory opinion to be given by the Supreme Court at the request of the national government, any State organ, or any county government with respect to any matter concerning county government.[170] KNCHR grounded its request on the contention that 'there is an apparent contradiction, lack of clarity and/or guidance in High Court and Court of Appeal decisions on the place of Chapter Six of the Constitution, more so with regard to the leadership and integrity qualification of persons offering themselves to be elected or appointed to public service and/or offices in Kenya. This has had the result of creating a confused jurisprudence.'[171]

The alleged contradicting decisions of the Superior Courts cited by the Applicant include: *International Centre for Policy and Conflict & 5 Others vs. The Hon. AG*

163 Ibid. paragraph 3.

164 Article 163 (4) (a), *Constitution of Kenya* (2010).

165 Stanley Mombo Amuti vs Kenya Anti-Corruption Commission (2020) eKLR, paragraph 5.

166 Ibid. paragraph 7.

167 Ibid. paragraph 11.

168 Ibid. paragraph 17.

169 Ibid. paragraph 18.

170 Article 163 (6), *Constitution of Kenya (2010).*

171 Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (2020) eKLR, paragraph 2.

& 4 others, High Court Petition No. 552 of 2012; *Luka Angaiya Lubwayo & Another vs. Gerald Otieno Kajwang & Another,* High Court Constitutional Petition No. 120 of 2013; *Mumo Matemu vs. Trusted Society of Human Rights Alliance & others*, Civil Appeal No. 290 of 2012; *Marson Integrated Ltd vs. Minister for Public Works & Another*, High Court Petition No. 252 of 2012; *Benson Riitho Mureithi vs. J. W. Wakhungu & 2 others*, Constitutional Petition No. 19 of 2014; and *Commission on Administrative Justice vs. John Ndirangu Kariuki & IEBC*, Constitutional Petition No. 408 of 2013.[172]

However, Okiya Omtatah filed a preliminary objection claiming, the major contention being that the advisory opinion was *sub judice*[173] (or under judicial consideration in another court) given the following matters were pending in the High Court:

a) *Constitutional Petition No. 68 of 2017, Okiya Omtatah Okoiti vs. Jubilee Party of Kenya and Others.* The issue in this case was whether the requirement for clearance by state and private bodies, (being the Criminal Investigations Department, Higher Education Loans Board, Ethics and Anti-Corruption Commission, Kenya Revenue Authority and the Credit Reference Bureau), to vie for elective positions as demanded by the respondents therein, was *ultra vires* (or contrary to) the provisions of Chapter Six of the Constitution.[174]
b) *Constitutional Petition No. 142 of 2017, Okiya Omtatah Okoiti vs. Hon. Attorney General and 12 Others.* The issue in this case was whether a working group dubbed the Chapter Six Working Group on Election Preparedness (the Working Group) established by the Attorney General with the mandate to vet all candidates vying for the 8th August, 2017 General Elections was ultra vires the Constitution and the Elections Act.[175]

The Supreme Court was of the view that for the High Court to sufficiently pronounce itself in the two Constitutional Petitions, it would have to interpret and apply the provisions of Chapter Six of the Constitution on leadership and integrity.[176] While the issues brought before it by KNCHR were already before the aforementioned High Court constitutional petitions[177], the Supreme Court was reluctant to 'usurp' the jurisdiction of the High Court as the court of first instance with regard to the

172 Ibid. paragraph 4.

173 A description for in Section 6 of the Civil Procedure Act of 2012 which provides that No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

174 Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) (2020) eKLR, paragraph 61.

175 Ibid. paragraph 63.

176 Ibid. paragraph 68.

177 Ibid. paragraph 72.

interpretation and application of the Constitution.[178] In this regard, it cited its former decision in *the Matter of the Principle of Gender Representation in the National Assembly and the Senate,* Advisory Opinion No. 2 of 2012 that when similar questions of constitutional interpretation are brought before the Supreme Court and the High Court, the Supreme Court would in principle commit itself to order and efficacy in the administration of justice and require the process of litigation commence in the High Court and if need be followed by appellate procedures.[179] It therefore declined to exercise its jurisdiction under Article 163 (6).

