Laura Ervo*

Facing people through language use – linguistic tools to make proceedings fair

DOI 10.1515/ijld-2016-0015
Received March 19, 2016; accepted October 10, 2016

Abstract: Court proceedings should be fair. Accordingly, the right to be heard has traditionally been considered one of the fundamental principles of court proceedings. Earlier, this right was mainly interpreted in a normative and rather passive sense. Recently, however, the interpretation of the right to be heard has developed towards the requirement of active and factual participation of court parties on equal terms with the other parties involved. The explanation for this should be sought in modern (procedural) law, which is more sociologically influenced than has previously been the case. Nowadays fairness is also about feelings. Welfare in courts means not only the rule of law and legal security in its traditional form, but also a good atmosphere and the presence of concrete means to give fair experiences to people who visit courts. This places communication and interaction between judges and parties in a central position as some of the most important instruments for achieving a fair hearing. With regard to the formulation of judgments and decisions, it is important that court lawyers put themselves in the parties’ situation and give careful deliberation to the purpose of their texts and how they will be perceived and understood by those concerned. The media, too, has a key role to play as a communicating link between the courts and citizens. For the media to be able to give an all-round and balanced picture of the courts, decision-making processes in courts must, as far as possible, be observable, or, in other words, transparent. Therefore, courts are in the process of throwing open their doors and judges no longer tend to hide behind their law-books. Post-modern legal decision-making is “doing justice together” rather than isolated use of power. Courts need to face people. And to do that, they need to master the most crucial instrument of all, namely appropriate language use. The present article discusses how to realize/operationalize this “modern” form of fairness in courts and how to maintain it with reference to legal theory and practical needs.

*Corresponding author: Laura Ervo, The University of Örebro, 702 81 Örebro, Sweden, E-mail: Laura.Ervo@oru.se
Keywords: court communication, fair hearing, Hume’s guillotine, media publicity, official language, therapeutic jurisprudence, trust in courts

1 Background

Court proceedings should be fair. The guarantee of fairness is the most important principle in procedural law and it is widely recognized globally. It is the core concept in international conventions and in national codes for court proceedings. But what exactly constitutes fairness? What type of “ingredients” must be present for something to count as fair? Traditionally, the right to be heard has been considered a mainstay of fairness in court proceedings, but earlier this right was mainly interpreted normatively and in a mostly passive reading of the word. It was enough to offer a party the chance to be heard, whilst the hearing *per se* remained more or less technical with little guarantee that the involved party was really listened to; little guarantee that his/her comments were taken into consideration, and little consideration for whether s/he had the resources and practical tools for participating in an active way on equal terms with the other parties (especially the opposite party). Recently, the right to be heard has evolved to also mean active and factual participation – in an equal way – with the other party. In addition, the state is nowadays responsible for providing practical, concrete tools for realizing this type of participation, which means that legal aid, for instance in the form of intellectual and temporal resources, should be granted whenever needed (Ervo 2005).

