EDITORIAL

Plain Language

Improving Legal Communication

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At the Sir William Dale Centre, Prof. Helen Xanthaki and Dr. Giulia Adriana Pennisi have come to explore the crossroads between legislative drafting and language/linguistics. In particular, they have opened a new agenda: the use of teachings from the discipline of linguistics in applications useful and relevant to legislative drafting. An example of this work so far has been a workshop on "Legislative Drafting and Language" that took place at the IALS on 27 June 2013 and witnessed the participation of eminent scholars and experts in the fields of law and language. Among the important themes discussed in the workshop, two points have been particularly stressed: first, the quality of legislation and the intrinsic drafting difficulties. In fact, the implementation of legislation may be significantly influenced by a range of 'filtering agents' at whom legislation is directed and who may constrain, adapt, and modify the intentions that form the basis of the legislation approved in the first place. For this reason, it becomes crucial to explore how linguistics may be of some help for the legislative drafters who want to know how a piece of legislation is structured in terms of lexico-grammatical and discoursal features[1] and the extent to which its goals will be reached. Then, the theme of law reform and the way meaning and text functions develop or might evolve in the process of text production was another important issue raised during the workshop. Effective legislation is more likely to be accomplished when the efficacy of the drafted legislation is tested by linguistic and discoursal analysis of its outcomes. In fact, without the possibility of an immediate linguistic exchange, law reform may certainly lose a great deal of its potential and valuable results. Since then, the *Legislation and Language* project has started a profitable cooperation between linguists and legislative drafters in terms of the

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1 Discourse analysis is a general term for a number of approaches to analysing written, vocal, or sign language use or any significant semiotic event. The objects of discourse analysis – discourse, writing, conversation, communicative event – are variously defined in terms of coherent sequences of sentences, propositions, speech. The essential difference between text linguistics and discourse analysis is that this latter aims at revealing socio-psychological characteristics of language/words rather than text structure. For more details on this issue, *see* T.A. van Dijk, *Discourse Studies, Vol. 2*, London, Sage 1997; N. Fairclough, *Analysing Discourse: Textual Analysis for Social Research*, London, Routledge 2003; V.J. Bhatia, *Worlds of Written Discourse*, London, Continuum 2004.

analysis of the drafting aspects of language and the discussion of their use in legislation. Scholars and researchers working in the field of law and language have been asked to share their knowledge and expertise and this *EJLR* special issue represents one of the first important outcomes of this collaboration in the field of plain language movement and law reform.

In terms of the law reform perspective, it would be useful to start from Jeffrey Barnes' suggestions[2] to consider plain language idea as a law reform project taking into account these important assumptions:

1 '[T]he operation of legislation can only be fully understood in terms of its background.' If an instrumental position is taken, the background can be seen to include recognition of a 'problem', determination of objectives, and the choice of means for their achievement.
2 There are 'inherent difficulties in the drafting of legislation'. The drafter is no mere scribe. Drafting is affected by the environment of the Parliamentary process.
3 The implementation of legislation can be enormously affected by various 'filtering agents' – rule enforcers, rule interpreters, and the population at whom legislation is directed. They can 'constrain, adapt and modify the intentions and policies that may have motivated the passage of the legislation in the first place'.
4 If the law maker or someone else wishes to know how the law in question has performed and the extent to which the goals of legislation have been met, the investigation will benefit from the adoption of a broadly 'scientific' approach. None the less, the investigator has imperfect instruments to carry out the measurement task. 'Seeing the world accurately is not easy [and] researchers can't see it all'.

Therefore, the need to produce a better legislation cannot be reached without the help of other disciplines such as linguistics.[3]

Historically speaking, legal English evolved over the three-century period between the 1470s (the setting up of the first printing press in England) and the 1770s (American Declaration of Independence). Inevitably, its terminology and style are still in the form they had reached by the early years of the 19th century. In modern times, important changes have been brought in the length and layout of legal documents. Despite these important transformations, language has

2 J. Barnes, 'The Continuing Debate about "Plain Language" Legislation: A Law Reform Conundrum', *Statute Law Review*, Vol. 27, No. 2, 2006, pp. 85-86.

