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LAW FOR ELITES

Abstract. It has been claimed that to fully understand the law, one must know the language of normative texts and the relevant rules governing its use. It usually means that normative texts do not seem to be comprehensible enough to persons without formal legal training. In an on-going research project, we are focusing on the process of writing texts of legal regulations, conducting semi-structured interviews with those involved in drafting normative texts. In this paper, we focus on lawyers as a speech community of legal language speakers and we discuss why and to what extent this speech community may be considered an elite in a society. We show that competent usage of special – legal – language in regulating the whole society may help create a special group of persons wielding an important segment of cultural capital: the knowledge of legal language, and, in consequence, competent knowledge of law. Given the fact that this language is used to exercise (legal) power in a society, lawyers appear to be in the advantageous position of an elite. We argue that those who draft new legal texts reproduce writing rules and customs, constantly re-creating legal language as a language mostly incomprehensible to a non-competent speaker, and, in consequence, creating lawyers as an elite speech community.
Keywords: law, law-making, legal language, cultural capital, Bourdieu, elite.

Introduction

It has been claimed "that a democratic method of making legislation is better than non-democratic methods in three ways: strategically, epistemically and via the improvement of the characters of democratic citizens" (Christiano, 2018). It works with a simple definition of democracy, claiming that the term "refers very generally to a method of group decision making characterized by a kind of equality among the participants at an essential stage of the collective decision making" (Christiano, 2018). Yet should we

claim that a democratic method of making legislation is the best possible based on the presumption of equality among the participants of such process, there has to be such equality present. But what if law-making is an unequal, and thus non-democratic process because of the inequality of law itself (or legal language at least)?

It has been claimed that to fully understand law,[1] one must know the language of normative texts (i.e. the language in which the normative texts are written) and the relevant rules governing its use. It usually means that normative texts are not seen to be sufficiently comprehensible to persons without formal legal training.

In an on-going research project,[2] we are focusing on the process of writing texts of legal regulations, conducting structured interviews with those involved in drafting normative texts. In these interviews, when talking about issues related to formulation, choice of words and the structuring of normative texts, we have consistently been given an answer along the lines of "that is just how it is done". Yet when asked further about the source of these "perceived rules", the interviewees could not really point to any specific drafting rules, or if they did, the actual rules were in fact not as strict and as clear as they made them out to be. These answers sound suspiciously like the answer a speaker of any language would give about the grammatical rules of their own language: a competent speaker usually knows what is the right way to say something, yet they are usually not able to explain the grammatical rules they employ in everyday speech.

Ultimately, the texts of legal regulations – the texts of normative nature – are seemingly written in a language in which previous legal regulations were written and they follow rules these drafters were taught. Therefore, is it possible that what is being passed on in training a legislation drafter becomes learned ignorance, the knowledge that Bourdieu describes as "a mode of practical knowledge not comprising knowledge of its own principles" (Bourdieu, 1977, p. 19)? If so, does legislation drafting unconsciously and inadvertently secure the position of legal language speakers as an elite, wielding a special type of power, the power to use law in a competent way?

In this paper, we focus on lawyers as a speech community formed out of legal language speakers, and especially out of speakers competent in the language of normative texts, and we discuss why and to what extent may this speech community be considered an elite in a society. We show that competent usage of special – legal – language in regulating the whole society may help create a special group of persons wielding an important part of cultural capital: the knowledge of legal language, and in consequence, competent knowledge of law. Given the fact that this language is used to

exercise (legal) power in a society, lawyers appear to be in the advantageous position of an elite.

In this paper, we focus solely on written normative texts and on the language used to draft them. Based on data gathered from interviews we conducted for the research, we show that those who draft new legal texts reproduce writing rules and customs, constantly re-creating legal language as a language incomprehensible to non-competent speakers and, in consequence, creating lawyers as a closed elite speech community.

Legal speech community

Even though legal language – the language of normative texts, judicial or administrative decisions and legal writing and discourse in general – is not generally considered a language in the same way that English or French is, it is still a code of no little importance in the establishment and communication of basic regulatory principles in a society. It is generally considered to be a functional variant (Mattila, 2006, p. 3) or style (Čechová, Krčmová, & Minářová, 1995; Kořenský, 1995) of a given natural language; a language for special purposes.

Language for special purposes is usually delineated through the functions it needs to perform. First and foremost the function that legal language performs is the establishment of legal rules: written legal regulation (constitution, statutory laws, secondary legislation) are a means of promulgation of legal rules, through which those legal rules come into being. It is also a means for the communication of law: our contemporary legal systems of states that call themselves democratic and who adhere to the rule of law are built around the principle of *ignorantia iuris neminem excusat*. The means of promulgation of law is also the most prominent means of actual communication of law to its addressees by the state. The language to perform these two functions seem to be tasked to fulfil two contradictory requirements: it needs to be precise enough to guarantee legal certainty and it needs to be simple enough to guarantee its understandability to those who are required to act upon it. However, the more precise a language gets, the more complex it gets and the less understandable it becomes. This contradictory situation – this paradox of legal language (Holländer, 1995; Myška, Smejkalová, Šavelka & Škop, 2012) – is at the core of all considerations surrounding the issues of understandability and comprehensibility of law. But legal language does not serve only to constitute and communicate law. It also expresses judicial decisions and provides a common code for legal practitioners to converse in.

