



« 25 years of European law online »  
23 November 2006  
Hémicycle, Luxembourg

Maximilian Herberger  
Professor at the Law Faculty of  
the University of Saarland



### Access to law

Access to law has always been an issue, throughout legal history as we know it.

Let us consider three historical milestones.

The first dates from (around) 1 750 BC.

In the epilogue to the "Code of Hammurabi", the ruler boasts about having given the oppressed access to law:

*"The king who rules among the kings of the cities am I. My words are well considered; there is no wisdom like mine. By the command of Shamash, the great judge of heaven and earth, let righteousness go forth in the land: by the order of Marduk, my lord, let no destruction befall my monument. In E-Sagil, which I love, let my name be ever repeated; let the oppressed, who have a case at law, come and stand before this my image as king of righteousness; let him read the inscription, and **understand** my precious words: the inscription will explain his case to him; he will find out what is just, and his heart will be glad, so that he will say:*

*'Hammurabi is a ruler, who is as a father to his subjects, who holds the words of Marduk in reverence, who has achieved conquest for Marduk over the north and south, who rejoices the heart of Marduk, his lord, who has bestowed benefits for ever and ever on his subjects, and has established order in the land.'* "

[The Code of Hammurabi, Epilogue, *Translated by L.W. King (1910), Edited by Richard Hooker*, <http://www.wsu.edu/~dee/MESO/CODE.HTM>]



Publications Office  
Publications.europa.eu



« 25 years of European law online »  
23 November 2006  
Hémicycle, Luxembourg

Maximilian Herberger  
Professor at the Law Faculty of  
the University of Saarland

In German, the word for "access" is "Zugang", which means literally "going in". And we see this here – the person seeking justice "goes in" to the temple where the stele on which the Code of Hammurabi is written can be found. The text goes on to say that he may approach the stele so that he can read the inscription. But this is to be more than just reading the wording. Interestingly, it is emphasised that the person seeking justice should be able to **understand** the text of the law:

*"let him read the inscription, and **understand** my precious words ...".*

So "access" here means not only "superficial" access to the text as a piece of writing, but also "internalised" access to the meaning of the text. This is an important distinction for our present-day understanding, as we will see.

Let us now turn to a second episode where "access to law" is an issue, this time from the Old Testament. This passage is set in the middle of the fifth century BC, at the time of the return of the Jews from their exile in Babylon.

In the Book of Nehemiah we read the following:

*"1And all the people gathered themselves together as one man into the street that was before the water gate; and they spake unto Ezra the scribe to bring the book of the law of Moses, which the LORD had commanded to Israel. 2And Ezra the priest brought the law before the congregation both of men and women, and all that could hear with understanding, upon the first day of the seventh month. 3And he read therein before the street that was before the water gate from the morning until midday, before the men and the women, and those that could understand; and the ears of all the people were attentive unto the book of the law.*

*4And Ezra the scribe stood upon a pulpit of wood, which they had made for the purpose...*

*5And Ezra opened the book in the sight of all the people; (for he was above all the people;) and when he opened it, all the people stood up: 6And Ezra blessed the LORD, the great God. And all the people answered, Amen, Amen, with lifting up their hands: and they bowed their heads, and worshipped the LORD with their faces to the ground...the Levites, caused the people to understand the law: and the people stood in their place. 8So they read in the book in the law of God distinctly, and gave the sense, and caused them to understand the reading.*

*9And Nehemiah, which is the Tirshatha, and Ezra the priest the scribe, and the Levites that taught the people, said unto all the people, This day is holy unto the LORD your God; mourn not, nor weep. For all the people wept, when they heard the words of the law. 10Then he said unto them, Go your way, eat the fat, and drink the sweet, and send portions unto them for whom nothing is prepared: for this day is holy unto our LORD: neither be ye sorry; for the joy of the LORD is your strength... 12And all the people went their way to eat, and to drink, and to send portions, and to make great mirth, because they had understood the words that were declared unto them.*





« 25 years of European law online »  
23 November 2006  
Hémicycle, Luxembourg

Maximilian Herberger  
Professor at the Law Faculty of  
the University of Saarland

[Nehemiah, Chapter 8, Verses 1 – 12 (King James Version)].