3 D. Crystal and D. Davy, *Investigating English Style*, London, Longman 1969; B. Danet, *Studies of Legal Discourse: Special Issue of Text: An Interdisciplinary Journal for the Study of Discourse*, Vol. 4, Nos. 1-3, 1984; V.K. Bhatia, *Analyzing Genre: Language Use in Professional Settings*, London, Longman 1993; J.B. Gibbons, *Language and the Law*, London, Longman 1994; P. Tiersma, *Legal Language*, Chicago, University of Chicago Press 1999; B.A. Garner, *Legal Writing in Plain Language*, Chicago, University of Chicago Press 2001; M. Gotti, *Specialized Discourse. Linguistic Features and Changing Conventions*, Bern, Peter Lang 2003; C. Williams, *Tradition and Change in Legal English*, Bern, Peter Lang 2005.

remained largely frozen. Traditional legal language has been increasingly challenged, and this questioning has been increasingly stimulated by the consumer movement of the latter decades of the 20th century. Particularly relevant was the rise in the 1960s of Western consumer movements which were concerned with empowering laymen so they could defend their rights against private companies and government bodies. Isolated attempts had been made during the first half of the 20th century, for example in the United States, to introduce measures to make legal English less convoluted.[4] Across the Atlantic, in Liverpool, the plain English campaign was born in 1979 and by the mid-1980s it was already possible to speak of a 'Plain Language Movement' operating in all major English-speaking countries, including Canada, Australia, New Zealand, and, by the early 1990s, South Africa.[5] During the same period (late 1970s), the movement took root in the USA when the Executive Order 12044[6] imposed regulations issued by federal agencies be written in plain English. More recently, the *Plain Writing Act of 2010* aims to improve the effectiveness and accountability of federal agencies to the public by promoting clear Government communication[7]. Several states in the USA require insurance contracts to be written in plain English; yet, there has in fact been relatively little innovation in the drafting of legislation in the USA. The same is also true of the United Kingdom which introduced the *Unfair Terms in Consumer Contracts Regulations* 1999 implementing a directive of the European Commission and stating at *regulation* 7 that "any seller or supplier shall ensure that any written contract is expressed in plain, intelligible language".[8] In Canada, Australia, New Zealand, and South Africa, plain language principles and techniques have developed more deeply, and many new laws are drafted in plain English these days to the advantage of legal drafting generally, and not merely the field of securities documents.[9] In this regard, we can mention the *Companion Policy to National Instrument 81-101*, on the topic of disclosure in mutual fund prospectuses in Canada and the *Queensland Industrial Relations Act 1999*, which requires the Queensland Industrial Relations Commission to ensure that its written decision are "in plain English and structured in a way that makes a decision as easy to understand as the subject-matter allows".[10]

Proposals to reform legal English have been coral and among the specific causes generally mentioned there are sentences of undue length, overuse of archaic and Latin expressions, unnecessary and repeated definitions and expressions, partiality of nominalizations, and a labyrinth of sentences and clauses. Indeed, "several commentators have cited similar problems. Others have expressed more

4 D. Mellinkoff, *The Language of the Law*, Boston and Toronto, Little Brown and Company 1963.

5 C. Williams, 'Legal English and Plain Language: An Introduction', *ESP Across Cultures*, No. 1, 2004, p. 116.

6 <www.presidency.ucsb.edu/>.

7 *Plain Writing Act of 2010*, Sec. 2.