And these are not the only functions the legal language is to fulfil. Mattila names several others that partially overlap with the above (Mattila, 2006, p. 31). Not only is legal language a code in which to transmit legal messages, legal language is a means to achieve justice and produce effects – law aims to regulate human behaviour through the rules expressed in legal language. In this sense legal language has a performative function – reality is being changed through words (Austin, 1962). Legal language is also a means of "reinforcing the team spirit of the legal profession" (Mattila, 2006, p. 31) and through legal language policy goals are achieved (Mattila, 2006, p. 31).

It follows from the above that to achieve all these functions there might be some differentiations across legal language and that it is not a homogenic code: the language (terminology, syntax and style) of normative texts will differ from the language of judicial decisions, and the language(s) of written legal texts will differ from the legal jargon of legal practitioners, even though they would naturally be mutually reinforcing. The jargon of legal practitioners stems from the language of legal texts and in turn this jargon takes roots in legal writing, possibly making its way not only to the texts of judicial decisions or court motions but also to the normative texts themselves.[3]

Legal language is a language and all languages constitute a community (White, 1981–1982). The relationship between a language and a community has been well explored, mostly by linguistics and linguistic anthropology. These theories may be used in order to better understand the community legal language constitutes.

Linguistics makes use of the concept of a speech community as a group of persons sharing common code and common rules and expectations of use of that code (Yule, 2017, p. 910). They are said to "develop through prolonged interaction among those who operate within these shared and recognized beliefs and value systems regarding forms and styles of communication" (Morgan, 2014, p. 1). Naturally, a typical example of a speech community is one that shares a common language: a group of persons speaking English may be considered members of an English-speaking speech community, French speaking persons may be considered to be members of a French-speaking speech community. However, this term may be used in a more complex manner, since a speech community is not a fixed group, nor does it have clear delimitations. Neither may it be delimited solely by the use of language. As Labov pointed out "[it] is not defined by any marked agreement in the use of language elements, so much as by participation in a set of shared norms: these norms may be observed in overt types of evaluative behavior, and by the uniformity of abstract patterns of variation which are invariant in respect to particular levels of usage" (1972, p. 120–121).

This participation therefore manifests in behaviour and in actual code use. Even though the use of language is what creates the community and sustains it over time, the community itself acquires qualities that do not have to be considered solely language-based. In this sense, a speech community may be understood as a community of practice (Wenger, 1998). A community of practitioners of a profession is a type of community of practice. But a specific type of practice that is mainly a practice of specific discourse (Mellinkoff, 1963, p. vi). To participate successfully in this community, one must become a competent user of this discourse.

As any other language, we may say that legal language constitutes a community. The language of law (or lawyers as a special professional community) as a shared code of communication is capable of constituting bonds between individuals and a community and, naturally, between members of a community (Mattila, 2006, p. 52). The language of legal norms, legal texts and legal practice is, of course, not a natural one, even though it stems from it, but it is language whose use must be taught through comprehensive training. Not exactly by practicing a whole new vocabulary or syntax, or by learning only specialized vocabulary; legal language is so intertwined with law itself that to understand legal language properly we must know the system of law as a whole, because in law, the normative consequences of legal text cannot be simply read from its surface (Myška et. al., 2012). One has to know the relevant context and be able to recognize what the relevant context is.

Should we accept the approach that law and legal language are intrinsically and existentially bound together, legal language and law are two sides of the same coin (Myška et. al., 2012) and, therefore, law is language sui generis (White, 1985, p. xiii), so law itself could be understood as a sociolinguistically delimited speech community (Goodrich, 1984, p. 173) and, along these lines, we may then theorize that legal language constitutes the community of law.

Language use in a practice and speech community implies a cultural and social context, possibly one that provides the speakers with knowledge, interpretive tools and pre-understanding that allows them to fully understand what is being communicated: through interpretation of the text in a specific way (Fish, 1976, p. 465–485). This consideration is what we understand as an interpretive community. This concept was developed by Fish, who assumed that language (a text) "does not have a shape independent of context" (Fish, 1980, p. 268) and only within this context assumptions of meaning of that language are formed. This context has social and cultural character. For Fish, meaning is not a production of the text or the

reader but rather of communities of "those who share interpretive strategies not for reading but for writing texts, for constituting their properties" (Fish, 1980, p. 14).

This approach may be understood in such a way that a specific code acquires a specific meaning only within a specific cultural context. In our enquiry, this context is provided by a professional community of lawyers: as a group of persons educated and trained to work within specific area of expertise, their main object of focus is legal text. Legal text may take many forms, from the normative text of constitutions or statutory regulations, through judicial and administrative decisions to texts of claims, court motions, etc.