This step may only be the beginning in this recent development, where normative fairness is increasingly approaching publically perceived fairness. Currently, the most important function of adjudication is to ensure that decisions are contextual and that they satisfy the relevant parties. Thus, whatever satisfaction is achieved in court should *feel* fair too; or put differently: fair decisions are produced through fair proceedings (Ervasti 2004: 433; Haavisto 2001: 98–102, 2002: 165–251, 260–262 and 287). In this modern interpretation of fairness, the perspective is prospective rather than retrospective and tends towards an internal focus rather than an external focus on the parties and their needs (Ervasti 2002: 56–62; Leppänen 1998: 32–41; Lindell 2003: 82–101; Lindblom 2000: 46–58; Virolainen 1995: 80–89). This makes communication and interaction between judges and parties the most important instruments for achieving these aims, which, in turn, means that a modern judge must master not only legal but also psychological, linguistic, and social skills to be successful at their job.
If we accept the above premises, formal and absolute procedural rules to guarantee fairness are no longer needed. Similarly, material truth finding, materially correct judgments or legal protection are no longer key words in the present context. The current demands are markedly different from what used to be in focus, and the “service” provided by social and communicative judges is seen as one of the main components of fairness along with transparency and co-operation. The question, one might say, is no longer how to guarantee a fair trial but how to produce it for those who will experience it. In Sweden and Finland, for instance, substantial efforts have been put into quality assuring how courts promote these new values in court service. In Sweden, the quality discussion started already in 1997 and is still ongoing (Hagsgård 2014; Savela 2006). In the Finnish Court Quality Report it is concluded that the rapid changes in the operating environment have led to a situation where the requirements for the courts’ quality, efficiency and cost-effectiveness are becoming ever stricter. Because expectations are growing, there is a constant need to develop the activities of the courts. Against this background, the dominant idea in court quality assessment has been to identify areas where an activity could be developed and to agree on the measures that are to be undertaken to this end. The core idea was to develop the quality of adjudication so that the court proceedings – as a process and as the decision of the court, with all its incidentals – respond ever better to people’s expectations of a fair trial and access to justice (Savela 2006:8).

As we can see, the point of view is changing from passivity to activity and from obeying to co-operation and service. The main actors are the parties and the people rather than the state and the judge. To find out their needs, a survey was conducted in 75% of Swedish courts, where a number of court parties and lawyers were interviewed. The total output of the study amounts to some 2000 interviews (Hagsgård 2014:1006–1008), which is quite an investment in assuring the quality of the work carried out in Swedish courts. Good court service, according to the survey, includes easy accessibility, human and respectful reception, rapid processing times, transparency, and understandable formulation of decisions written mainly to the parties instead of the upper courts; effective media responsibility, wide information and good conduct of court personnel. All these aspects are well-known to us as customers and clients. Instead of being subservient, court parties are plenipotentiaries who participate in the conflict resolution. In addition, the target group no longer covers only parties. All stakeholders who deal with court proceedings are included, including e.g. witnesses. Witnesses are nowadays seen as assistants to the decision making process; they come to help us find the solution and are therefore entitled to information and good treatment. Finally, the general
audience also has a right to know and discuss court cases. Here the media constitutes the main intermediary.

2 Legal or sociological?

Due to this development in the interpretation of fairness, it can be said that procedural law has been approaching sociology/sociological sciences, making Hume’s guillotine increasingly less applicable. The view that there is “no ought from is” is arguably becoming outdated, whereas a good atmosphere, feeling good about an experience; good communication, and constructive interaction are becoming main components in modern court fairness (Ervasti 2004: 168; Haavisto 2002: 20; Laukkanen 1995: 214; Takala 1998: 3–5; Tala 2002: 21–23; Tyler 1990: 94; Virolainen and Martikainen 2003: 5). It would not be enough to satisfy present-day court parties if everything in a procedure was done in a legally correct way (cf. normative fairness) if the parties are not “happy with the proceedings” and with the result they led to. Instead, parties require a feeling of fairness too, and expect to be mentally satisfied with the procedure and the result. To achieve this kind of satisfaction a new skills set and new tools are clearly required. Rules, paragraphs and law books are no longer sufficient if the societal need is to face people in a joint experience of fairness. I argue in this paper that court professionals need to master understandable language and professional but courteous and empathic behavior as their main instruments to face court users.