Justice Lenaola issued a dissenting opinion claiming that the petitions in the High Court in fact dealt with specific issues in dispute between specific parties and the reference made by the KNHCR was not a litigation dispute. This is because italso dealt with issues that were not substantially similar, "who should determine whether a person has met the criteria for an elective position within Chapter Six of the Constitution and specifically in relation to the 2017 General Election (and perhaps in other such elections)".[180] The broader issue in the application was "what is the criteria to be applied in vetting, appointing or electing persons in relation to the provisions of Chapter Six of the Constitution".[181]

Failing this argument, Justice Lenaola invoked public interest in the matter relying on the case of *Re The Matter of the Interim Independent Electoral Commission* Constitutional Application Number 2 of 2011. In that case, the Supreme Court indicated that where a reference has been made to the Supreme Court where the subject matter of which is also pending in a lower Court, the Supreme Court may render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion.[182] He was of the view that the fit and proper criteria set under Chapter Six of the Constitution, has an important application to vet the moral and ethical soundness of persons seeking elective or appointive offices. It is thus central given the issues were of great public importance and that they raised a variety of implementation challenges unbeknown to the traditional integrity and leadership criteria previously in force necessitating the Supreme Court's guidance.[183]

Did the Supreme Court miss a timely occasion to respond to a compelling need guiding jurisprudence on Chapter 6, or was it wise and justified in its hesitation? Perhaps time will tell, yet its ostensible reluctance in determining issues relating to Chapter 6 of the Constitution is no undeniable fact.

178 Ibid. paragraph 73.

179 Ibid. paragraph 55.

180 Ibid. paragraph 94.

181 Ibid. paragraph 95.

182 Ibid. paragraph 97.

183 Ibid. paragraph 102.

6. Final Nuggets: Lessons learnt in the first ten years of the 2010 Constitution of Kenya

From the analysis of the existing legal framework, there is an apparent duplication and superimposition of statutes with the importation of Public Officer Ethics Act of 2003 into the Leadership and Integrity Act. The legal framework could have been simplified by the enactment of one comprehensive statute. The enforcement agency will have to do the extra work of ensuring that the provisions of the older statutes do not conflict with the new ones.

Although the Anti-Corruption and Economic Crimes Act of 2003 is a more elaborate statute than the Leadership and Integrity Act of 2012, it is also not without a few shortcomings, two of which stand out. Firstly, the appointment of special magistrates is left to the discretion of the Chief Justice. Section 3 of the Act states that the Chief Justice may appoint as many special magistrates as may be necessary. The special magistrates are not a permanent feature and thus it is likely that at some point in time, a class of magistrates with adequate experience to deal with matters of corruption and economic crimes efficiently and expediently would be non-existent. Secondly, the penalties prescribed by the Act are couched as maximums leaving great leeway to the magistrates when it comes to sentencing. It has been argued that the exercise of discretion in sentencing is one of the causes of judicial corruption.[184]

In enacting the new laws to implement Chapter 6, Parliament also withheld (whether by design or accident) prosecutorial powers from the EACC. This is despite the fact the 2010 Constitution contains a novel provision which potentially removes the monopoly of prosecutorial powers from the DPP.[185] There is statistical evidence indicating that the number of convictions obtained by the DPP is rather infinitesimal (in the 2014/2015 year it was below 1%) compared to the number of cases forwarded to the DPP for prosecution. It can only be surmised that perhaps the EACC has not done thorough investigations on the files forwarded to the DPP or that the DPP has not prosecuted diligently and tenaciously.

Article 75(2) of the 2010 Constitution also appears to be problematic as it provides for disciplinary measures which may or may not exist. The Article reads as follows: 'A person who contravenes clause (1), or Articles 76, 77 or 78 (2) – shall be subject to the applicable disciplinary procedure for the relevant office;' If the applicable disciplinary procedure referred to is non-existent, then there would be no legal way available to punish State officers who contravene the listed provisions. This is an abeyance that ought to be remedied. The statutes enacted pursuant to the provisions of Chapter 6 do not provide for disciplinary procedure for 'the relevant office'. The Leadership and Integrity Act failed to close this gap as it also made reference to

184 See for example, William Ouko: *Final Report of the Task Force on Judicial Reforms (Ouko Report).* Kenya, Republic of Kenya, 2010. 93. The Task Force noted that 'The perception of the public is that the exercise of judicial discretion in sentencing is neither judicious nor fair and just'.