As language becomes an engine fuelling a person's participation in a given speech community, their communicative competence ("the knowledge a speaker must have to function as a member of a social group" (Dell Hymes, 1972, p. 269–293)) becomes crucial.

We have been talking about the ways how legal language represents a specific functional variety of natural language to achieve the main function of regulating a society and that since it is a language of a kind, it is capable of creating a community of its speakers. We have shown above that to become a speaker of legal language requires training. Therefore, such considerations imply that there must also be a group of non-speakers. The issue of incomprehensibility of the law because of the incomprehensibility of the legal language it uses, has been a long-debated topic. From the widely-cited Mellinkoff's critique of legal English (1963, 2004) and subsequent plain language campaigns to individual studies on the nature and comprehensibility of other legal languages to laypersons (Mattila, 2006; Cao, 2007; Tiersma, 1999), various authors discuss and criticize various aspects of communication of law to its addressees (Stevenson, 2003). The issue of (non) comprehensibility of legal language has reached such a level, that many jurisdictions choose to prepare summaries or explanations of the law in simplified language (Mattila, 2006). But if such a communicative step is deemed necessary, it means that the language of normative texts fails to fulfil its function as a means of transmitting legal messages to all those that may be required to follow them. Or, and that is the core of the issue we examine here, it does not transmit the message to everyone but only to those who speak the language.

Goodrich points out that the notion of legal language itself as a special variety of language that is different from the way people usually talk to one another, is itself a product of a society where only a set of legally competent persons are capable of understanding and reading legal texts (Goodrich,

1984, p. 534). Legal language is for him a "unity to be understood as the social image of the argot or language of elite or professionalised power; it is the language of authority, which takes the discursive form of monologue, distance (temporal and hierarchical), and specialisation" (Goodrich, 1984, p. 185–187).

A reader implied by the text: An elite

To tackle the issue of comprehensibility of normative texts of any kind[4] to those without formal legal training, authors have been asking what kind of reader, what competencies and knowledge does it actually require to understand it. White, as one of those who understand law as a kind of language, points out that any text implies a specific type of a reader whose knowledge and competence will make them ideally suited to understand that text (White, 1981–1982, p. 427). To understand such a text, one must become this ideal reader (Smejkalová, 2013).

We have suggested above that to understand the words and sentences used in a piece of legal text and to understand that legal texts with all its normative consequences are two different things. The distance between the two is partially dependent on the individual language. While legal English has been receiving a lot of criticism and seems to be undergoing changes in that respect, legal Czech has been given little if any attention. Knapp claimed that even persons without formal legal training seem to understand the language of legal norms (1988). Others, however, point out that this does not imply they understand the true context in which those legal norms make sense (Smejkalová, 2013, p. 447–472). Hoecke points out that the "normative character of the law requires that the interpretation of legislation is not limited to the prima facie receiver-meaning" (2002, p. 131).

It follows that even a superficially comprehensible normative text requires knowledge that cannot be obtained from the text alone; the ideal reader that is implied by the legal text is not constructed by that text.

The legal text itself assumes a constitutive role: if we want to understand it we must become the ideal reader. If a text presupposes a complex competence that is not a part of general education, it means that it will remain inaccessible to all those lacking this competence. It is the text itself that actively constructs an image of its ideal reader; and the lay reader is not them. As Smejkalová and Škop point out "[s]hould the author (or the text) truly construct the reader and in the process of her construction rely on factors external to the legal text, the legal text becomes an elitist message

accessible only to some recipients, but perhaps not to those addressees who are expected to make use of the law and behave accordingly" (2017, p. 65). Given the nature of the normative text as a primary means by which regulation of the society occurs, this latent activity of construction on the part of the text is creating an elite (consisting of real readers of such text, capable of reading and interpreting it within its relevant context).

Traditionally, an elite is understood as a group that holds a certain amount of power in a society and uses it to influence its processes (Frič, 2008, p. 85). Thinking of lawyers as an elite has a special dimension since law itself creates power and ultimately represents power in a society. Naturally, different elites command different types of power and the type of power depends on the type of capital an elite has at its disposal.

Bourdieu defines capital as an "accumulated labor (in its materialized form or its 'incorporated', embodied form) which, when appropriated on a private, i.e., exclusive, basis by agents or groups of agents, enables them to appropriate social energy in the form of reified or living labor" (2011, p. 81). He explains it as "a vis insita, a force inscribed in objective or subjective structures, but it is also a lex insita, the principle underlying the immanent regularities of the social world" (2011, p. 81). He further states that "capital can present itself in three fundamental guises: as economic capital, which is immediately and directly convertible into money and may be institutionalized in the forms of property rights; as cultural capital, which is convertible, on certain conditions, into economic capital and may be institutionalized in the forms of educational qualifications; and as social capital, made up of social obligations ('connections'), which is convertible, in certain conditions, into economic capital and may be institutionalized in the forms of a title of nobility" (2011, p. 82).

In different contexts and different situations one can find different types of capital. The most usual and typical are economic capital, cultural capital and social capital.