Once again, the law was made accessible to the people and presented to them in dual form – first recitation and then commentary. It is striking how often the passage emphasises that the recited text was also explained and understood, and how the people's initial reaction of upset and tears gave way to joy. This shows that mere contact with the law by hearing it without really internalising it can be considered a transitional stage, but that additional explanation is required to lead to real understanding of the text. This is a point which is still relevant today.

The third "access story" takes place in Rome in 304 BC.

Whilst the first two texts talk about access to the law being *granted*, the third reminds us that, under certain circumstances, access to the law is a *struggle*. Digesta 1.2.2.6-7 tells us the following:

“Pomponius, *Enchiridion*

(6) *Deinde ex his legibus eodem tempore fere actiones compositae sunt, quibus inter se homines disceptarent: quas actiones ne populus prout vellet institueret certas solemnesque esse voluerunt: et appellatur haec pars iuris legis actiones, id est legitimae actiones. et ita eodem paene tempore tria haec iura nata sunt: lege duodecim tabularum ex his fluere coepit ius civile, ex isdem legis actiones compositae sunt. omnium tamen harum et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur, quis quoquo anno praeesset privatis. et fere populus annis prope centum hac consuetudine usus est.*

(7) *Postea cum Appius Claudius proposuisset et ad formam redegisset has actiones, Gnaeus Flavius scriba eius libertini filius subreptum librum populo tradidit, et adeo gratum fuit id munus populo, ut tribunus plebis fieret et senator et aedilis curulis. hic liber, qui actiones continet, appellatur ius civile flavianum, sicut ille ius civile papirianum: nam nec Gnaeus Flavius de suo quicquam adiecit libro.*”

What had happened? The writer Gnaeus Flavius, son of an emancipated slave, in the service of the patrician Appius Claudius Caecus, had drawn up and published an unauthorised copy of the official formulae for submitting a case and the judicial calendar. This meant that knowledge of the law and the dates of court proceedings was no longer the preserve of the priestly class but had been made accessible to the people. The people thanked him for this act by bestowing offices on him; they must therefore have considered providing access to the law to be a good deed. This implies that the law thus made accessible was comprehensible and understood, as otherwise there would have been nothing to be thankful for. So, once again, we encounter the link between making the law accessible and the expectation that it will be understandable – accompanied by feelings of satisfaction.

These three historical documents show that people have always been concerned by access to the law and the tension between its being granted and fought for – as is still the case for us here and now.





« 25 years of European law online »  
23 November 2006  
Hémicycle, Luxembourg

Maximilian Herberger  
Professor at the Law Faculty of  
the University of Saarland

Let us then move forward to the present and congratulate all those who, twenty five years ago, started making European law available online to Europe's citizens, and all those who have kept this initiative going until today. I was surfing the Internet in preparation for this talk and found that an Australian university once used the acronym CELEX – obviously without alluding to "our" CELEX – to mean "CELebrating EXcellence". It should mean the same to us, as CELEX is an excellent achievement to be honoured.

However, even on such an auspicious day, further-reaching questions should be allowed, such as the following:

Is it enough to make the texts of the law available to the public (previously, we would have said "the people") in easily accessible form? Or should our task for the future be to expand our interpretation of "providing access to the law"?

It goes without saying that the first step – providing access to the texts, free of charge – was and still is necessary.

But – and this is my hypothesis – this step is just one necessary condition for making the law accessible in the full meaning of the word, but it is by no means sufficient. Can we really say that the law is "accessible" if citizens, when confronted by a text they have accessed, find it incomprehensible? What would be gained, if citizens were to gain access to one "secret" only to be faced by another equally impenetrable one? And what would be the consequences?

However, support for my hypothesis that access to the law implies that this law is comprehensible can be found from an unexpected side. I am sure you have heard of the "Web Accessibility Guidelines" of the World Wide Web Consortium, which establishes rules for the accessibility of websites.