Hume’s guillotine (“no ought from is”) has long been criticized in the legal sciences (Ervasti 1998: 377; Lappi-Seppälä 1997: 201; Searle 1988: 175, 1988; Ukkonen 2013: 28) even if Kant upheld a similar formula in his legal doctrine (Kant 1929). Kelsen’s Reine Rechtslehre, too, has attracted similar criticism (Klami 1983; Lagerspetz 2005: 64–65; Raitio 2014: 527). What seems to be happening is that we are moving beyond re-evaluating Hume et al.. Thus, the main concern of present-day legal theory is perhaps no longer whether to theoretically discount Hume’s guillotine (Ervo 2005: 83; Niemi 1996: 128) or discussions on how to agree on acceptable scientific methodologies (on legal dogmatics or empirical studies, see for instance Ervasti 1998: 377). Instead, our concern is (or should be) with reality. As already indicated, procedural law is no longer simply “the law in books” as far as the content is concerned but also “law in action”, meaning that procedural law is now gaining its contents partly from “is”, i.e. the above-mentioned real satisfaction and real needs of parties. The parties’ wishes and choices are presently one part in legal proceedings, a part that is becoming increasingly more important. A similar phenomenon can be
witnessed also in private law, where, for example, Thomas Wilhelmsson has written about the significance of so-called “small stories” in and for private law (Wilhelmsson 1987). In that discussion, the context of private law is the single case or “story” in question and its parties. The significance of “the single case” has implications for the whole field of private law, where perhaps in future the general principles will increasingly be developed from these “small stories”.

I detect a similar trend in the recent development of procedural law, where we seem to follow what Wilhelmsson showed us already some decades ago. Before the recent developments in procedural law, where the law increasingly sources part of its contents from “is” (i.e. at least in the form of discretion, party-autonomy, delegation principle and non-mandatory rules), it was much debated in the legal sciences whether the “is” principle could be used for the application of laws at least in situations sensitive to the interpretation of law. Similarly, it has been suggested that contextualism has been strengthened in recent procedural law, for instance, by the ECHR (European Convention on Human Rights) (Karhu 2005; Koskenniemi 1989; Rautiainen 2014: 128–134). Finally, it has also been stressed in the literature that the practice of law is a multi-level phenomenon, and that contextualism and teleology are linked together, based on the current context. Depending on the subject, some legal areas are nowadays more goal-oriented than others. This has, for instance, been said of EU law (Raitio 2014: 541).

Nevertheless, I would like to argue that current procedural law is not only about this mutual interaction between “is” and “ought”, whose relevance most legal scholars have acknowledged a long time ago. It is also not only about finalism, where the interpretation of laws is carried out through the final result of the interpretation, but it is something more, where – as I have already indicated above – the contents of procedural law are partly derived from ‘reality’ or ‘Dasein’ (meaning the “being there” or “presence”/”existence”) of the parties involved. Such reality is implied and effectuated through “court service” where the word “service” means quite a lot. The parties will get what they order, so to speak. This is at least partly true and exemplified in the daily life of courts, even if it is the court which still officially leads and holds the responsibility for the proceedings. Nevertheless, more and more attention is paid to the satisfaction of customers and their wishes and needs. Procedural law is no longer that very formal and absolute subject of law where most rules are mandatory and where the perspective is that of the judge. Procedural law has moved from the judge’s arena to the parties’ arena, as it were. And through this development, the traditional dichotomy between “is” and “ought” comes under pressure, too.

I would like to highlight here the emerging academic field of therapeutic jurisprudence. Short of assigning the social aspect as the most important
element in legal matters, therapeutic jurisprudence nevertheless reminds us that there are always also social effects involved in legal matters, and especially in how legal proceedings are realized. The therapeutic field proposes that law and adjudication do not only reflect and govern the economy, politics and moral issues, but that they also reflect and influence the well-being of the people (Diesen 2007: 151, Winick 1997: 648). Perhaps “well-being” is not the best choice of word to illustrate the therapeutic aspect, especially if well-being is claimed to only be socially rooted rather than rooted in economic and moral issues as well, which traditionally also belong to law and adjudication. And yet, the social aspects of law and adjudication should be stressed as such when analysing present-day law and adjudication proceedings. Laws are our common rule sets to handle our common lives in a given society and adjudication and alternative dispute resolution are mechanisms to handle conflicts between human behavior and rules. The social aspect, then, plays a highly significant role. It facilitates well-being as one significant component, along with economic and moral aspects. That said, the intrinsic value of the social aspect as such in court proceedings has not, I think, been sufficiently analyzed or understood well enough in the field of therapeutic justice. Social aspects should thus not merely be linked with therapy but also with wider private and public interests like fairness and trust in courts and the legitimacy of the whole system. I shall attempt to elaborate on this view below.

