THE LAW AND THE ART OF COMPLEXITY

(An introductory note to Cyberspace 2006)

by

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This was the Golden Age that, without coercion, without laws, spontaneously nurtured the good and the true. There was no fear or punishment: there were no threatening words to be read, fixed in bronze, no crowd of suppliants fearing the judge's face: they lived safely without an advocate.

Publius Ovidius Naso, Metamorphoses

Law Created and Discovered [1]

In general, there are two mainstreams in the legal doctrine and practice with regards to grounds of the legal normative system. First of them, let us call it legislative optimism, is based on an assumption that the law is based on the will of the lawmaker and is determinable from various lawmaker's expressions or utterances.[1] Taking the law from this point of view, we can say that the lawmaker is creating the law, while its recipients only interpret the meanings from the available normative utterances. From the methodological point of view, this approach to the law seems relatively simple, as the whole process of creation and perception of legal norms exists within one-sided informational channel originating at the lawmaker's will. Then, the information is expressed in the form of a normative utterance[2] and later it is received and interpreted by the recipient.

The key point in understanding and perceiving the law is, in the case of

[1] Such approach is typical namely for the pre-war and mid-war schools of legal positivism. See for example BIX, B., Legal positivism, University of Minnesota Law School, Minnesota, 2000, p. 9 and following.

[2] For axiological distinction between norm and normative utterance, see Kelsen, H. (1990), On the Theory of Interpretation, in Legal Studies, Vol. 10(2), p. 127, originally published as Kelsen, H. (1934), Zur Theorie der Interpretation, in Zeitschrift für Theorie des Rechts, Vol. 8, p. 9.

legislative optimism, the ability of the recipient to restore the will of the lawmaker. Thank to dominant communication media, the language, the process might be even very simple. Many times, it is possible to express the meaning (norm) by appropriate and precise words and to communicate it in official and publicly accessible form (code, precedent) to its recipients. Then, all what is needed for perfect understanding, i.e. recreation of the lawmaker's will in the mind of the recipient, is just simple "reading the law."[3] There are, however, natural limits of the will of the lawmaker as well as there are natural limits of the language.

Unlike natural sciences, the legal doctrine, unfortunately, does not praise unsuccessful scientific attempts. Thus, almost all legal works including student's theses never admit failure or defeat of their main proposition.[4] However, there appeared some brave representatives of the legal doctrine and related disciplines who invested their talent and enormous efforts into showing the doctrine ways that do not lead to the success. One of such attempts was carried out by the philosopher whose influence still shapes modern European history, Gottfried Wilhelm von Leibniz. Besides many other achievements, he tried to develop such a language that would make possible to perfectly and precisely describe all material facts. Consequently, the language could be adopted also for expressing the norms. Later, the fact that Leibniz did not succeed in his truly titanic task has, more or less paradoxically, motivated further massive development of legal science in the sense that it is impossible for it to rely on the precision of the language as the only media for communicating the law.

Besides the limits of the language, there is second important factor acting against the normative optimistic understanding of the law. It is the limits of the lawmaker's will (or lawmaker's mind). Unlike in the case of application of law, the lawmaker has always to define the norms for the future. Thus, it is impossible for her to have in mind the normative orders for all possible practical situations. Consequently, it is many times impossible to search for the appropriate interpretation of the law in the mind of the lawmaker, but we need to creatively guess what would be her will in the case she knew

[3] For refreshing publication briefly addressing limits and challenges of the language in law, see the note of Sir Reginal Croom-Johnson in South African Law Journal, vol. 65, p. 537.

[4] Fear of the defeat causes that many legal scientists even do not define for their works any propositions at all.

about the present legal question.[5]

Another approach to the law that we can see in present jurisprudence does not consider the law as being created but only discovered. From this point of view, the lawmaker only reveals and articulates legal norms and principles instead of creating them. It implies that the activity of the lawmaker, although useful, is not necessarily needed as it is possible for the recipients of legal norms to perceive them also from such sources that do not originate at the lawmaker. It is also possible to, according to this doctrine, consider whether acts and utterances articulated by the lawmaker are in compliance with the law or not – in other words, it is possible to assess whether the law is being discovered and articulated by the lawmaker in the proper way.[6]

Although it seems as an attractive view on the law compared to the legislative optimism, the pessimistic contraposition unfortunately does not offer that solid grounds or basis for argumentation. When we critically separate the law and the act of the lawmaker, we regularly loose solid base for formulating strong arguments and we rely on individual and relatively vague categories like reason, fairness, natural order or the law of the God. That, of course, does not imply impossibility to use the pessimistic view on the law in doctrinal work or in legal practice – it just makes the use of law much more problematic, relativistic and time consuming. Also, the pessimistic approach makes quality of the outcome heavily dependent on individual abilities of the interpreter and its legitimacy on willingness of the recipients to trust in them. Thus, the legislative pessimistic view on law requires, in order to be successful compared to the optimistic arguments, more attention and efforts and it has to count even with such factors like courage, experience, wisdom, sensitivity[7] or even luck.