8 SI 1999 No. 2083, revoking and replacing SI 1994 No. 3129.

9 W.H. Hurlburt QC, *Law Reform Commission in the United Kingdom, Australia and Canada*, Edmonton, Juriliber 1986.

10 For more details on this issue, *see* P. Butt, *Modern Legal Drafting: A Guide to Using Clearer Language*, 3rd edn., Cambridge, Cambridge University Press 2013.

muted versions of the problem, saying simply that there is a 'need to improve understanding and access to the law'".[11] Much of the criticism by plain language advocates of legal language is clearly reasonable in that much of it is objectively difficult for the layperson to understand. As William observes, "drafters should attempt to use expressions and a phraseology that can bring legal texts closer to ordinary citizens, but not at the expense of creating uncertainty or ambiguity, as this would ultimately be even more detrimental to those citizens in whose defence the text may have been written to start with".[12] There are inherent factors that make it difficult for the drafter to convey the intentions of the legislator and ensure there are no ambiguities and misunderstandings in the words and expressions that have been chosen.[13] Not only increasingly complex societies imply ever more complex legislation, but increasing political demands to produce legislation quickly and efficiently, on the one hand, and the lack of effective consultations between policy makers and legislative drafters, on the other hand, certainly affect the language used and the underlying function of the text. In this regard, scholars working in the field of Language for Specific Purposes (LSP)[14] observe that legal language is made up of several genres,[15] each with its own specific characteristics, ranging from

> the spoken exchanges in a court between, say, lawyers and witnesses in a cross-examination, to the relatively standardized instructions given to jury members who are required to express a verdict in a court case, to the jargon employed by members of the legal profession in interpersonal communication, to the written language in case law, law reports and prescriptive legal texts.[16]

11 Barnes 2006, p. 97.

12 Williams 2004, p. 123.

13 Moran Q.C., 'Legislative Drafting, Plain English and the Courts', *Clarity*, Vol. 52, No. 43, 1999, p. 54.

14 For more details on this issue, *see* P. Robinson, *ESP (English for Specific Purposes)*, Pergamon, Oxford 1980; J.M. Swales, *Episodes in ESP*, Oxford and New York, Pergamon 1985; J.M. Swales, 'Language for Specific Purposes', *in* W. Bright, *International Encyclopedia of Linguistics*, Vol. 2, Nos. 300-302, Oxford, Oxford University Press 1992; K. Hyland, 'Specificity Revisited: How Far Should We Go Now?', *English for Specific Purposes*, Vol. 2, 2002.

15 In philosophy of language, Mikhail Bakhtin's basic observations were of *speech genres* of speaking or writing that people learn to mimic, weave together, and manipulate. In this sense, genres are socially specified, that is, they are recognized and defined by a particular culture or community. In this regard, Norman Fairclough has a similar concept of genre that emphasizes the social context of the text, believing that "genres are different ways of (inter)acting discoursally", Fairclough 2003, p. 26. A text's genre may be determined by its: (i) linguistic function, (ii) textual organization, (iii) formal traits, (iv) relation of communicative situation to formal and organizational traits of the text, *see* P. Charaudeau, D. Maingueneau & J. Adam, *Dictionnaire d'analyse du discours Seuil*, 2002, pp. 278-280.

16 The latter may include anything from international treaties to municipal regulations, insurance policies, and contracts of sale or wills. Some of the genres constituting legal language are more formal than others. *See* Williams 2004, p. 111.

Indeed, certain types of written legal language may contain lexico-grammatical features that mark it as being so peculiar as to be at times incomprehensible to anyone except legal experts. Butt[17] sarcastically describes the peculiarities of legal English, often bordering on intricacies, defining it as "mysterious in form and expression" and

> larded with law-Latin and Norman-French, heavily dependent on the past, and unashamedly archaic. Antiquated words flourish – words such as *aforementioned*, *herein*, *therein*, and *whereas*, which have rarely now heard in everyday language. Habitual jargon and stilted formalism conjure a spurious sense of precision – *the said*, *the aforesaid*, *the same*. Oddities abound: oath-swearers do not believe something, they *verily* believe it; parties do not wish something, they are *desirous* of it; the clearest photocopy only purports to be a copy; and so on.[18]