Whereas traditional proceedings are seen as vertical and focusing on dispute resolution, the transformed therapeutic proceedings are seen as horizontal, problem-solving, and dispute avoiding. The traditional way to handle conflicts is formal, adversarial, claim-oriented, and rights-based, whereas the more modern proceedings under investigation here are informal, collaborative, people-oriented and interest or needs-based. In the traditional procedure, the application and interpretation of law is important whereas in the more therapeutic procedure the application of human behavior research is seen as a key component. There are also differences in the judge’s role. Traditionally, the judge has been seen as an arbitrator, whereas in the new form s/he acts more like a peacemaker or a coach. The orientation is now forward-looking instead of backward-looking and the outcome should also be therapeutic and not only legal. Whereas the traditional procedure is dispassionate, impersonal and formal (with an isolated judge making decisions), the more modern procedure is open and personal, being based on a team approach and co-operation when making decisions or investigations (Diesen 2007: 153).

In therapeutic jurisprudence it is also stressed that it is not only the question of private interests and private well-being of individuals that is at stake, but
that, especially in the long run, the ignorance of the mentioned social elements and social needs in law and in proceedings may lead to negative or harmful consequences for the whole society (e.g. a legitimacy crisis or revolutionary behavior). Thus, there is clearly also a public interest in adopting a more therapeutic jurisprudence (see Diesen 2007: 155).

What is exciting in the field of therapeutic jurisprudence are the new perspectives it lends to law and adjudication. Thanks to this emerging field, a totally new type of question can be asked, e.g. “what are the designers of procedure afraid of?” This is a strikingly new type of question in legal studies and by asking such a question instead of previous ones, like “who may speak?” or “what shall be regarded as a relevant argument?” “What shall be regarded as a success or a failure?” etc., we may effectuate a new, social approach to proceedings. To make it easier to reply, we may ask further if someone “is afraid of feelings?” or whether someone is “afraid of making a mistake?” (See Diesen 2007: 155–156). To make procedures more social and therefore more therapeutic and fairer, we should strive to overcome a party’s fears and get the courage to meet other parties or stakeholders in a transparent way. This applies not only to the legislator but to both the parties and practitioners who attend in single proceedings as well. To be successful as a credible social phenomenon these questions should be first asked and secondly any potential fears should be handled or allayed. The therapeutic procedure requires an open mind and a brave heart, as it were.

Therapeutic jurisprudence has been criticized, much like it is the case with traditional procedures, in the sense of being paternalistic and purporting to know “what is best for the individual”. Is it possible to talk about well-being when it factually means power or influence (that someone else holds over a party)? Is it possible, likewise, to call something a treatment/a therapy when it actually is a punishment? Perhaps in practice there is no real choice here. Of course, any label or naming can be abused and misunderstood. Still, showing empathy and avoiding confrontations is something which therapeutic jurisprudence can bring into focus in the more modern proceedings. It is something which is needed if human relations are to flourish. Therefore, therapeutic jurisprudence is not simply something idealistic, but a notion or concept closely connected with legal realism. It is not an alternative but a supplement to the traditional judicial process. And through it we can indeed reach further, by potentially facilitating a legal solution to a problem – or perhaps even rehabilitation (See Diesen 2007: 157–158, 160–161).

If we view modern court proceedings more (or at least partly) as an “is” phenomenon instead of an “ought” phenomenon, and focus more on “Dasein” instead of pure normativity, the significance of language use is clearly increasing. This positions communication and interaction between stakeholders in
court sessions in a central role in terms of “*Dasein*”. As Gadamer has said, “*Dasein*” is possible only with the help of language (Gadamer 1994). Searle too emphasizes that without language there cannot be any promises, agreements or altogether well-working administration. Thus, language remains “the main practice of communal practices” (Siltala 2012: 942). Conversely, there cannot be any working jurisdiction without language either.