185 Article 157 (12), *Constitution of Kenya (2010).*

procedures contained in 'any other law' concerning the removal or dismissal of a State officer on the ground of breach of the code.[186]

It is also clear that the courts have not determined the standards of integrity with finality. Since it is a matter enshrined in the 2010 Constitution, the citizenry should not be expected to look elsewhere other than the courts for a definitive interpretation. Unfortunately, the *Trusted Society for Human Rights Alliance* case never reached the full bench of the Supreme Court and hence an authoritative definition of the term integrity as used in the Constitution of Kenya 2010 is yet to be laid down. As highlighted, the case reached the Court of Appeal which not only implicitly rejected the jurisprudence laid down by the High Court but also rejected the help of philosophy in defining the term by declaring that the life blood of the concept is not to be found in the abstract philosophy that underlies it. However, in the absence of an alternative affirmative definition, the High Court definition in the *Trusted Society of Alliance for Human Rights* case has been gaining significance as a result of being relied upon in subsequent court cases on the subject of the integrity of appointed or elected state officers. It was, for instance, relied upon in the *International Centre for Policy and Conflict & others -v- The Attorney-General and 4 others*[187]. Besides this, the Supreme Court missed other crucial chances to lay down the definitive jurisprudence on the constitutional notion of integrity. Without a clear set of parameters or standards of judging integrity issues, it will be hard, if not impossible, to implement Chapter 6.

Compared with Britain, Kenyan authorities are slow in dealing with corruption cases as indicated by media reports on the so-called Chicken gate Scandal. In this matter, senior officials of the then Interim Independent Electoral Commission (IIEC) and the Kenya National Examination Council (KNEC) received kickbacks from a printing company Smith and Ouzman Limited in order to win tenders for ballot and exam papers respectively.[188] The company was convicted of making corrupt payments and was ordered to pay a total of £2.2 million in a sentencing hearing at Southwark Crown Court in Britain.[189] Nicholas Charles Smith, the sales and marketing director of the company, was in 2015 sentenced to three years' imprisonment and was released after completing his sentence.[190] Meanwhile, Kenyan authorities are still struggling to pursue criminal charges against the Kenyan individuals alleged to be the recipients of kickbacks from the British company.[191] This speaks volumes on the capacity of Kenyan authorities to deal with mega-corruption scams, especially vis-à-vis other jurisdictions.

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186 Leadership and Integrity Act 2012, s. 41(2) *Laws of Kenya*.

187 (2013) eKLR, Nairobi High Court Petition No. 552. of 2012.

188 Brian Wasuna: 'Briton jailed for IEBC 'Chicken gate' scandal walks to freedom' Daily Nation, 18th February 2019 https://tinyurl.com/4x5d58h8 accessed on 18th August 2020.

189 Serious Fraud Office (SF0), 'Convicted printing company sentenced and ordered to pay £2.2 million' SFO News Releases, 8th January 2016 https://tinyurl.com/mux9992v/ accessed on 18th August 2020.

190 Brian Wasuna: 'Briton jailed for IEBC 'Chicken gate' scandal walks to freedom' Daily Nation, 18th February 2019 https://tinyurl.com/4x5d58h8 accessed on 18th August 2020.

191 Ibid.

There also seems to be a duality of standards of integrity applicable to appointed leaders on one hand and to elected leaders on the other as the Ferdinand Waititu cases depicted. Beyond accessing State office, one is left to surmise whether the same dual standard would be applied in the event of removal from office. Ever since the promulgation of the 2010 Constitution it has not yet happened that an elected State officer is removed from Parliament for want of integrity.