*"The English version of this specification is the only normative version."*

(<http://www.w3.org/TR/WCAG10/>)

Guideline 14:

***"Ensure that documents are clear and simple so they may be more easily understood."***

*Consistent page layout, recognizable graphics, and **easy to understand language** benefit all users. ...*

***Using clear and simple language promotes effective communication.*** *Access to written information can be difficult for people who have cognitive or learning disabilities. Using clear and simple language also benefits people whose first language differs from your own, including those people who communicate primarily in sign language."*

[<http://www.w3.org/TR/WCAG10/#gl-facilitate-comprehension>]



Publications Office  
[Publications.europa.eu](http://Publications.europa.eu)



« 25 years of European law online »  
23 November 2006  
Hémicycle, Luxembourg

Maximilian Herberger  
Professor at the Law Faculty of  
the University of Saarland

“Checkpoints” are then set out. Checkpoint 14.1 states:

“14.1 Use the clearest and simplest language appropriate for a site's content. **[Priority 1]**”

[\[http://www.w3.org/TR/WCAG10/\]](http://www.w3.org/TR/WCAG10/)

This checkpoint is given a priority 1, which means that:

“**[Priority 1]**”

*A Web content developer **must** satisfy this checkpoint. Otherwise, one or more groups will find it impossible to access information in the document. Satisfying this checkpoint is a basic requirement for some groups to be able to use Web documents.”*

[\[http://www.w3.org/TR/WAI-WEBCONTENT-TECHS/#tech-simple-and-straightforward\]](http://www.w3.org/TR/WAI-WEBCONTENT-TECHS/#tech-simple-and-straightforward)

This is the standard in Germany, for example, for the websites of federal authorities. The regulator laid down the following in the annex to the BITV (*Verordnung zur Schaffung barrierefreier Informationstechnik nach dem Behindertengleichstellungsgesetz* – Order on the creation of accessible IT in accordance with the Equal Treatment (Disability) Act):

*“The requirements and conditions in this Annex are based, in principle, on the Web Content Accessibility Guidelines 1.0 of the World Wide Web Consortium of 5 May 1999.”*

[\[http://www.gesetze-im-internet.de/bitv/BJNR265400002.html\]](http://www.gesetze-im-internet.de/bitv/BJNR265400002.html)

As the Federal Ministry of Justice publishes Federal law on the Internet, it is therefore responsible, as the web content developer, for ensuring that the language used in the laws published there is clear and simple....

But is this a real problem? When it comes to today's EU law, is the problem of incomprehensibility really so serious that it constitutes a significant barrier to access?

At this point – and to complement your own experience in this matter – I would like to call as my star witness the former Swiss Chancellor, Annemarie Huber-Hotz. She said the following on this subject in 2000:

*“The greatest challenge in terms of intelligibility of our laws is currently, without doubt, EU law, which we have been 'independently shadowing' for a long time now and, with the advent of bilateral agreements, directly applying in some cases. Don't get me wrong: I am a convinced European, but, in my view, we should not just sit back and accept as a given the sometimes absurdly complicated, intricate and incomprehensible nature of some EU laws. As an example, let me give you only the title of an EU Regulation. I realise that I am expecting a lot of you... The title is:*





« 25 years of European law online »  
23 November 2006  
Hémicycle, Luxembourg

Maximilian Herberger  
Professor at the Law Faculty of  
the University of Saarland

*Commission Regulation (EC) No 2592/1999 of 8 December 1999 amending Regulation (EC) No 1826/1999 amending Regulation (EC) No 929/1999 imposing provisional anti-dumping and countervailing duties on imports of farmed Atlantic salmon originating in Norway with regard to certain exporters, imposing provisional anti-dumping and countervailing duties on imports of such salmon with regard to certain exporters, amending Decision 97/634/EC accepting undertakings offered in connection with the anti-dumping and anti-subsidies proceedings concerning imports of such salmon and amending Council Regulation (EC) No 772/1999 imposing definitive anti-dumping and countervailing duties on imports of such salmon [Official Journal L 315 , 09/12/1999, p. 17]*”.

[Annemarie Huber-Hotz, *Recht haben - gerecht sein*,  
<http://web.archive.org/web/20030701101153/http://www.admin.ch/ch/d/bk/hu20001106.htm>]

So far, so good – or so bad.

However, and by way of a brief digression, the existence of possibly incomprehensible EU Regulations prompts an interesting question concerning EU law:

Can an incomprehensible Community Regulation be transposed into national law so as to be understood, even though it already applies (but is possibly incomprehensible) without being transposed?