### 3 Public perspective – trust in courts

The background discussed above is mainly based on private interests. In other words, it is important that parties are satisfied and happy with proceedings and their outcome. The modern perception of fairness, then, is mostly about individual parties’ feelings and subjective experiences. Nevertheless, all those aspects are also linked to a range of public benefits. First and foremost, it is for instance vitally important for a well-working legal order that people trust the courts. Allow me to illustrate. Back in 2008, the Swedish Ministry of Justice produced the following list (SOU 2008: 106:26) of the top eight elements that contribute to the people’s trust in the courts:

- The accessibility of the courts and the court staff for parties and people giving evidence
- The courts’ reception of parties and people giving evidence
- Processing times at the courts
- The transparency of the courts’ decision-making processes
- The formulation of judgments and decisions
- The way in which activities of the courts are portrayed by the media
- The knowledge of the general public about what goes on in the courts
- The conduct of judges

Again, these listed elements are mostly concerned with communication and information, language and behavior; in other words, trust is based on meeting people correctly and factually. Once again, it is about that good feeling that I (the individual) received good-quality “service” in my court case or in any other court circumstance that I as a stakeholder might find myself in. My needs and my person were taken seriously and into consideration, and this was shown through good communication, good interaction, understandable language and professional but friendly and empathic behavior.

It is also said that people’s will to contribute in court procedures is based on their trust in courts. If they no longer trust the court, the will to voluntarily
participate and contribute will decrease. Even if courts can use coercive measures to push people to act, court work goes more smoothly and is more efficient if stakeholders fulfill their duties on a voluntary basis (Heuman 2009: 48–49). Therefore, real trust is necessary for a court to function optimally.

The quality of courts can be analyzed under two categories. Namely, professional quality, which is based on the competence and knowledge of court staff. And users’ perceived quality, which is based on their own experiences. Unfortunately, the common trust in courts’ professionalism tends to be higher compared with the trust in courts among users based on perceived quality. There can, of course, be many reasons for this. Not only can users’ own experiences have been bad – but also certain people who would otherwise have a low trust in courts tend to come into contact with courts more often than some other people. (Heuman 2009: 49–51). Still, especially in Sweden, a lot of effort has been put to increasing users’ trust in courts by improving their individual experiences at courts and so far this work has produced good results (Cf. Hagsgård 2014 and other resources mentioned in that study).

The measures taken are based on very wide empirical studies on “facing people” at Swedish courts and on the kind of experiences of court service users have. The examples of ways to proceed are:

– information about the court hearing and court proceedings available on the court’s website as well as in the waiting room of the court;
– staff in the court’s waiting room explain the main stages of the court hearing to parties and witnesses waiting for their turn;
– judges start the court hearing by presenting themselves and explaining who is who in the court room and how the court proceeding will be held;
– judges and lay people actively show interest in what has been said during court proceedings by eye contact and asking follow up questions;
– judges lead the court hearing in a more active way and in a language understandable for non-lawyers
– judges strive to explain the judgment orally to parties (Hagsgård 2014: 1007).

4 Creating atmosphere

How to face people, then? First of all, it is about creating an atmosphere. It is important that people who deal with courts feel as secure and peaceful as possible when giving evidence or presenting their case. Professional users – like attorneys – appreciate order in a court room, whereas other users focus more on the
subtle and neutral behavior of judges and other stakeholders. Users also emphasize the engagement and attentiveness of other stakeholders/parties. A positive atmosphere will help stakeholders fulfill their duties in the most effective manner. In order to be able to give a free, detailed and accurate account, people must be listened to when it is their turn to speak. They also need enough information about their duties; what is going to happen, how the court room looks like, how the procedure is going to progress, and so on (Bemötande i domstol 2013: 89–90, Vad tycker brukarna? 2010: 45–47 and Vad tycker hovrättsaktörerna om EMR-reformen 2010: 32). Providing a good reception for parties and people giving evidence is ultimately a question of legal security, which is a matter of ensuring that the court obtains the best possible basis for its judgment in cases (SOU 2008: 106:31). All this also boosts individuals’ trust in courts as explained earlier. Based on court quality research in Sweden, the prioritized list of Swedish courts’ value basis is presently as follows: respect, professionalism, competence and transparency (‘Har vi blivit bättre på att bemöta brukarna?’ 2008: 33.)