It is clear that the law needs to be streamlined and specified in order to implement the provisions of Chapter 6 of the 2010 Constitution of Kenya more effectively. The penalties and consequences for breach of leadership and integrity provisions should also be couched with a minimum and a maximum so that judicial discretion is limited within a known range. Besides this, the Judiciary could also issue the courts with a sentencing policy to promote fairness in sentencing. The Judiciary should also give the anti-corruption courts more structural stability by establishing them through statute, devolving them and increasing the number of judges and magistrates assigned to them. Finally, the Supreme Court ought to intervene through an advisory opinion in order to set clear jurisprudence on the implementation of Chapter Six of the 2010 Constitution of Kenya: if the chapter is pivotal in realizing the aspirations Kenyans had when the new constitution was promulgated fourteen years ago, a determination of these issues with finality by the apex court is long overdue.

DOI: 10.55019/plr.2023.1.149-152

Pázmány Law Review
X. 2023. • 149–152

VADIMONIUM FACTUM

Reflections on Norbert Pozsonyi's latest monograph

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1. Introduction

Researching Roman law scientifically involves mainly gathering and examining primary legal sources. While crucial for understanding republican and imperial Roman law, these legal documents are not the only ones to consult for a thorough exploration of *ius privatum*. Inscriptions, papyri, and literary sources are significant in uncovering Roman law.

The volume[1] presented in this review is a unique undertaking to analyse and present extrajudicial *vadimonium* in Roman law. The author's analysis puts literary and epigraphical sources at the centre of his analysis. This is all the more important because extrajudicial *vadimonium* has consistently been overlooked in the study of Roman law.[2] Generally, most handbooks and encyclopaedias refer to the texts of the Sulpicius archive in this regard. In this sense, the author expands the scope of his investigation by including other texts beyond the *sedes materiae*.

2. The structure and the content of the book

The author explores and presents the meaning and use of the terms *vas*, *vadari* and *vadimonium*. To this end, he analyses the works of Plautus, discusses Cicero's speech *Pro Quincto*, and thoroughly analyses the manuscripts of the Sulpicius

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1 Norbert Pozsonyi: *Ex eo tempore res esse in vadimonium coepit. A (peren kívüli) vadimonium megjelenése az irodalmi és az epigráfiai forrásokban*. Fundamenta Fontium Iuris 17. Szeged, Iurisperitus Kiadó, 2023.

2 Cf. Tommaso Beggio: Epigraphy. In: Paul J. Du Plessis – Clifford Ando – Kaius Tuori (ed.): *The Oxford Handbook of Roman Law and Society*. Oxford, Oxford University Press, 2016. 52., with literature.

archive. This commitment is fulfilled in five chapters, with a synopsis at the end of each chapter. An appendix at the conclusion of the volume includes the most considerable *vadimonium* documents of the Sulpicius archive. The volume ends with a comprehensive bibliography.

Though the author summarises his research at the end of the chapters, the volume still lacks a conclusive synopsis. This induces the hypothetical question of whether the lack of such a summary might impede the comprehension of the overall message and research results. The author's conclusions can be predicted to be logical and clear despite adding section summaries to each chapter. As a result of his meticulous research, a new and complete overview of *vadimonium* is presented. This book is a worthy successor to Wolf's famous work.

At the beginning of the work, the author defines *vadimonium*. Its concept entails a double *stipulatio*, in which the *promissor* on pain of paying a fine (*poena*) undertakes to perform some future act. At first glance, the reader may as well associate this legal act with a bill of exchange in our current legal practice.

Within the range of types of *vadimonium*, a clear distinction is drawn between litigious and extra-litigious *vadimonium*. The former group also comes into two separate cases: the first focuses on deferral, and the second on transferral. Litigious and extra-litigious *vadimonia* are also distinguished based on the rules governing the two types of institutions. A litigious *vadimonium* was subject to the praetorian edict, while an extra-litigious *vadimonium* was entirely dominated by the private autonomy of the parties.

The backbone of the work is the analysis of primary texts: Plautian comedies, Ciceronian speeches and contemporary deeds all provide a reasonable basis for examining the topic. First, the author analyses five texts from the comedies by Plautus. First, the author concludes that because theatrical works aimed to entertain ordinary people, Plautian comedies doubtlessly reflect the institutions and practices of Roman law.[3] Following a detailed analysis of the chosen texts, he plausibly reconstructs the procedural acts indicated by the verb *vadari*. As a result of his exegetic approach, he also concludes that self-enforcement was presumably not excluded within the framework of these procedural acts. As a further practical contribution to the analysis of the Plautus texts, he delimited what was common practice in vadari in the 3rd-IIth centuries BC.

The *vadari* could be a unilateral or bilateral act. A bilateral act concludes a contract between the prospective plaintiff and the *vas*. As a unilateral act, it is the plaintiff's invitation to the defendant to claim the *vas*. A vas had to be provided whom the opposing party would accept, and the *vas* "would not be excluded" from assuming the obligation. If the surety was unsuccessful, the plaintiff had the legitimate power to take the opposing party into private custody to secure his appearance.[4] A passage

[3] Cf. Pozsonyi op. cit. 16.

[4] On this, see also Ernest Metzger: Republican Civil Procedure. Sanctioning Reluctant Defendants. In: Paul J. Du Plessis – Clifford Ando – Kaius Tuori (ed.): *The Oxford Handbook of Roman Law and Society*. Oxford, Oxford University Press, 2016. 253.

from "The Pot of Gold" shows that the extrajudicial savage was already known at the time of Plautus. The iron had the right to use its power to bring a person who refused to appear before it. He identifies the function of the iron as that of a 'subpoena enforcer'.

In his analysis of the Pro Quincto, he first reviews the history of the trial and then outlines the facts of the case, one by one, that can be found in the text.

In his conclusions, he first presents the four-stage dispute resolution dynamics based on the gradualism principle. The first step is the conciliation of the parties in person or through a mediator. If this is unsuccessful, the next stage is the extra-litigious *vadimonium*, with room for agreement. If the positions do not converge, we move to the pre-litigation stage, where we aim to prepare the *in iure* proceedings. The case enters the litigation phase with the *in ius vocatio*, from where the fourth step is the *apud iudicem* stage.

In the extrajudicial phase, settling the legal fate of the former *vadimonium* was important. In the case of the *stipulatio* form, the relations could be concluded either by performance or, in the absence of performance, by *acceptilatio*. Based on the text, the author suggests that the defendant was also required to disclose his most crucial evidence before the *litis contestatio* and could not rely on further evidence afterwards. In itself, ipso facto, the omission of *vadimonium* cannot be a legal consequence of *missio in bona*.

In his exegesis of the texts of the Sulpicius archives, the author clearly shows the importance of documentary sources. Before the discovery of the wax tablets, there were no direct primary sources on the extrajudicial *vadimonium* available to researchers. With the discovery of the Sulpicius archives, this changed radically, opening up new avenues for research into the litigation process.

One of the conclusions from this analysis concerns the role of extrajudicial *vadimonium*. In his view, in the context of litigation, the *vadimonium* provided a legal framework for the cooperation of the parties, under the auspices of which the form of the action to be brought could be agreed. Based on the sources, he reconstructs the formula of the *vadimonium-stipulatio* between Roman citizens: *Spondesne te sisti [in certum diem] in certo loco, et si non steteris, quinquaginta aureos dari*?

Earlier, he stated that the vadimonium could be secured by *poena*. The amount of the *poena* was equal to the amount of the primary claim. In the event of a delay in the institution of proceedings, the *stipulatio poenae* took effect. In this context, however, it was sufficient to prove the absence.

In the last two chapters of the volume, the author reconstructs the formula of the *actio certae creditae pecuniae* based on a document from the archives and describes in detail the pre-trial phase.

3. Evaluation

This book is a valuable contribution to the existing reservoir of secondary works on Roman procedural law. The author reviews and studies the sources pertaining to *vadimonium*, presenting new insights and findings regarding this intricate institution.

His conclusions are consistently rational, grounded in and consistent with historical data, and relevant to the social context of that particular time.

The volume's significant worth lies in its heavy focus on literary and epigraphic works. The author examines and analyses the texts and demonstrates a deep understanding of these sources throughout the entire volume. He is knowledgeable about the social and economic context of the age he is studying. His meticulous and focused approach reflects the author's evident passion, resulting in a pleasant outcome. If any slight criticism were to be expressed about this excellent work, it would pertain to the lack of a foreign language synopsis in the volume. After showcasing this impressive work in Hungarian, submitting these findings to foreign journals is now appropriate.