Economic capital is the most obvious and clear of the three. It consists of all financial assets owned by an individual or an organization. Of course, even the question of economic capital is more complicated but for the purpose of this paper we may understand it simply as an economic power.

Cultural capital is a more complex matter. It exists in three variants: embodied, objectified and institutionalized. The first one means "long-lasting dispositions of the mind and body" (Bourdieu, 2011, p. 82), the second is cultural goods and the third marks for example educational qualifications. All three types are naturally interconnected and acquiring one usually means a necessity of another type of cultural capital. However, the charac-

ter and direction of such connection is often unclear. Embodied cultural capital constructs a habitus, an integral part of one's behaviour, a long-term strategy of acting in life (Bourdieu, 2011, p. 82–88), including the use of language.

Habitus is a way of behaviour which is taught "by the way," it becomes an integral part of one's way of life, a pattern of reacting to various situations. Habitus is gained or cultured during upbringing, during socialization and seems so natural that it can hardly be consciously taught later in life. Habitus is a result of living with a certain amount of cultural capital. It can be partly hereditary and partly needs time to be built in a process which is often unconscious because it takes place, e.g., in family life or in another social group during socialization and, e.g., by learning by imitation or in another form not easily found and achieved. Cultural capital creates a cultural competence and the logic of its transmission is based on inequality because it cannot be controlled from outside (Bourdieu, 2011, p. 82–88).

Social capital consists of a network of connections or relationships in a society and is fluid and always changing in time. According to Bourdieu, it is "the product of an endless effort at institution, of which institution rites – often wrongly described as rites of passage – mark the essential moments and which is necessary in order to produce and reproduce lasting, useful relationships that can secure material or symbolic profits" (2011, p. 87). It can be individual or collective and consciously or unconsciously used both in the short or long term. Resulting obligations may be subjectively felt or institutionally guaranteed through *consecration*, which means "the symbolic constitution produced by social institution" (Bourdieu, 2011, p. 87). Bourdieu explains that exchange of gifts strengthens a group and by recognition of it reproduces the group itself and reaffirms the limits of the group. One can imagine it as exchanging gifts, meeting for meals, attending cultural events etc. (2011, p. 87).

In the context of our paper, we understand legal language to be a special type of capital, either a part of cultural capital that is being acquired through cultivation and training throughout formal legal education, and indirectly a part of social capital when speaking not about the language of normative legal texts but about the language of lawyers, a jargon, as a means of intra-community communication.

It is quite clear how cultural capital in the form of knowledge of the language of normative texts can become a means of power. Legal language (the language of normative texts) is the language of power, Mattila says, therefore, it is often categorical. Especially when it comes to normative texts, it does not explain, it does not persuade (Mattila, 2006, p. 45). Legisla-

tion is a type of communication though which a legal change comes about (Hoecke, 2002, p. 130), thus the language of the outcomes of legislation – the normative texts – is full of commands. Through this, the language has a character of expression of "pre-emptory power" (Mattila, 2006, p. 45). Legislation is created within the enactment of power relations: the legislator one-sidedly imposes rights and obligations upon the subjects of law. There are no doubts about the fact that the promulgation of legislation is an act of power (Hoecke, 2002, p. 130).

To have an elite who understands the language of power better than others in this sense may seem inevitable. But if we realize that "[l]anguage ideologies are complex and textured in that, as cultural beliefs and practices, they are reproductions and representations, as well as tools to examine, reflect, subvert and exalt those representations" (Morgan, 2014, p. 14), reproducing rules and practices of use of that language may not just serve the "proper" communication of law, but also it may strengthen the power stance of a group who wields this particular type of power capital.

Law symbolically consecrates, as Bourdieu calls it – "by recording it in a form which renders it both eternal and universal – the structure of the power relation between groups and classes which is produced and guaranteed practically by the functioning of these mechanisms" (Bourdieu, 1991, p. 188).

In power relations, specialized language may be understood as a very useful part of exercising such a power. As Heinze put it, "[l]anguage's deceptively benign power becomes all the more lethal when it assumes the guise of cultivated, specialist knowledge and professionalized technique" (2012, p. 204). Foucault (1994) also addressed the proliferation of specialized discourse under the oversight of professional elites as a tool of social control.

Yet, according to Pareto, elites are necessary in every society and history is nothing more than a circulation of various elites coming into power and declining from it. The existence of an elite (in our context a legal language competent group) is not a good or bad thing, but a natural necessity and stating there is one is a description of a society, not a criticism. In this perspective, only an elite can govern a society because a mass is unable to form a structure with enough will, energy or competence to manage it.

However, both an elite and a mass contain in some ways elements of superior and inferior nature. For an elite to survive it should ideally be flexible and open enough to strengthen its superior elements and weaken the inferior ones. Thus, it should be able to attract persons from the mass with the capacity to lead to become members of this elite instead of mobilizing

a mass: it effectually makes sure any persons with superior leadership abilities are members of an elite, instead of leading the mass. Yet an elite is naturally closed to outsiders because it is exclusive. But unless it opens itself to outsiders, it will cease to exist. The outcome of all this is a circulation of elites in time (Pareto, 1991).