In addition to these pragmatic bases for a pleasant atmosphere there are several other theoretical preconditions to enlist. From the study of classical rhetoric, we know that the plausibility of a speech may be based on the speaker him-/herself (ethos), along with his/her use of feelings to move the audience (pathos) and/or the appeal to facts (logos). The same is arguably true in modern court proceedings, where logos arguments tend not to convince if the pathos is disrespectful or mean-spirited or if ethos is immoral and unprofessional. In ancient times, ethos referred to the speaker’s morality and his/her benevolence and understanding. In the court case, a logos focus is appropriate and if the speaker can present themselves in a consistent way, then the audience’s trust in the speaker’s ethos will increase, which can evidently be significant also in modern court proceedings where in many cases the solution is linked with probabilities (see Saranpää 2014: 191–192); there is rarely only one truth in legal matters. Even the interpretation of norms is – more or less – based on plausibility. In addition, there are always risks involved in proving a disputed “fact” and variation in how to evaluate the evidence. Therefore, it is important to maintain the trust in courts and court decisions by means of professional ethics and expertise. Logos, then, is not enough to convince the modern audience. Ethos too (and pathos when delivered in a correct way) are needed to convince people to obey the law and the parties to follow the decisions voluntarily (see also T.R. Tyler’s research, Tyler 1990). Only by these means of persuasion can the law be renewed for modern society. If, for instance, logos were correctly presented but ethos signalled an unprofessional or immoral bias and pathos were applied without kindness, the addressees (the parties and the general audience as well as other judicial stakeholders, including the higher instance)
would arguably not “listen” or take the court rhetoric seriously. The practice of law— if expressed in the latter terms – would not be renewed, something which normally happens whenever norms are applied (see Tuori 2001: 316). Moreover, unsuccessful court rhetoric (which fails to convince its stakeholders), is likely to lead to appeals and other dissatisfaction. Poorly applied court rhetoric, I venture, will thus make legal norms weaker and less likely to be followed.

To establish a pleasant atmosphere, good communication plays a significant role, of course. The language used should be understandable for the parties and the general audience. Court authorities and attorneys need to understand that they are talking to their clients and also to the general audience, not only to each other, and not only to other legal professionals. The parties are in focus, not the court staff’s colleagues. Understandable language plays a key role in media publicity, too. Thus, it is important to talk to the media directly. What often happens is that stakeholders in court proceedings talk to each other via court members even if they could do so directly. Secondly, language use should be clear and accessible, avoiding legal terms and other expressions which are used in authorities’ internal communication.

In Finland, the government has invested quite substantially in good and understandable language use by government authorities (http://www.kotus.fi/kielitieto/virkakieli/yleista_virkakielesta/virkakieliikampanja_2014_2015). See for instance, the Finnish Government’s Plain Language Campaign (2014–2015) (http://www.kotus.fi/kielitieto/virkakieli/yleista_virkakielesta/hyvan_virkakielentoimintaohjelma). The incentive encourages government agencies to improve their texts and communication by presenting free plain language tools and good practice guidelines on its website. Examples are given by the campaign’s seven pilot agencies, whose plain language projects can be followed on the campaign website. A competition for best practices is another way to disseminate new ways of achieving clear texts and accessible communication. The project to create better practice in using plain language by authorities has been promoted mainly by means of so-called “soft power” because if writing practices are to be changed there must be a desire to do better. This is perhaps best achieved by using soft power instruments like competitions, recommendations, information, education, marketing, and so on. However, to achieve a real change, hard power is also necessary. Thus permanent structures must be put in place by legislation or administrative decisions (Piehl 2015).