The Commission, in a recommendation addressed to Denmark in 1973, considered this possible:

*“ Under Article 189 of the Treaty, those Regulations are directly applicable in Member States and entered into force in Denmark on 1 January 1973. There is therefore no need to incorporate their provisions in national instruments. This could lead to confusion as to the entry into force or the direct applicability of Community regulations as such. **The repetition, even in part, of provisions of a Community regulation in a national legal instrument should at most be permitted only where necessary in order to make the instrument comprehensible to users.**”*

[73/157/EEC: Commission Recommendation of 27 April 1973 to the Government of Denmark on the draft order implementing Regulation No 117/66/EEC and Regulation (EEC) No 1016/68, Official Journal L 182, 05/07/1973, p. 27.

[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=DE&numdoc=31973H0157&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=DE&numdoc=31973H0157&model=guichett)

So, there is still surprising scope for national efforts to make European legislation more comprehensible.

I am no utopian, and I am not suggesting that, under current conditions, we could make all our laws comprehensible to the man on the street. But should we not aim to achieve this at least for a core body of law and certain fundamental principles? If we do not succeed in credibly





« 25 years of European law online »  
23 November 2006  
Hémicycle, Luxembourg

Maximilian Herberger  
Professor at the Law Faculty of  
the University of Saarland

communicating this impression, we may be faced with citizens mentally fleeing the common legal area which the European Union is trying to build.

After all this, can we say that, having recognised the problem, we are on the way to solving it? Given the seriousness of the situation, this will probably not be enough. But what more can be done?

Firstly, we should never forget what has already been done by the European Union in this regard by way of good examples and decisions. We should mention, above all, the "Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation", the aim of which is to make the Community's legal instruments ever more **accessible and comprehensible**. This Agreement associates access and comprehensibility in the context advocated here, and has as its highest principle:

**"1. Community legislative acts shall be drafted clearly, simply and precisely."**

(OJ C 073 of 17/03/1999, p p. 1 – 4, [http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31999Y0317\(01\):EN:HTML](http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31999Y0317(01):EN:HTML))

We should also "think outside the box" about new ways of communicating law.

For example, why not follow the suggestion made by Martin Cutts to start all directives with a citizen's summary:

*"Few people bother to read directives. One reason is their strangeness: they are like nothing most people have read before. Directives have few features that are welcoming to ordinary citizens, who may suddenly find themselves on unfamiliar ground. A way of resolving this is to start all directives with a brief summary of the key points – a citizen's summary."*

[<http://www.clearest.co.uk/files/ClarifyingEurolaw.pdf>]

Or, being even more radical, why not try visual forms of communicating the law? If it is true that a picture can tell more than a thousand words, perhaps some of our difficulties are the result of thinking exclusively in terms of text.

I would like to conclude with an anecdote and a question.

I cannot tell it better than Jörg Berkemann did in 1999 at the eighth German *EDV-Gerichtstag* (Conference of the German Association for Computing in the Judiciary) in his talk "Free law for free citizens". It takes place in the 18th century, the time of the Enlightenment, and concerns Johann Georg Krünitz.

According to Krünitz,



« 25 years of European law online »  
23 November 2006  
Hémicycle, Luxembourg

**Maximilian Herberger**  
Professor at the Law Faculty of  
the University of Saarland

*'national laws need to be brought to the attention of the general public cheaply by way of calendars. An annual police calendar of this kind would, by and by, 'bring to people's attention the content of old and prevailing laws, as well as new police and national laws and regulations, in extract and through reminders and comments, thus, over time, bringing whole collections to their notice.'*

*In Krünitz's view, calendars of this kind were the most effective way of improving knowledge of the law. Adults, children and servants would read the texts 'often, if only to pass the time' and ultimately 'become fully acquainted with them'. Picture the scene: the paterfamilias, holding the latest edition of the calendar, reading the new legal texts to his assembled family, checking whether he can remember what he once knew."*

[Jörg Berkemann, *Freies Recht für freie Bürger!* JurPC Web-Doc. 188/1999, 1 – 79, <http://www.jurpc.de/aufsatz/19990188.htm>]

I cannot imagine anything similar catching on today (if it ever did!).

But what else can we do?

That is still the crux of the matter when it comes to our understanding of "access to the law".

\* Professor Maximilian Herberger is Director of the *Institut für Rechtsinformatik* (Institute for legal data-processing) at the *Universität des Saarlandes* (<http://rechtsinformatik.jura.uni-saarland.de/>), Chairman of the *Deutscher EDV-Gerichtstag* e.V. (<http://www.edvgt.de/>) and publisher of the independent web-based journal for legal data-processing and information law 'JurPC' (<http://www.jurpc.de/>).