

COMMUNICATION OF LAW AND ACCESS TO COURTS

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Abstract in original language

This paper will target the issue of legal procedures and their accessibility for a common layman. With the omnipresence of the Internet, the question of communication of law acquires a new platform. Legal firms and other private entities offer their own reproduction of the legal texts, restating law in a more (?) accessible language. One must ask why this common practice has not reached the institutions of the Czech Republic. There is a lack of information on how to access the courts, how to file a claim. state/government should feel responsible to (successfully) attempt to communicate the law to laypersons.

Key words in original language

legal language, due process, Internet, on-line availability of law

Abstract

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1. INTRODUCTION

Over the history of jurisprudence, there have been great many approaches as to what law is, what law should be and what is its relation to the professional audience/users as well as the lay public. One of the recurring issues has been the question of understandability of the forms in which the law(s) is (are) to be found. The 20th century has brought language and law into close consideration. The language of law has become the object of numerous analyses, critiques and consequently, attempts on reform. Especially the English language law environment witnessed the birth and

flourishing of various “plain language” campaigns and movements, fighting for a more accessible language used for communication between the government and citizens.

The law and the society (hereby understood as the sum of professional and lay public) are interconnected and one cannot be fully understood without the other.¹ For law to be able to regulate the life of a society effectively, it has to be duly communicated to its addressees. As Lon Fuller explains when defending his idea of “morality” of law, without proper communication to the addressees, a rule loses its character of law or of order of any kind.² Therefore, a question of real effectiveness of law is also a question of language and successful means/channels of communication.

The development of the Internet and search engines such as Google, have changed our information-seeking habits.³ We no longer tend to contact the institutions directly and ask for information; we have learned to consult the Internet first to see what is already available. Furthermore, people do not try to look for the website of the institution, they use the search engines and tend to pose questions as if asking a person, not as if looking for an entry in an encyclopaedia. The change of the medium that carries the information entails the need to change the style of how the information is presented.

I do not wish to address here the issue of the language of law as such: my concern here is not purely the one of the plain language campaigns but rather that of the nature of the relatively new medium of the Web and its relation to the communication of law. Thus, this paper focuses on the problem of practical accessibility of law and its consequences for the access to courts. The concept of accessibility may be divided into two main parts: physical accessibility (the laws have to be made available somewhere; matter of accessibility of this “place”) and the communicative accessibility (the code of the communication of the laws should be understandable).

This paper addresses these two related parts: the issue of the place where the information is to be found and the style in which it is offered to the lay inquirer. Consequently, it discusses the issue of due communication of law in relation to the access to justice.

1 This is rather an approach of the sociology of law than legal positivism. But even legal positivists acknowledge that the sources of the positive law are people in the form of a law-making body.

2 Fuller, L.L. Fuller, L. L. Positivism and Fidelity to Law – a Reply to Professor Hart, 1958 in 71 Harv. L. Rev. 630, p. 644..

3 See Susskind, R. *The End of Lawyers?* Oxford: OUP, 2008, p. 69 while drawing on Battele, J. *The Search*. Portfolio, 2006.

2. WHERE IS THE ANSWER TO MY QUESTION?

In the Czech Republic, the official source of law is the printed *Sbírka zákonů* (Collection of Laws), available to be looked into at various state institutions as well as online. The printed version of the Collection is the official means of promulgation and it entails various legal consequences for the validity and force of the laws thus published, so it seems understandable that the online version is deemed to be only subordinate to the printed one. The “counterpart” of the Collection of Laws available at the website of the Ministry of the Interior is not *THE* Collection of Laws.⁴ But in nowadays information society with the omnipresence of the Internet, the online availability of rules that bind the state and the society is crucial. Although the Collection is available online, there are only limited ways of how to search in it but to open each and every issue of it.⁵ The government-provided access to the Collection does not answer the needs of an average layman searching for the solution of his problem.⁶