Among the reasons given for insufficient efforts in making language more accessible, authorities mention a heavy workload and used standard models for decisions. The authorities asked additionally found education in language matters very useful and they reported that they used about 84% of all the hints they had learnt during language training. 60% said that there was not enough
language training, and no one was of the opinion that there was too much training. (http://www.kotus.fi/nyt/uutistekstit/tiedotteet/tiedotearkisto/tiedotteet_2008/kielitoimiston_kurssien_vaikuttavuutta_tutkittu).

It is well worth training language and communication aspects, it would seem. Also for economic reasons. Statistics based on Aino Piehl’s research at the Institute for the Languages of Finland, for instance indicate that when the Finnish Immigration Service organized its information package for students, the number of calls per year decreased significantly. Before the reform, the Service received 4 820 calls and after the reform only 1 027. When the Norwegian Public Roads Administration reformed the formulation of standard letters, they experienced 40% less contacts and the savings in paper and postage costs amounted to 1.2 million NOK. When Arizona’s tax authorities clarified three standard letters, calls based on letters dropped to only 5 000 call (where before the reform the number had been 23 000) and thus the processing time of applications was reduced from 49 days to 21 days. 15 per cent of recipients replied before the reform, and after the amount was 85 per cent (Piehl 2015a).

There evidently is a real need to address language use in authorities. In an additional small Finnish empirical study, carried out by Henna Kosonen, 24 persons (no lawyers, no linguists, 12 male, 12 female, 20–79 years old, 12 academic degree, 12 some other degree or no degree at all) were asked to read and understand two sections of the Finnish Code of Inheritance. The result of the study was that:

- 3 persons could explain the contents correctly.
- 4 could explain the contents but the answer was deficient.
- 2 could explain the contents mainly correctly but the answer included some mistakes.
- 15 could not explain the contents of the text (Kosonen 2010).

5 Marketing

Parties and people giving evidence should clearly know what is going to happen and what is expected of them in court. The information coming from the court must be easy to understand and must not be perceived as unpleasant or threatening. It is important that there are also fellow human beings at court who are easily accessible and can reply to questions to give the feeling of calmness and security to the stakeholder and parties involved. By doing so, the parties can focus on their duties in court and do their best, which best serves the objectives of adjudication and assists the court in reaching the best solution.
in the case. During the hearing, the party and the person giving evidence must be able to feel that the members of the court are attentive (SOU 2008: 106:27, 33–36). The need for information is mutual, which should be kept in mind at all times. People who visit courts need information to do their best. The reason why they are there in the first place is in many cases that they need to be heard. But the court also needs information from them. To maximize this mutual interest, stakeholder and parties need to be treated well, which was not always such an obvious fact. We need only go back to the 1990s when adjudication was seen more as an expression of power than as court service.

With regard to the formulation of judgments and decisions, it is important that court lawyers put themselves in the parties’ situation and give more thought to the purpose of their texts and how they will be perceived and understood by those concerned. This approach makes it easier for parties and others who are not well-versed in the law to understand the reasoning of the court, and thus to be convinced by it. The language should be formally correct and it should be obvious to the audience what the message is, without any risk of misunderstanding. If it is necessary to use legal terms which are not familiar to the addressees their meanings should be explained in a popular way. Metaphors and examples can be used in illustration to make the judgment more realistic and easier to understand for the average citizen (see Saranpää 2014: 205). Naturally, tact and carefulness is required in the latter example. The judgment should be expressed in tactful terms, be clear, and not include anything unnecessary.