Legal writing originates from different sources that have influenced its style. Some of them still exert constant influence/power over it, such as the pressure to conform to professional forms, the need to avoid ambiguity, the combination of various languages from which legal writing derives its vocabulary, conservatism in legal profession, familiarity that comes from adopting words and expressions that have been used for years and seen to be effective. The main lexico-grammatical features of written legal texts are usually listed as follows:

a the inclusion of archaic or rarely used words or expressions
b the inclusion of foreign words and expressions, especially from Latin
c the frequent repetition of particular words, expressions, and syntactic structures
d long, complex sentences, with intricate patterns of coordination and subordination
e the frequent use of passive constructions
f a highly impersonal style of writing
g tendency towards nominalization.[19]

Written legal texts do not necessarily contain all the features outlined above, though many of them do, and the compound effect often makes them extremely difficult to decipher without a specific training.[20] It is clear therefore that a contrastive analysis of key instances (legal language and plain language movement) and key subjects (*i.e.* legal drafters and linguists), supported by the investigation of practical cases taken from the contemporary international context, would serve as a valuable aid to the legislator, the lawyer, and the drafters involved in a process of plain language reform.

17 Butt 2013, p. 1.
18 Emphasis of the author (Williams 2004).
19 Legal texts show a high frequency of nominalization, *i.e.* when verbs are transformed/nominalized into a noun. For example, *to settle* nominalized into *to enter into a settlement agreement*, or *to refer* nominalized into a *made referral*. *See* Butt 2013; Williams 2004; Garner 2001; Tiersma 1999.
20 Williams 2004, p. 115.

This *EJLR* issue on "Plain Language: New perspectives and recent outcomes in European and International arena" draws its plain language reform data from the United Kingdom, Italy, the European Union, Australia, Pakistan, and the international context. The focus of investigation is centrally on the analysis of discourse[21] (very broadly construed to include lexico-grammatical analyses as well as generic and textual analyses) but with the analyses cited in particular contexts (legal, national, and international). These issues are examined in a more detailed form in the contributions to this volume, which focus on the legal, linguistic, and cultural aspects of plain language discourse in different European and non-European countries. In order to highlight the transformations and/or adaptations of legal texts in terms of plain language reform, the investigation of textual and phenomena has been conducted taking into account the cross-cultural traits.

The purpose of Derwent Coshott's paper is to provide an overview of the criticisms against plain language from legal profession. Some critics assert that the law is too complex to be properly comprehensible by those without legal training. Other critics argue that plain language lacks judicial scrutiny and opens the way to a flood of litigation to test meaning. Despite a growing body of evidence to the contrary, these criticisms continue to hold sway even today, when plain language finds increasing acceptance amongst law firms and the judiciary. His analysis confirms the thesis that if legal documents can be made clear and certain, then there is every reason why they should communicate with laypersons and plain language should improve the standing of legal profession.

In his paper, Francesco De Pascalis takes into consideration the importance of plain language for less sophisticated investors and examines the interventions taken by the European institutions to recognize the essentiality of plain language introducing it in the Key Investor Information Documents (Directive 2009/65/EC) for retail investors. According to the economic analysis, financial markets do not operate efficiently because of information asymmetry that inevitably jeopardize the well-functioning of financial markets when one party lacks sufficient *information as to the risks* inherent to his/her investment. In particular, this paper takes into consideration the reaction of retail investors' counterparties to the use of plain language. The analysis of the use of plain language as a tool to guarantee transparency in the disclosure of information on packaged retail investment products (PRIPs) eventually raises important questions of whether issuers of PRIPs have sufficient plain language knowledge in terms of its use and the effects related to its use.

Italian and British arbitration proceedings have been assessed and compared by Stefania Maci, in an attempt to account for culture-specific elements in both texts. In particular, she conducts an investigation on plain language in arbitral memories across national and professional cultures. By carrying out a comparative analysis of the written evidence presented in two arbitral processes, she tries to evaluate the degree of influence that different legal cultures may exert on the type of language used in written arbitration evidence. The use of lexis points to interesting differences in arbitral plain language, and this evidence suggests that

21 *See supra* n. 1.