Keller (2011) states that nowadays (besides a so-called discreet elite with vast holdings) elites usually consist of professionals and managers of corporations. He calls them a "helping elite". Lawyers can be considered a part of this category of elite. In contrast to discreet elite members, the helping elite have no security of position since they can lose their post at any time and with it their elite status. In addition, they are in competition with one another, they have to actively pursue maintaining their status (whereas the members of discreet elite do not) and their helping elite status does not grant them financial security. Therefore, it is understandable that they would try to secure their position.

This is not to say that lawyers, as an elite, would intend to lead a whole society politically; there is no evidence to suggest that they would aspire to decide for a society in all matters. We have enough examples from the past to know how terribly it can end (Clark, 2000). Nevertheless, whether consciously or unconsciously, they may effectively be guarding access to law through their knowledge of how to use it, that is through their competence in legal language. One of the best depictions of such approach to law is a part of Franz Kafka's *Process* called 'Before the Law' (2017). In this short tale, a gatekeeper denies a villager access to law for so long that the villager dies without ever seeing the law. It is an excellent metaphor for our purposes because this story says nothing about law, its quality or any quality of its application. We do not know if the villager would think better or worse of law without really seeing it. If lawyers create an elite for the purpose of acquiring power or accumulating it and their tool to do it is their legal knowledge, it makes sense that they would do their best to minimize access to law for outsiders. But if their purpose is to make law work in the best way possible and a high level of legal awareness in society is a condition for higher effectiveness of law, they should open the door to law as wide as possible.

There are usually more elites than one in a society. There are different elites wielding different types of power based on their capital. Lawyers have a big social capital in a society just because they are lawyers (Dezalay & Garth, 1997, p. 109–141). In popular culture, lawyers are usually portrayed as people with connections, money and exceptional knowledge of law (Friedman, 2017, p. 3–30). If this is true, it means they have economic, so-

cial and cultural capital in abundance purely as a result of their occupation. Of course, such a portrayal is not always accurate, but still it is a picture of how the rest of the society sees them. However, they understand law better than a layperson, so they have more cultural capital and wield more power accordingly.

But does it mean that legal language used in normative texts and by lawyers needs to be (or should be) incomprehensible to laypersons as addressees of rights and obligations encoded in such normative texts? Stevenson (2005) comes to the conclusion that normative texts are not intended for laypersons, even though they seem to be the primary addressees of the therein encoded rules (rights and obligations). If legal texts are drafted in a language with such specific qualities that it takes a university-level education to understand them, what is such a situation capable of communicating about the whole system?[5] Therefore, it would seem that requiring specialist help from lawyers when it comes to understanding and navigating the law is an inevitable part of what law is in a current society.

To support the idea of legal language having an elitist nature might serve also Mattila's remark on the fact that the problem of comprehensibility of law (legal language) does not seem to be a problem when it comes of lawyers: "Where a legal text is intended for use only between lawyers, the requirement of understandability is less emphasized than would be the case for texts intended for reading by the general public" (Mattila, 2006, p. 35–36).

Yet, in general discourse, lawyers as a group, or an elite, are not usually viewed in the most positive light. The idea that lawyers hold such a special power is not generally appealing. Why else would a famous Shakespearean quote "Let's kill all the lawyers" (Shakespeare, 1999) be cited so often both in legal texts and in a popular culture (Kornstein, 2005).

Methodology and analysis

For the purpose of the project we referred to above, we have conducted semi-structured interviews with the aim to map out the process of drafting a legal text. Our approach here is one of qualitative research, which means that we cannot generalize our conclusions. We do, however, use the responses we were given for closer analysis of the specifics of the community of lawyers, or more specifically, drafters of normative texts.

The interviews were divided into two parts. In the first part, we aimed to map out the process of writing itself. In the second part, the interview

was structured around a practical exercise, aiming to explore to what extent do the interviewees tend to draw on their knowledge of rules of interpretation of legal texts. The first part of the interview was divided into five thematic fields. We asked about the work of drafting a normative text in general, the process of such a work, the practical aspects of writing, the influence of other elements on their work (superiors, colleagues, formal guidance documents etc.) and the respondents' relationships to their work. In the second part, we have prepared a set of normative texts that might contain more or less obvious breaches of formal guidance and rules, inconsistencies, or were simply pieces that allow for more than one way of interpretation.

The respondents were chosen from experts with practical experience in drafting statutes, usually in state administration, mostly as employees in specialized "legislative departments" (read "departments specialized in legislation drafting"). They come from the Ministry of Education and Youth, Ministry of the Interior, Ministry of Transport, Ministry of Justice of the Czech Republic and the National Cyber and Information Security Agency, and represent different levels of experience.

Conducting interviews allows for gaining a deeper insight into the experience of the respondents while letting them not only to answer our questions but also to open topics that they find important and that we might not think of in advance (Kvale 1994). This was especially proven in the topic that we address in this paper. While we might have suspected that certain unwritten rules shape the normative texts and the process of their writing, it was through these interviews with persons actively involved in the drafting of normative texts that we were able to confirm their existence and gain further insight on the community of drafters.

For the purpose of this paper, we have initially analyzed nine of the interviews.[6] Full transcripts of them were examined for repetitive patterns related to references to the sources from where the respondents draw their knowledge on how normative texts should be drafted, where to look for specific rules, how to react to situations where it is not clear how a particular piece of text should be formulated, or to whom the text is supposed to be understandable.

Therefore, we analyzed the responses related to the rules and guidance available when drafting normative texts, including testing the practical knowledge contained in one of the most relevant "rulebooks" – the Legislative Rules of the Government, and the responses related to the intended addressee of the drafted text and their conclusions regarding the comprehensibility of normative texts to persons without formal legal training.

The rules of drafting specified in the Legislative Rules of the Government (LRG) seem to play a crucial role in the drafting of legal texts. The participants consistently pointed to them, claiming (as one participant put it) that they "ensure the minimal guaranteed level of clarity, comprehensibility and inner consistency and coherence".

Although one of the participants claims that the LRG provides all the rules he needs when drafting a legislative text (Participant 1), for others this particular document does not contain answers to all drafting questions that arise, and these gaps tend to be filled in by less official rulebooks and other written guidance, or by "established and recognized practice". One of the participants does not rule out that these gaps naturally tend to be filled in in an ad hoc manner, regardless of what the Legislative Rules of the Government state.

> The Legislative Rules of Government themselves must be interpreted. They are in many ways vague and do not provide answers to all the questions, there are white spots that must be filled in. By an established, accepted and unwritten practice, or a completely new solution must be created, regardless of what the Legislative Rules of Government say. [...] the principles are expressed vaguely and every person can understand them in a different manner. Even when the principle is expressed [in the LRG] it does not guarantee that the result will fit the needs. (Participant 2)[7]

This claim seems to be proven by another participant (Participant 3) who described a situation wherein she, with others, were trying to solve a drafting problem not covered by the LRG but where the generally accepted practice seemed to prefer a solution they deemed nonsensical. In the end, they collectively chose her solution over the established practice and no-one disputed it. They argued that their solution would be more favourable to the future addressees of that normative text.

When asking participants about the intended addressees of their texts, we aimed to find out whether – or to what extent – they take into account the fact that their texts might be read by persons without formal legal training. The participants typically answered that they do not write for a specific type of addressee. They believe that a text following the drafting rules (as set out in the LRG) would be sufficiently clear and comprehensible, but accepted that in reality this is not always the case:

> ... I generally draft for an average person with an average intellect, so that with a little luck they will understand it. But this is not always possible. (Participant 6)

[The text]... should work even from the point of view of an average individual that could interpret the text. (Participant 4)

They do admit, however, that various normative texts are expected to be read by different addressees. One of the participants pointed out that the rules on family law would likely be read by a much wider audience than the rules on sailing:

Of course it is also a matter of social sphere. If the legal regulation we draft is a matter of family law, such regulation should be more comprehensible and accessible than the regulation of sweetwater sailing. (Participant 2)

Only one participant explained that in their thematic area of work, they have a very precise idea about the future reader of the normative texts they draft and that they do not address their normative texts to average persons:

...in our area of expertise, we do not aim to regulate any common person. We aim at very concrete subjects. Not natural persons, but legal persons, legal entities. So we have a clear idea about who is supposed to be the addressee of that regulation and we try to see the regulation through their eyes. (Participant 6)

Such answers seem to suggest that normative texts might differ in terms of comprehensibility for different audiences. However, the answers also point to how the recipients perceive their work; not as directed towards a particular addressee, rather as doing their work well, drafting an objectively good (clear, comprehensible) text. One participant referred to the drafter's work as something having an objective result: if the text is comprehensible and clear and free of errors, it makes a good normative text (Participant 2). Škop and Vacková, interpret this response in such a way that mechanical adherence to a formal standard of drafting makes a good (comprehensible and clear) text (2019, p. 23). In this respect, one of the participants (Participant 1) went so far as to described themselves as a tool.

Yet the participants do not seem to agree on what it means exactly for the text to be comprehensible. As shown above, they believe that in general, they are creating texts that are understandable to "average persons". They do seem to imply, however, that the ability to understand the normative text is a competence one needs to learn (Škop and Vacková, 2019, p. 22), in this sense, they recognize the need to become a competent speaker of the language of normative texts. This "learning", however, is not meant as some sort of formal training but rather an experience passed along by superiors and colleagues.