3. DO I UNDERSTAND THE INFORMATION THUS PROVIDED?

Online availability is not enough: if the rules are communicated in a language only few laymen are able to decode, the communication has not been successful.⁷ The Internet is not a medium of long texts. An average person searching for information online is not prepared to read long unstructured texts. He is used to “click on hyperlinks, experience multimedia, and add notes and share passages with others.”⁸ With the development of new technologies, people seem to read differently.⁹ This is a question that is closely related to what the Plain Language movements try to address: the layperson seeking information about the law has different experience and searching habits from the ones of a lawyer. Furthermore, he or she is most likely not acquainted with the specialist terminology of the

4 § 12 of the 309/1999 Sb. provides 1) *Ministerstvo vnitra zveřejňuje způsobem umožňujícím dálkový přístup* 3) *stejnopis Sbírky zákonů vydávané po 4. květnu 1945 a Sbírky mezinárodních smluv.* 2) *Stejnopis Sbírky zákonů a Sbírky mezinárodních smluv podle odstavce 1 se nepovažuje za Sbírku zákonů a Sbírku mezinárodních smluv.*

5 Portál veřejné správy České republiky (portal.gov.cz) provides a basic search feature within the statutes present in their database.

6 Not to mention the question whether the inquirer even knows about the existence of the Collection and whether such knowledge is to be regarded as a basic social skill or not.

7 Similarly Fuller, L.L. in *supra*.

8 Tiersma, P. M. *Parchment, Paper, Pixels. Law and the Technologies of Communication.* Chicago and London: The University of Chicago Press, 2010, p. 4.

9 Tiersma, P. M. *ibid*; and Carr, Nicholas. *Is Gogole Making us Stupid?* Atlantic, July/August 2008, p. 56.

statutes nor is she acquainted with the idiosyncrasies of the system of the law.

Although the law is supposed to regulate the societal elements indiscriminately, the texts of law have basically two audiences: the lawyers (i.e. people skilled in a special professional jargon and educated in terms of understanding legal concepts) and the laypersons (i.e. addressees of the particular command). We seem never to question the understandability of the legal language to the legal practitioners.¹⁰ We question the legal language in relation to the laypersons. The question that arises at this point is what kind of problem we are actually facing here: can we discuss the accessibility of law for laypersons separately from the accessibility of law for the professionals? Or, is the nature of legal language given by the complexity of the law itself and does this question become a matter of actual possibility of communicating the highly complex legal concepts to the layperson. To discuss this matter in depth is out of the scope of this paper.

Plain language movements are largely layperson-oriented and pursue a simple agenda: law should be communicated clearly, effectively and precisely.¹¹ They emphasise that whatever “plain” may mean, it should not be understood as vulgarized or devaluated. What passes as a clear, plain language should match the reading skills of the audience. The term “reading skills” should be understood in a wider sense here: It should comprise not only the vocabulary to be comprehended (which is a complicated enough matter to be covered here) but also the expectations and familiarity with the technical features available and expected of an online text.

In general, writing allows structuring and subject indexing, features designed to make the text more accessible. The computer technology takes these features further by enabling e.g. hyperlinks. A Collection of laws without utilizing these features becomes quite futile for a truly useful usage. The lawyers themselves only rarely use the actual copies of the Collection (if ever), and tend to rely on commercial databases providing interlinked texts of laws and in addition hyperlinks (or at least citations) to case law or doctrinal publications.

¹⁰ And as David Mellinkoff has recognized, on the level of communication between lawyers (as between any professionals) the use of jargon is fine. See Mellinkoff, David. *The Language of the Law*. Oregon: Resource Publications, 1963.

¹¹ Compare Schooner, S. L. *Communicating Governance: Will Plain English Drafting Improve Regulation?* – review. In *70 Geo. Wash. L. Rev* 163 2002, p. 168.

Plain language proponents stress the importance of several core stylistic issues to be implemented when drafting legal regulation, such as:¹²

- question and answer format
- short paragraphs
- informative headings.

For online communication of law may be added:

- technical ensuring to be displayed among the first results in Internet search engines
- use of hyperlinks where appropriate
- the 2-click rule
- use of other Web 2.0 practices where appropriate

4. ACCESS TO COURTS/JUSTICE

The right to a fair trial is recognized as one of the fundamental rights (see Art. 6 of the European Convention of Human Rights or Art. 36/1 of the Czech Charter of Fundamental Human Rights and Freedoms). It is a highly complex right comprising not only the fairness of the trial itself but also the issues of the access to courts or the right to a free legal help.¹³

According to Richard Susskind, access to justice should encompass also the offer of access to the opportunities that the law provides.¹⁴ *“How can citizens be presumed to know the law, if its contents are not accessible?”*¹⁵ This “accessibility” must be understood not only as physical but also as communicative accessibility.

12 Compare Schooner, S. L. *supra*, pp. 172-175 when discussing Murawski’s ideas. Similar propositions may be found eg. Plain Language Association InterNational at <http://www.plainlanguagenetwork.org/Legal/>.

13 See for example the decision of the Constitutional Court of the Czech Republic No. I. ÚS 669/03 taken on 31st March 2004 (N 47/32 SbNU 441) , judgement Delta vs. France taken on 19th December 1990 or F. C. B. vs. Italy taken on 28th December 1991.

14 Susskind, R. *The End of Lawyers?* Oxford: OUP, 2008, p. 232.

15 Susskind, R. *The End of Lawyers?* Oxford: OUP, 2008, p. 255.

I believe the fairness in accessing the courts/justice includes also a matter of the appropriate communication of law: The individual has the right to find out about possible measures the law allows him or her to use, among them the right to file a claim to the court. The rules of procedure set by the law of the Czech Republic take the form of a statute, thus published in the Collection and made available online. But here we face still the same problems: legal language, special structuring, interconnectedness to other statutes only the lawyers are taught to understand. But the same requirements for an effective communication of law should apply to the rules of procedure.

Susskind, who has co-operated in the reforming of the judiciary in the United Kingdom, names accessibility of law as one of the building blocks of access to justice: “source materials and case law should be easily accessible and digestible through non-cost (to users) legal information systems.”¹⁶ A couple of such sophisticated information systems that contain up-to-date legislation, allow hyperlinks among and within statutes, links to case-law, literature are available commercially. But even if they were available for free (and such is the requirement that must be formulated with respect to due communication of law) they are still encoded in legal language. The layperson seeking advice does not care for theories behind a precedent or a particular statutory interpretation; Susskind asserts that a common citizen needs different tools, because “they want quick, cheap, punchy, practical, and jargon-free guidance.”¹⁷ To a certain degree, the English governmental Internet portal www.direct.gov.uk (which I would like to use as an example of good practice here) tries to communicate the law to the laypersons in this way through a system of structured, Q&A formatted texts with links to related documents, forms etc. The Czech Republic is far from that. Although there have already been attempts to provide information on law by the governmental websites,¹⁸ there seems to be a significant lack in providing the information on how to access the courts, how, where and when to file a claim, what are the basic timeframes to be followed.

16 Susskind, R. *The End of Lawyers?* Oxford: OUP, 2008, p. 237.

17 Susskind, R. *The End of Lawyers?* Oxford: OUP, 2008, p. 261.

18 See the website of the Ministry of the Interior and its “Citizen at the Administrative Bureau” section, containing basic information on certain matters when a layman needs to deal with the governmental agencies. Yet the information thus provided are related solely to administrative affairs (such as marriage, civil partnership, obtaining citizenship etc.). Furthermore, these information do not fulfil the 2-click rule as they are to be found rather deep in the structure of the Ministry’s website. The style of the information provided tries to make use of structuring and a near question and answer format. Still, the very language used is for most part only copied from the related statutes, retaining the passive voice and long sentences. See <http://www.mvcr.cz/ministerstvo-vnitra-ceske-republiky.aspx>. In defence of this service may be added that it makes use of hyperlinks and when searching for the information by e.g. Google, the links to the Ministry’s website are displayed among the first ones.

Furthermore, with the exception of the supreme courts and the Constitutional Court of the Czech Republic, there is a serious lack of comprehensive Internet use in order to communicate information on the judiciary and on how to access it. The website on courts accessible from the website of the Ministry of Justice¹⁹ contains only the basic contact information, such as addresses and telephone numbers. Comparing to the practices known from other legal systems, such as the English one,²⁰ this may seem more than inadequate.