English written documents are expressed in very plain legal language, whereas the type of language used in Italian written documents seems to disregard the suggestions provided by the Italian Government[22] (*Direttiva sulla semplificazione dei linguaggio dei testi amministrativi*) concerning the simplification of legal language.

Ilahi Mazhar's paper analyses the language of legislative texts in India and Pakistan where English is not understood by ordinary people at a very large scale. As he explains, English is not understood by the ordinary people, but it is still used as language of legislative texts. This disparity derives from the specific ethno-lingual and political issues which, notwithstanding the efforts to 'Islamise' legal system, make legislative drafters, judges, lawyers, and members of the legislative bodies believe that the Urdu translations of different statutes already contain more archaic words than in the case of English. In addition, the statistical analysis of the percentage of people able to speak and understand written Urdu provides a useful insight of the potential impact of plain language movement for writing laws in Urdu language.

William Robinson looks at the clarity of the legislation of the European Union (EU), in particular the clarity of the language used. He sketches out the basic EU rules on transparency and openness, past expressions of concern for clearer EU legislation, and the response of the institutions, providing a historical overview of concern for clearer EU legislation – from 1990s to *The Smart Regulation Agenda* of 2010 – and analysing the impact of concern for clearer EU legislation – in terms of misuse of technical terms, multicultural implications in drafting, language and interpretation, and nuances in EU usage unknown to the general user. His analysis confirms the hypothesis that while much has already been done to make EU legislation accessible in all the EU languages, more could be done to make it clearer and more easily understandable.

In his analysis of the criteria to communicate in legal language, David Roebuck stresses the importance of clarity, observing that "it is not plainness that ultimately counts but clarity – the quality of transferring a message from one mind to another comprehensively and with no distortion. Plainness is good but clarity matters more" (see his article in this issue). In this paper, 'mediation' and 'conciliation' are taken as examples of definitions created by legislators which do not correspond with categories in practice. As he shows, historical research illuminates cultural differences which affect transmission of meaning, on the one hand, and recent practice also illustrates the possibilities of creative methods of resolving disputes and the dangers of unnecessary prescription, on the other hand. In his analysis, he demonstrates that the insistence on plain language has been shown to be essential but not sufficient: the drafter's aim must be the accuracy of reception. Since every receiver has a separate idiolect, he poses the following question whether it is fair to assume that it is enough to send out a message that would be understood accurately by a *reasonable* recipient rather than the individual whose comprehension is now in question.

Michele Sala takes into consideration the influences of plain language in legal academic research. The assumption at the basis of this investigation is that the

22 <www.funzionepubblica.gov.it/TestoPDF.aspx?d=16872>.

exposure to and experience with this way of using the language in professional settings is likely to have influenced the way experts write in research-related and pedagogical contexts. Based on a comparison between 40 research articles (RAs) written by English, American, and Australian authors and 40 RAs authored by experts working in Civil Law contexts, this paper focuses on the main differences in the two groups in the use of epistemic modality markers and personalization – both intended to facilitate interpretation by controlling assertiveness and lexicalizing the rhetorical figure of the author – and interactive markers like code glosses – which are meant to paraphrase or reformulate meaning to both simplify and bias the interpretive process. The analysis shows legal actors are likely to reproduce existing linguistic practices in order to gain or corroborate community acceptance. By sticking to conventionalized model and replicating recognizable paradigms, writers define their identity, authority, and disciplinary relevance within the community of reference, that is, they are appreciated as expert in the domain owing to the fact that they know how to conceptualize meanings and how to discursively deal with them.

As can be seen from this presentation, although each paper is primarily located in a specific context, this volume does not represent a mere collection of paper expressing the peculiarities discovered/ascertained in various countries and operating in different fields, but is based on a more general perspective. As the contributions analyse plain language applied to various documents constructed, interpreted, and used in different multilingual and multicultural legal contexts, the purpose of this volume is to provide a better insight of legal language from an international perspective and to favour a more detailed understanding of linguistic and textual phenomena that are closely linked to cross-cultural aspects.