One of the respondents (Participant 3) talks about a certain intuition when it comes to practically formulating normative texts, guided by an experience of what kind of texts make it through one specific body that reviews every draft normative text being created on the level of government, or individual ministries.[8]

> I think it is very intuitive, but also influenced by the Legislative Rules of Government. [Others kept pointing out that] we cannot do it in such and such a way, because it would mean adding a seventh paragraph into a section and that would mean that the Legislative Council of Government would send it back to us; or we cannot do it like that because the Legislative Council would not like it done that way... There is some metaphysical corrective of what passes through the Legislative council and what is being known that the Council would tend to send back and say 'Not this way'. Maybe in practice, rather than referring to the Legislative Rules of Government [...] you keep thinking about what would the Legislative Council of Government say.

The intuition regarding the preferences of the Legislative Council of Government is what is guiding the formulation of normative texts. This experience, however, is often not personal and direct but mediated by senior colleagues. But it is not clear if these senior colleagues do have the personal experience or if they just pass on the unwritten sentiment they experience from colleagues senior to them.

> I think that it depends on where you come to, what is your first experience with legislative drafting. It also depends on who your more experienced superiors are [...] When I needed help, when drafting something, I would always go and ask them. (Participant 4)

As one of the respondents in our research put it: "Legislature is a social competence that you cannot learn. It is an experience that is built on establishing social links" (Participant 9), therefore one needs to acquire the necessary communicative competence that is needed to be a full member of the social group of legislative drafters (cf. Dell Hymes, 1972, p. 269–293).

Throughout the interviews, regardless of a particular question, we have been given an answer along the lines of "this is how it's supposed to be". When further questioned, the respondent was usually unable to give a detailed answer and basically referred to some sort of experience through which they learned about that practice or expectations. They seem to be functioning within a very specific community of practice, reproducing in their work the patterns they learn from the experience they gain through prolonged interaction with other legislative drafters with whom they share a certain

understanding regarding what the form and style of communication (i.e. how to draft normative texts) should be (cf. Morgan, 2014, p. 1 on the basic characteristics of a speech community).

The participants' answers seem to consistently show (as also shown by Škop, 2018) that the final form of the normative text is shaped by rules that do not necessarily come from any formally enacted document, but rather from customs, passed along by their superiors or colleagues, or in the form of other types of experience (such as when a text containing "an error" gets returned to them from various actors in the legislative process).

Nevertheless, Škop and Vacková show that "it is very difficult, if not impossible, to identify an approach that characterizes law-making as a purely mechanical activity that is a purely formalistic without any relevant creative elements" (2019, p. 17).

It is clear from our interviews that at least in part the knowledge and skill involved in the drafting of legal texts is acquired as a learned ignorance in much the same way as most other specialized professions. This learned ignorance is a characteristic of a speech community which as any other community that has its own rituals and its own language often becomes. The legal language speech community has the status of an elite because it has a special type of capital at its disposal: the capital of legal language competence. Because of this advantage, members of this elite may prefer to secure their position by making it more difficult for outsiders to become a part of this elite. Using legal language based on learned ignorance without any actual knowledge of how to flexibly solve a dilemma between legal accuracy and comprehensibility of legal texts (or even to recognize the dilemma), may serve as such hardship.

However, Bourdieu explains that the laws of the transmission of such capital are a particular case of the laws of the legitimate transmission of cultural capital and are measured by academic criteria, on the level of education and on the social trajectory (1991, p. 61). It means that learning the skill and craft of legislation drafting from one's superiors and colleagues is not necessarily wrong if it is accompanied by an actual knowledge of its principles. An inequality is created naturally because as Bourdieu explains, "...the social mechanisms of cultural transmission tend to reproduce the structural disparity between the very unequal of the legitimate language and the much more uniform knowledge of this language" (1991, p. 63). Moreover, one has to take into account the role of law schools, because "(T)he specialized languages that schools of specialists produce and reproduce through the systematic alteration of the common language are, as with all discourses, the product of a compromise between an expressive interest

and a censorship constituted by the very structure of the field in which the discourse is produced and circulates" (Bourdieu, 1991, p. 137).

Discussion and Conclusion

Bourdieu claims that "(t)hough equally free, human beings are unequal in their ability to use their freedom authentically and only an 'elite' can appropriate the opportunities which are universally available for acceding to the freedom of the 'elite"' (1991, p. 149). Our findings indicate that the possibility of understanding law through legal language used in legal texts is not equal for everyone because it requires additional legal knowledge. However, it does not mean that this inequality is always created by drafters of legal texts as a result of their learned ignorance. It can sometimes (and often does) mean that an ideal reader of such legal text is a lawyer with the necessary legal expertise.

But is such a situation acceptable? Smejkalová and Škop discuss to what extent may (and should) this ideal reader be a construct in the legal text's author's head or be constructed by and through the text itself (2017). They conclude by saying that the ideal outcome of drafting a legal text is such a text that (or, in fact the actual author of that legal texts, such as the drafter of that piece of legislation or a judge as an author of a judicial decision) "constructs the text in such a way that the text is well capable of education and forming the reader" (2017, p. 65).

However, we may theorize that lawyers are not really interested in law becoming a democratic competence, because they would lose their purpose. If it is lawyers themselves who are participating in the drafting of normative texts in a manner that does not support the proper construction of their readers (that is by providing lay readers with all the necessary information to help them become a competent reader) they are reinforcing the idea that lawyers are in fact a closed society that guards the knowledge of law. Thus, should legal expertise – well recognized and mostly understood by the lay society – be sufficient to secure the lawyers' standing as an elite?