The media, as already mentioned, also has a key role to play as a communicating link between the courts and citizens. Because most people never come into contact with courts, it is important that there is correct, tactful and many-sided information available in the media (Heuman 2009: 48; Savela 2006: 38). For the media to be able to give an all-round and well-balanced picture of the courts, decision-making processes in courts must, as far as possible, be observable, or, in other words, transparent. Every judge must also be accessible to the media dependent on the nature of his/her cases. And the general atmosphere should be characterized by openness and willingness to provide information. One tool for improving courts’ relation to the media is to introduce “media judges” and to train judges in media issues. In Sweden, it has even been proposed that there should be a spokesperson, who will be the person who can represent the courts and provide information about the activities of the courts in the national broadcasting media and through articles in national newspapers. It has also been proposed in Sweden that the general public should have access to information on forthcoming proceedings in all courts, including access to asking questions and receiving answers to issues related to the courts on courts’ web pages. Furthermore, the courts should, more frequently than
today, try to deliver judgments orally, particularly in situations in which a trial has been watched by a school class or a case has attracted considerable attention and therefore attracted many spectators (SOU 2008: 106.27, 33–34).

Conversely, it has also been emphasized that increasing media pressure can jeopardize judges’ impartiality and we should be aware of this risk, too. Effective media publicity also limits individuals’ privacy (Savela 2006: 36–38). It is, of course, true that the interests in media publicity can be of a commercial nature. In other words, scandals sell news. Therefore, a difference between the need for public discussion and mere public curiosity has to be observed. They are two totally different things, as Mäkinen (2009: 107) reminds us.

Some time ago, there was a debate on media publicity in Finland, where some stakeholders were of the opinion that judges should “open up” even further and that also the recruitment of judges, especially at the Supreme Court level, should be the subject of public discussion. This suggestion, however, received some criticism and the traditional, neutral, silent and invisible status of judge was defended for cultural and historical reasons (Apunen 2011; Kulla 2011; Pihlajamäki 2011). But, cultures and traditions change. Society and its needs change too. It is difficult to defend something on historical and cultural grounds if the current needs and demands of society are factually different now than, say, two decades ago. That said, it is probably unlikely that fully-fledged “North-American-style” media publicity around court proceedings will be transplanted into a Nordic context. Nevertheless, times, people and societies change. And this fact only necessarily prompts the adoption of new habits and new ways of doing things.

6 Why do that? Why should they bother?

As mentioned above, instead of being subservient, court parties can be viewed as plenipotentiary agents who participate in the conflict resolution. Moreover, witnesses are nowadays seen as assistants to decision-making; people who come to help the court system find the right solution and who are therefore entitled to information and good treatment. The general audience has the right to know and discuss court matters, where the media is the main intermediary. Therefore courts have to throw open their doors, where possible and as widely as possible, and judges should no longer seek to “hide” behind their law books (see also Aarnio 1997: 426 and on different roles to act as a judge Kulla 2011). Post-modern legal decision-making, then, is “doing justice together” rather than an isolated display of power. There is currently a substantial change underway in the way of thinking about court proceedings and how to carry out justice. The
civil procedural paradigm is radically changing as the “old traditions” and attitudes are no longer seen to be working (Ervo 2013).

Today more than ever, modern (procedural) law is rooted in sociological studies. Nowadays, fairness is also about feelings, as has been discussed above. Welfare in court means not only the rule of law and legal security in its traditional form, but also a good atmosphere, good service, professional and courteous conduct, quick and effective proceedings, reasonable costs and other similar types of concrete means to give fair experiences to people who visit courts. To realize all this, understandable communication is paramount in the form of plain language use and professional but empathetic behavior. One might argue that law has become ever closer associated with applied (socio-)linguistics or rhetoric.

In this development, empirical experiences have, if not superseded traditional normativity, then at least reached an appropriate balance in relation to it. The discussion is no longer about the link between “is” and “ought” or whether empirical methodologies should be allowed in legal science or not. Instead, we are discussing the extent to which normative contents come directly from “Dasein”/reality. Through this development, normativity has lost its superpower, and, instead of being an isolated site of power, law can now be seen as an interactive, co-operative instrument in modern societies.

References


Webpages: