LAW VIA THE INTERNET

Free Access
Quality of Information
Effectiveness of Rights

Proceedings of the 9th International Conference

"Law via the Internet"

(30-31 October 2008 – Florence, Italy)

Edited by

Ginevra Peruginelli and Mario Ragona

EUROPEAN PRESS ACADEMIC PUBLISHING

Legal Information As an Essential Aspect of Citizenship

Vincenzo Zeno-Zencovich
University of Roma Tre, Italy

Abstract. The relationship between law and citizens has significantly changed in the last quarter of century. Legal provisions, increasingly, are no longer simply an order, but offer to citizens access to social services, rights, freedoms, liberties. Enforcement of the legal order requires informed citizens who not only abide by the law but also take full advantage of its provisions. The sources of the law have multiplied and can no longer be confined to acts of Parliament. This requires a different basical approach to the issues of legal information. The argument is that public authorities are under a positive obligation to inform in a complete and substantial way the "consumer" of their legal products.

1. As new notion of citizenship

Information societies change many social and economic relations. They change also the nature of citizenship.

Citizenship is, traditionally, qualified as a political status which confers upon the holder a bundle of relations, both active and passive, which reflect his position towards public authorities and other member of the community. There are participation rights such as voting rights, right of association and assembly, having a saying in decision-making processes. There are also rights to public services such as education, health-care, and essential social services. There are rights in employment relations such as freedom to work, contractual conditions, welfare, right to form and join trade-unions. And there are rights which pertain to the family sphere such as marriage, parental relationship, and succession rights.

The status of citizen is well defined in modern constitutions which in setting out fundamental rights clearly distinguish between human rights and citizenship rights, following a centuries old tradition which dates back to the French *"Déclaration des droits de l'homme et du citoyen"* of 1789.

On the other hand, going even further back in time the notion of citizenships finds its theoretical and legal foundations in the Greek $\pi o \lambda \iota \varsigma$ and the powerful Latin expression *civis romanus sum*. In the modern age citizenship is strongly related to the theory of social contract which sees it as the status conferred upon a person in exchange of obligations towards the institutions such as taxation and military service.

After World War Two the notion of citizenship has gradually expanded both subjectively, including persons which up to then were only "half citizens" (*e.g.* women did not hold voting rights), and objectively with the increasing intervention of the State in the social sphere and in the economy. From the 19^{th}

Century liberal theory approach – which considered citizenship a civilised privilege for the affluent, we have moved towards "second" and "third generation" rights, generally ensured through wider and heavier taxation or by imposing obligations on private businesses such as non-discrimination in employment, contractual conditions for monopolists and public service enterprises, protection of the weaker party in consumer transactions.

A further step towards modern citizenship can be found in EU law, and in particular in 2007 Lisbon Treaty: there is no longer a direct relationship between being the citizen of a State and citizenship. And increasingly social rights – and even voting rights – are extended to persons who are not even EU citizens.

2. Information and citizenship

Against this background one can evaluate the role that information plays in constructing the notion of citizenship. The first, and most examined, aspect is that of the so-called "right to information". Historically this is seen as symmetrical to freedom of expression and freedom to disseminate one's ideas through any means. The relation between the two aspects is clearly indicated in article 11 of the European Charter on Human Rights, now incorporated in the Lisbon Treaty. A caveat is, however, necessary: the traditional perspective which sees information as an activity which is run by media enterprises (newspapers, periodicals, radio, TV), is very reductive if one considers the immensely wider dimension of information processes which in contemporary societies involve institutions, enterprises and citizens in a two-way flow of communications.

If one considers information not exclusively from the point of view of news-gathering and news dissemination, one can easily realize that in order to have an "informed citizenship" a vast effort – direct or indirect – of the public authorities is strongly needed.

3. Public information and awareness of social services

In the first place one must consider that in order to benefit from the numerous social services that welfare states offer to their citizens it is necessary that they be adequately informed on the nature of the services, who is eligible, how they are delivered.

One can appreciate here a fundamental difference between the private and the public sector. While the former lives on communication – mostly advertising - in order to offer its goods and services to the public and tries to simplify all the various procedures, the latter - owing to its monopolistic position and the absence of for-profit goals – generally has rather opaque communication policies which render it not easily understandable or simply creating a significant difference between the message which is sent to the public and the factual practices which are applied in order to render the various social services.

A further element of difficulty in public information over social services is the extreme complexity of some of them (*e.g.* health-care and welfare services) and the educational level of those to whom they are offered. It should not be forgotten that quite often social services are aimed at those citizens whose economic and cultural conditions are very low. It is sufficient to consider that even legal experts find it difficult to move through the maze of primary and secondary legislation, supplement by a thicket of by-laws, regulations and case-law. How can one ensure that a layman knows if and when he is entitled to social services, and to what extent.

Traditionally, education and information are two quite different processes. Without considering the issues related to the "digital divide" (which will be analyzed further on) one can not but stress the fact that the years spent by children at school cannot be aimed only at acquiring basic knowledge and abilities, but requires - in a modern State - that students should be made aware of their citizenship status and of the rights and opportunities that are offered to them.