Bourdieu argues that cultural and sociological capital as an instrument of power affects society significantly, legal language is and when a legal text is written, it is a manifestation of power (1991). But if the resulting incomprehensibility of legal texts is beyond the framework of how law requires accuracy, it is a misuse of power.[9]

Even if the process of re-creating and reinforcing of this legal speech community as an elite may seem inherent (and maybe to some extent nat-

ural), it still does not answer the question, if – in a democratic society – it is acceptable for knowledge of law as basic rules of that society become and elite social capital?

We could assume that an ideal lawyer would want their lay client to be able to read the legal text so then they can talk about it together in order to solve a legal problem. A layperson who fully understands the law at all times without any help of a lawyer is utopia. Yet when drafting legislation we need to take into account the layperson in order to ensure that they would be able to understand the legal text on some sort of basic level. In terms of language competence, at the very least the A1 level (which means mostly a passive knowledge of language in common situations) (Council of Europe, 2001) in legal language is necessary in order to be able to participate in legal matters.

The paradox of legal language as we have discussed it above is inherent to law and as such it cannot be eliminated. In consequence, it would be naïve to believe that there might be a moment in time when we will not need a group of specialists with legal expertise who would understand law better than the rest. These people (usually lawyers) hold the power of legal knowledge, which makes them a part of elite. The existence of an elite is not in itself negative; however, a properly functioning elite must be open, and accepting, when it comes to new members bringing with them enriching capital.

Passive knowledge of legal language is sufficient to participate in everyday situations and choosing a member of an elite to represent the layperson's interests in more complex situations does not need to be understood as completely unacceptable. While a layperson should be able to understand the most basic of rules (such as the civil code) and use it in everyday life, in more complicated matters, where an active knowledge of law is necessary, such as buying a company or applying for asylum, it is both normal and necessary to seek the professional advice of a lawyer to represent them. Is such a "representative" law in collision with the principle of democracy? Most democratic states have a representative democracy. Representative law works similarly. Therefore, if the principle of representation is acceptable for democracy, it is the least of our problems when it comes to legal language.

N O T E S

[1] There are, of course, various approaches to define and delimit law. However, the differences between these approaches are not relevant to this paper. In this paper – and in the research we refer to later on – we focus solely on normative texts, i.e. texts of legal regulations, which are (at least in civil law countries) a necessary part of law. We choose

not to differentiate between various kinds of normative texts, because such differentiation does not directly influence our line of argumentation. We focus instead on lawyers as a community, one that may be united by the language it masters, or by the practice it shares, and we are approaching legal language (the language in which the normative texts are written) as a tool that shapes and re-creates such a community.

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[3] Thus, one can presume that there is a special (implicit) kind of communication between normative texts and judicial decisions about legal language. It goes both ways and the meaning of law communicated in those texts can be very different depending on the role of judges in different legal systems. For closer considerations on the mutual communication between the legislature and the judiciary through judicial interpretation of normative texts see Smejkalová, T. (2013) *Soudnictví, jeho povaha a role v právním systému ČR*. Disertační práce, Faculty of Law, Masaryk University, p. 13, p. 140 ff., p. 171ff. and p. 235–236. We do not, however, address in any way this special dimension of communication. While we admit that the jargon of legislation drafters, defence attorneys or judges might naturally differ, all these groups will share an essential common competence: understanding the normative text, a competence that a layperson will probably lack. As specified above, in our considerations we do not assess this competence among judges or defence attorneys; our object of interest strictly involves those actively engaged in drafting legislative texts.

[4] For this line of argumentation it is not necessary to differ among various types of legal regulation, neither between substantive and procedural regulations. Not only does one regulation often contain rules of both, substantive and procedural nature, but also without understanding the processes one has at hand, understanding substantive rules only does not make them a competent user of law.

[5] What an element of a system looks like is capable of communicating a piece of information about the system as a whole. In law, this approach was used e.g. by Lasser (1994), who approached judicial decisions as self-portraits of the judiciary (or, in consequence) whole legal system, because individual formal as well as material aspects of judicial decisions inevitably reflect basic principles the system is based on. This approach was also used by Smejkalová (2013).

[6] This research is ongoing. Not all intended data have been gathered and accordingly final results have yet to be published.

[7] This quotation, along with all subsequent quotations from the interviews were translated from the original transcripts by the authors of this paper.

[8] This body is the so called Legislative Council of the Government. Its task is to review draft laws before they are approved by the government. They review it from the point of view of consistency with the rest of the legal system, but they also review the text from the point of view of explicit drafting rules as specified in the Legislative Rules of Government.

[9] Legal linguistics has long shown how petrification of ancient legal formulae actually adds to incomprehensibility not only of normative texts to anyone without formal legal training (see Mellinkoff, 1963, Tiersma, 1999).

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