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[5] Such a method of interpretation is primarily based on the teleology, but instead of trying to guess the actual will of the lawmaker and her contemporary aims (historic teleology), we try to figure out what would be the will of the lawmaker nowadays (actual or hypothetical teleology) – this way of teleological interpretation of law can be illustrated on many court rulings out of which we may, for example, choose the decision of European Court of Human Rights in rem C.R. v. United Kingdom (22/11/1995).

[6] Such grounds are typical namely for various streams of naturalist legal thinking – for comprehensive analysis of various schools of naturalist legal philosophy, see for example Bix, B. Natural Law Theory – the modern tradition. In Coleman, J. L., Shapiro, S., Handbook of Jurisprudence and Legal Philosophy, Oxford University Press, 2000.

[7] Permanent empirically based criticism of formalist approaches to the law lead even into interesting attempts to plead the lawmaker to legislate metanormative elements into the positive law – see for example Laster, K. O'Malley, P., Sensitive New Age Laws, in International Journal of the Sociology of Law, Vol. 24, p. 21.

Discovering the Law – A Matter of Experience [2]

It might seem similar to the question whether there was an egg prior to a chicken to ask whether there was lawmaker prior to the law or otherwise. It might also seem strange to ask such question in a paper dedicated to law and information technologies. However, in this case, relatively young area of ICT law, although not entirely settled among other legal disciplines, offers us such examples that can, in our opinion, substantially facilitate the answer on the question whether the law has priority in existence compared to the lawmaker. Consequently, it is possible to use empiric experience with the development of ICT law to find the answer to the question set in previous chapter, i.e. whether the law is dependent on act of the lawmaker or not.

Reading the above cited part of the Ovid's poem, we might see its direct implications to above indicated questions. As the golden age, Ovid names the age when people lived together in peace and order and preserved the law even without existence of the code or judgments. At this age, the law existed spontaneously and thus, there was need neither for the lawmaker nor the judge.

We are quite convinced that there used to be also a sort of golden age of digital information networks. By such name, we would rather call not the recent age of still continuing massive development of the internet infrastructure or growth of social penetration by its services, but particularly the age when stakeholders lived in peace and order without legislation or authority of the state. Many of us can still remember the age of various BBS', FIDOs and other computer network environments within which social relations started to develop. Information distributed within such networks was almost unexceptionally clear, precise and all the communication was friendly and extremely polite. There was no need for any authority (administrator or even the state) to regulate the community and to punish offenders, as there were no offences and the law was spontaneously obeyed.

Above indicated example and also the wording of Ovid's poem clearly show that the law as a normative system aiming social order and development does not basically rely on the acts of the lawmaker, but

otherwise. As already empirically gathered experience shows, it is nothing entirely exceptional when the law exists without establishment of the lawmaker. On the contrary, there are cases when the lawmaker was institutionally established and formally performs the lawmaking activity, but materially, there is no law at all.[8]

It is not accidental that when we have to answer difficult questions in law, we like to turn for an advice to more experienced colleagues. Although we know precisely the normative utterances of the lawmaker and we are able to use extensive methods of their interpretation, there is still difference in abilities to handle difficult legal questions between us and those who have more experience – what might often mean not just experience with particular legal discipline, but in general with law or even more in general with 'life'. Similarly to that, we find in many cases the answers, being on our own, even in discussions with non-lawyers, in pubs, at the walk or when watching TV advertisements for chocolate.

There is a true story of professor of law who was asked by his former student on his opinion on some difficult question in law. "I looked at the case-law and to legal books, but I am still not sure about the answer," said the student. "It is difficult question, so do not look to the case-law or legal books, they will only mislead you," was the answer. "But when I read and interpret the code, I am not able to come to the right answer," quarrelled the student and so the professor concluded by saying "do not read the code, it will mislead you as well."

That empiric fact can, in our view, also support the hypothesis that the law is *de facto* not being created but discovered. Consequently, we have to ask why is it necessary for the lawyer who would like to become better in answering questions in law, to live the life, go to pub, to go for a walk or to watch TV. The answer is, in our opinion, in ancient and the only exhaustive definition of the law saying that 'ius est ars boni et aequi,' i.e. the law is the art of good and fair.