Whilst children and teen-agers rapidly learn outside the school environment to enter in a private economic relationship (shopping, travelling, receiving or making presents, etc.), it is much more difficult to explain how to interact with public bodies which deliver social services and which appear beginning with educational institutions – complicated, distant and foreign.

4. Electoral information

A different sector where, apparently, there has been for a long time a significant amount of public information is that concerning political rights. Traditionally participation in the various types of elections and public consultations is favoured directly through information by the State or local authorities on when, how and for what one is called to vote, and indirectly offering spaces – both physical and on the public media - through which parties and candidates may present their programmes.

These actions which are well experimented in modern democracies appear however inadequate in contemporary information societies. On the one hand the number of electoral engagements are increasing (in the European context one has municipal, provincial, regional, national elections; elections for the European Parliament; local and national referenda. Public awareness declines and abstentions surge. On the other hand it is increasingly difficult to explain convincingly why, for whom and for what one is called to vote, considering

also the fact that within the same State there may many different electoral systems.

Surely voter participation depends largely on those competing and the ideas and programmes they represent and present. But at the same time it depends on public decisions which make voting a simple procedure, because citizens know how to vote e can do so easily. Electronic voting – with all the necessary cautions – is surely one of the technical way to enhance voter participation. But the solution to the apparent paradox of the multiplication of electoral moments and dwining participation lies, in information societies, in the amount of public communication aimed at reducing – on easily ascertainable targets – the percentage of those who decide not to make use of their citizenship rights. Voting participation appears to be the result of sharing information and knowledge on one's political rights.

Surely voting is an essential aspect of citizenship, but in contemporary democracies there are many more ways to express one's role as citizen, in particular in decision-making processes which concern the community one belongs to: from town planning to environmental protection, from public transport services to the development of health and educational services, the role of public communication is essential from a substantial point of view in order to promote awareness; and from a procedural point of view because it ensures transparency of public decisions. One can easily understand the profound difference between a market or opinion poll which is meant to orient industry or political parties, and the role of a public consultation for the legitimacy, in front of the courts, of a public procedure.

5. Legal information and common knowledge of the law

Legal information, throughout the last centuries, has become a growing concern of modern States. In the age of enlightenment the right to know the laws which governed the land became one of the main claims against absolutism. From the 19^{th} Century the rule is introduced that laws come into effect only after they have received some form of publication. And at the same time the principle *ignorantia legis non excusat* become a general rule, especially in the field of criminal law.

One cannot avoid pointing out that, two centuries later, the axiom publication = presumption of knowledge still continues to stand and is the object of little controversy.

For a number of reasons that will be listed below, in information societies one can doubt of the wisdom of a formalistic approach to the effects of the publication of the law.

a) In the course of the last decades the amount of legislation has increased with amazing speed, reaching levels quite unprecedented. The sources of legislation have multiplied moving from Parliament to national and local government, to independent administrative authorities. To this one must add the overwhelming production of EU law. It is quite unrealistic - and contrary to the rule of reason - that an informed citizen should spend most of the day perusing the various types of "official gazettes" in order to know which are the laws or the rules he must abide by.

b) Traditionally it is up to the State to publish its legal provisions, while it is up to the citizen to inform himself if he wants to benefit from those provisions or does not want to incur into sanctions. In an information society the relationship should be seen in a different way. There surely is an obligation of each citizen to respect the laws of the State he belongs to. But there is a prior obligation of the State to inform its citizens on the existence, the extent, the purpose of the laws it introduces. The way through which the State performs its obligation is not irrelevant and reflects itself on the compliance by its citizens.

c) The principle of official publication of the laws has been developed mainly in relation to criminal laws as an aspect of the principle of legality (*nullum crimen sine lege*) and clearly reflects a punitive perspective. But in modern societies knowledge of the laws is only in a minimal aspect one of enforcement of the law against criminal behaviours. The huge amount of administrative legislation and regulation does not simply require compliance, but much more importantly cooperation by citizen. It is quite impossible that a modern State may achieve its goals if its citizens are not aware of them and therefore are not able to benefit from the public policies promoted via legislation and regulation.

d) The traditional form of publicity through printed communication is quite inadequate to ensure the level of knowledge and awareness which modern societies require and are accustomed to.

   i. In the 19^{th} Century printed press was surely the most advanced form of public communication, much more than public announcements posted on some wall or the town crier. It is no longer so when there are much more efficient and pervasive ways to communicate.

   ii. Behind the publication of laws in official gazettes there clearly is a paradox: in order to perform his duty and comply with the law a citizen must buy a copy of the publication. The State has a duty to publish its laws but only those who are able to pay the price can have complete access to legal information. And a yearly subscription to the various gazettes bears a significant cost.

   iii. Official gazettes surely satisfy the primary exigency of certainty of the law - the text which is valid is the one that has been published - but that of substantial knowledge of the content of the law. One

therefore must clearly distinguish between formal objectives and effectivity.

e) The modern techniques of communication have greatly evolved and the development of the science of public communication is extremely advanced. One is quite aware that the publication of a legal text is addressed not to all citizens but only those are able to understand it, possess the basic knowledge of legal language, know how a legislative text is structured, are familiar with the subject. Therefore only a minority of citizen are able to understand it, to posit it within the legal system, detect novelties and suppression of past rules. But the role of a modern State is to render its legislation to the great majority of its citizens, and not only those who have a legal education. This requires simplified forms of communication using the medium which is considered the most appropriate.

f) In early industrial societies messages could be disseminated only in a limited number of ways. In post-industrial societies any common person is submerged by messages. In any moment of the day he receives thousands of messages: through the radio and the television, the fixed and mobile phone, his computer, billboards, newspapers, road signs, stickers, leaflets, wall writing, shop windows and lights, banners. A public information policy requires a careful study of those to whom the rules are addressed, their age group, where they can be found. A one-size-fits-all approach, such as the official gazette solutions, is clearly formalistic and achieves no significant results in making citizens aware of the law and of the opportunities it offers, and not only of the sanctions it is announcing.

g) Traditional legal publication is once and forever. The day after one has to seek the gazette in a public library or wait until is reproduced in some publication, generally by a private publisher. Modern forms of communication are, and must be, permanently available and constantly updated.

6. Guidelines for the publication of norms

From what has been said one can model a new idea of publication of the law which, though maintaining some aspects of the past, is consistent with modern citizenship and the rights which are attached to it.[1]

i. The State and other public bodies with legislative and regulatory powers are under a legal obligation not only to publish the rules they enact but also to adopt appropriate measures in order to ensure their effective knowledge.

ii. Every legislative or regulatory act should contain specific provisions concerning the measures which must be adopted in order to render it effectively known by the public at large. These measures can be chosen from a wide range of solutions.

iii. In adopting legislative or regulatory provisions one should consider the economic aspects of the communicational measures, which are the first and unavoidable cost of legislation.

iv. With regards to certain provisions of wide social impact (*e.g.* health care and social security) information and communication policies must be envisaged on a continuous basis (*e.g.* call centres, on-line assistance) in order to ensure effective access to the relevant services.

v. One must gradually and conceptually establish a direct relationship between the text of the norm and its public communication, in a way not dissimilar to what is found in consumer legislation where, applying the *contra proferentem* rule, the advertising message prevails over the technicalities of the contractual text. Similarly one can adopt the well established rule in financial markets regulations which requires issuer to present the content of their offer to the public in a clear text of a limited number of words.

vi. If a citizen is mainly a "consumer of norms" obscure laws, because they have not been sufficiently publicized and made clear are a "defective (legislative) product" which entails not only disapplication but also a possible liability for damages.

vii. The State is under an obligation to make available to its citizens, freely, data banks constantly updated containing all the different types of legislation and all the case-law of its higher jurisdictions. This latter aspect is particularly important, especially in States which continue not to be aware of law-making role of jurisprudence. The rights of its citizens however - notwithstanding hard-to-die positivistic ideologies - depend largely on what is recognized by the courts.

viii. There are some indicia of awareness of the problem of access to publicly held information on behalf of the EU authorities. The most recent examples are Directive 2003/98 on the use of information belonging to the public sector or Directive 2003/04 on environmental information which implements the 1998 Aarhus Convention. This is, however, not enough considering the enormous role of information in the construction of an effective citizenship.

[1] One should consider the "Declaration on Free Access to Law" made by Legal Information Institutes meeting in Montreal in 2002, as amended at meetings in Sydney (2003), Paris (2004) and Montreal (2007). For the text see the Appendix of this volume.

7. The right of access to network facilities

In order to analyze the issue of access to legal information it is not sufficient to set out the rules that should superintend to the communication of laws and regulations. It is not sufficient that public authorities inform citizens of all the relevant provisions and make them available through on-line data banks.

The problem of the accessibility of these essential sources of information is twofold. On the one hand there is in all developed countries what is currently defined as a digital divide, *i.e.* the exclusion of a significant part of the population from access to computer services owing to their digital illiteracy. This involves mostly citizens that for reasons connected to their age or their socio-cultural conditions are not able to operate a computer and are therefore cannot access the huge amount of information - of any kind, including legal information - made available on the Internet. On the other hand accessibility is made difficult for those who do have basic computer skills by the lack of adequate infrastructures or network capacity. This depends mostly on geographical and economic factors. The current debate on broad-band connections and "next generation networks" (NGN) is surely an economic issue, but puts also into the limelight the problem of "digital citizenship".

Nowadays that so many public services - from health-care to transport, from education to cultural events - are provided easily and at no extra cost on-line it is clear that those who are not able to have access to them have an impaired citizenship.

This brings up the issue of significant public investments in order to reduce digital illiteracy and promote the development of (at least) broad-band networks. The present definition of "universal service" contained in Directive 2002/22 is manifestly inadequate to cope with the technological developments of this last half decade and with the notion of digital citizenship.

The conclusion is that in the information society *tout se tient*: legal information is not an exclusive problem of lawyers, but of all citizens. Access to legal information cannot be separated from the general issue of access to the information and communication networks.