My point here is not that the language of the legislation itself should be vulgarized or in other ways simplified (that is a different question which I do not discuss here). Neither do I criticize the fact that the majority of law-related information on the Web is provided by private entities (law firms, civic associations...). What I seek to stress is that the state/government should feel responsible to (successfully) attempt to communicate the law to the laypersons. The simple promulgation of laws by means of the Collection of Laws is no longer sufficient: even lawyers themselves no longer use its printed versions as sources of legal information. The mere online accessibility (as it stands today) is but a first step on a long journey whose directions are discussed by other authors such as Peter Tiersma or Richard Susskind²¹ and must not remain the last one; the very core of legitimacy of law and its institutions is at stake here.

Whether or not the language of the legislative drafting changes, the language of communication of law to its addressees becomes crucial. When it comes to the rules of the access to courts, the rules of procedure, this issue acquires further dimensions: inadequately provided information may fall under the scope of denying “legal help” and thus infringing the individual’s right to access the courts. Consequently, the overall image of the judiciary suffers. Inadequately communicated rules of procedure and related regulation may be seen as at least problematizing the access to courts and thus infringing the individual’s right to a fair trial.

19 See the website of the Ministry of Justice at www.ministerstvo-spravedlnosti.cz.

20 Her Majesty’s Court Service <http://www.hmcourts-service.gov.uk/>, from the 1 April integrated with the Tribunals Service, with all the information now accessible at <http://www.justice.gov.uk/about/hmcts/index.htm> and at <http://www.direct.gov.uk> . These websites contain the procedure rules as well as the general guidance, indexed alphabetically and allowing fulltext search.

21 Susskind, R. *The End of Lawyers?* Oxford: OUP, 2008 and Tiersma, P. M. *Parchment, Paper, Pixels. Law and the Technologies of Communication.* Chicago and London: The University of Chicago Press, 2010.

5. CONCLUSIONS

Fuller's requirement of adequate communication of law to its addressees is no novelty; it has been a matter of principle. Without understandable communication, law cannot fulfil its regulative function.²² During the reign of Maria Theresia, the "buta ember's" (a common man of average intelligence and basic education) task was to read the draft statutes and later re-tell its contents in front of a committee. If his testimony did not correspond with the actual content of the proposed statute, such a statute was re-drafted.²³

The means of communication of law used must reflect the changes in the society. When the majority of the society was illiterate, the king's messengers walked from village to village "promulgating" the king's will = laws. Nowadays, when the majority of the society is used to electronic communication, it would be irresponsible not to adjust the means of communication accordingly. The right to a fair trial (of which the right to access to justice is a principal one) is at stake when the communication of practical information of how to access courts and the rules of procedure remains hidden behind a veil of inadequacy of the current form of the Collection of Laws.

Without taking into consideration the actual words/terminology used for communication of law, the existence and the nature of the Internet entails different needs and expectations, among others the text-structuring and technical features.

Literature:

- Cao, D. *Translating Law*. Clevedon: Multilingual Matters, 2007.
- Fuller, L. L. *Positivism and Fidelity to Law – a Reply to Professor Hart*, 1958 in 71 *Harv. L. Rev.* 630.
- Holländer, P. *Paradox právního jazyka*. Dostupné z <http://www.juls.savba.sk/ediela/ks/1995/6/ks1995-6.html#paradox-pr-vneho-jazyka>

22 Cao, Deborah. *Translating Law*. Clevedon: Multilingual Matters, 2007; Holländer, P. *Paradox právního jazyka*. Dostupné z <http://www.juls.savba.sk/ediela/ks/1995/6/ks1995-6.html#paradox-pr-vneho-jazyka>.

23 See Holländer, P. *Paradox právního jazyka*. Dostupné z <http://www.juls.savba.sk/ediela/ks/1995/6/ks1995-6.html#paradox-pr-vneho-jazyka>

- Mellinkoff, David. *The Language of the Law*. Oregon: Resource Publications, 1963.
- Schooner, S. L. *Communicating Governance: Will Plain English Drafting Improve Regulation?* – review. In 70 *Geo. Wash. L. Rev* 163 2002
- Susskind, R. *The End of Lawyers?* Oxford: OUP, 2008
- Tiersma, P. M. *Parchment, Paper, Pixels. Law and the Technologies of Communication*. Chicago and London: The University of Chicago Press, 2010.

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