[8] As a typical example, we can take recent situation with the existence and the legitimacy of law in Iraq.

The Art of Complexity [3]

Just as in the case of understanding any piece of art, understanding the law requires not only technically-analytical skills, but, as indicated above, something more. It is not accidental at all that young children are impressed by simple shapes and shining colours of Mickey Mouse or Pokémon and when they become mature or elder, they turn to works of Picasso or Pollock. It is also not accidental that we watch beginner students of law giving simple and 'coloured' answers on even complicated legal questions, while when becoming more experienced, their answers and arguments are becoming more solid, sophisticated, but also relativistic and contemplative.

It does not represent any serious challenge for a lawyer to learn the words of so-called positive law and to acquire analytical skills for handling it. However, the law is not to be understood only as a set of elements that we are able to analyze and link together by logical or causal relations.[9] Although such approach might work in some cases,[10] we cannot name ourselves as understanding the law unless we are able to understand it in its entire complexity. Here again we can spot a parallel to understanding the artwork – detailed analysis of separate figures on Michaelangelo's Last Dinner or separate analysis of sound of every single instrument of the orchestra in Vivaldi's Four Seasons tells us almost nothing about the sense, meanings and beauty of the picture or the symphony.

The key to understand true meanings is in law the same as in case of the art. It is, as already mentioned, the ability to perceive not just elements, but primarily the complexity of some system. Complexity is described by various theories mostly as such feature of a system that makes it more valuable than the sum of its elements.[11] Taking an example by an anthill, we can analyze quality of every single ant, but except their extraordinary strength and diligence, they are not interesting by any special intellectual skills. Even more, compared to us, ants might seem being relatively dumb.

[9] There used to exist strongly influential pre-war stream in German positivist legal thinking called "jurisprudence of terms" based on assumption that the law is axiomatic deductive system, i.e. that all legal meanings can be logically deducted from basic axioms. However, one of most reputable representatives of this school, professor Gustav Jhering, have admitted incompleteness of this theory by simple saying "law is not mere matter of terms".

[10] In law, we call these cases as 'soft'.

[11] For brief but exhaustive definition of complexity, see Gell-Mann, M., What is complexity? Complexity, vol. 1(1), p. 1.

On the other hand, taking the anthill from the complex point of view, we see such logistics, construction skills or ant-resources-management that are able to comfortably challenge even the most developed human organizations.

Going back to the question set at the beginning of this sub-chapter, we see the difference between non-experienced and experienced lawyer not in their abilities to know the words of the law or to analyze them but in their abilities to understand the law in terms of its complexity. In this case, it is obviously very difficult task to understand the law as complex system, as its complexity is co-created by the acts of the lawmaker, judicial decisions, doctrine, outcomes of legal professionals, politics, media, technology development and all other possible social, national and even religious circumstances. Nevertheless it is, in our opinion, basic task of every lawyer to try to get the complex view on respective legal problems and to search for appropriate solutions despite the impossibility of getting the complex understanding and relatively low probability of coming to the right answers.[12]

Cyberspace 2006 [4]

The above mentioned might seem as having nothing to do with ICT law or the Cyberspace conference. On the contrary, we believe that complex approach is the first and most important must for ICT law.[13] As the technology-driven social environment enormously expanded, ICT legal issues have to be almost every time handled as hard cases and all the further development is, besides social and legal influences, heavily depending on development of technologies. Thus, almost any recent issue of ICT law needs the broad complex understanding not just of the 'hardcore' legal matter, but also of the whole complex of interrelated individual, social, technology and legal elements.

The conference was from its very beginning planned as an event with ambitions to follow the complex approach to legal problems and to give

[12] One of most influential contemporary legal theoreticians, Ronald Dworkin, argues that right answers do exist and the search for them can be successful. Trust in his challenging arguments can serve us as a strong motivation for undertaking such quest again and again.

[13] At this point, we feel a need to emphasize again that there is, in our view, no direct link between the law and the code and consequently, ICT law is not to be understood only as a set of codes regulating the use of information and communication technologies.

scientists of various disciplines the broadest possible view on issues that matter not only to ICT lawyers, but also to psychologists, religionists, sociologists, political or media scientists and others. As the conference has well established itself as leading Central European and universally-significant academic event of this kind throughout recent years, we might even state that it recently helps to develop mainstreams in both multi-disciplinary and cross-disciplinary (pansofic) approaches to emerging and globally recognized issues of the on-line environment. Consequently, we hope that the conference will successfully serve not only as a stable platform for the exchange of teachings and ideas, but that its outcomes will even be able to develop what was previously named as the experience, i.e. the complex understanding of emerging problems of the on-line world(s).