REPORT:

Transparence et opacité du discours juridique / Clarity and Obscurity in Legal Language – a conference report

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From July 5 to July 9 2005 l'Université du Littoral (represented by Prof. Anne Wagner) and the international association *Clarity* (represented mainly by Prof. Joseph Kimble, USA, and Nicole Fernbach, Canada) organised a conference on legal language in Boulogne-sur-Mer. The topic of the conference more specifically was (the overcoming of) the much debated unintelligibility of legal texts. A wide range of legal genres, ranging from information leaflets over contracts to statutory texts at local or national government level were treated at the conference. In this report, I will concentrate upon statutory texts, as they played a substantial role in the majority of the papers. Furthermore, I will limit myself to the papers I heard. And as most sections at the conference were running parallel, I must apologize for not mentioning a high number of contributions.

The conference had a good mixture of experience reports, hands-on sessions and more theoretically oriented contributions. Speakers came from most parts of professional legal communication: drafters, members of parliament, linguistic counsellors, lawyers, teachers and researchers of law, translators and teachers and researchers of specialised language. The conference thus constituted a rare opportunity to get an overview of different views, perspectives and methods of the field. Furthermore, papers were not only in English, but also in French. As simultaneous interpreting was offered in many cases, the conference thus presented itself as a truly international conference that took multilingualism seriously.

As already mentioned, the conference was organised partly under the auspices of *Clarity*. It is an international association of lawyers and interested non-lawyers with country representatives in 40 countries all over the world promoting the use of plain legal language (http://www.clarity-international.net/). The organisation was

especially in charge of two informal roundtables, in which the current status and ongoing and future initiatives in the area of plain legal language were presented. These roundtables covered countries like Sweden (Barbro Ehrenberg-Sundin: *The Swedish approach: systematic plain-language work at the highest level*), Denmark (Jan Engberg/Kirsten Wølch Rasmussen: *Plain language initiatives in Denmark*), England (Nigel Grant: *UK statutes – After the Tax Law Rewrite, how clear are they now?*), Belgium (Éric Battistoni: *Opacité dans le langage juridique et dans les écrit juridiques en Belgique*), Greece (Stefanos Vlachopoulos: *Reflections on the language of the law in Greece and Cyprus*), Canada (Vicki Schmolka: *Testing draft regulations and legislation in Canada*; David Elliott: *Plain Language Developments in Canada*), Mexico (Salome Flores Sierra: *Plain Language Developments in Mexico: the citizen's language initiative*), and Australia (Neil James: *Plain Language Developments in Australia*).

One of the great achievements of the conference was that the number of countries represented was high enough to show that the problems with achieving readability and intelligibility in statutes are not at all similar in all parts of the world, although some of the general characteristics of statutes lead to a certain degree of similarity in the problems. As an example of the differences, the legal culture in England and USA (the common law system) is very much focused upon specific ancient formulations and the wording of statutes with its interpretative history. This makes it difficult to carry out all the ideally necessary substantial changes, especially in statutory texts. Instead, it may be necessary to confine oneself to stylistic changes achieving better structures, but not necessarily a higher degree of intelligibility. An example of such a stylistic project was presented by the above mentioned Joseph Kimble, USA (*Revising hallowed text: lessons from the U.S. Rules of Civil Procedure*). He showed some of the problems he faced in the work as the leader of a commission that aimed at revising the US rules of civil procedure. The main problem was the "hallowed" character of the text. Fear of the legal consequences of change in prominent phrases prevented substantial changes. Consequently, the performed changes made the text easier to read and to work with, but were mainly cosmetic. This fact was to a high degree due to the doubts about possible differences in interpretation between old and new formulations among the members of the commission.

On the other hand, reports from Canada, Switzerland, Sweden and Australia, among others showed that the situation is different in other parts of the world. For example, Australia is also a common-law country, but the way to reform in the area of statutory writing seems shorter here. Eamonn Moran, Australia (*Legal certainty and clarity: and the greatest of these is ...*) presented some of the measures taken at statutory level. Most importantly, in Australia awareness exists of the fact that the common law system with its reliance on formulations and previous rulings rather than on statutory purposes is detrimental at least to the simplicity of the texts. This is due to the fact that the parliaments consider it necessary to bind the interpretations of the courts as much as possible through highly detailed formulations. In order to help mitigating this problem, the importance of the

purpose of the statute has been stated to be a central point of the interpretation in the Australian court system, without losing the importance of the formulation and the interpretive history of the statute. On this basis, Moran stated that Australian statutes have to be clear and precise and apart from this as simple as possible. He saw clarity as potentially in conflict with simplicity. In the case of conflict, statutes should rather be clear than simple.

As a second example of countries with fewer problems with achieving intelligible statutory texts Canada and Switzerland are both examples of countries with multilingual jurisdiction. This fact makes it difficult for lawyers form these countries to assume that the formulation of a statute may be the only source for interpretation, as normally at least two or three different versions of the same statute will exist and constitute the basis for statutory interpretation (Canada: French and English versions; Switzerland: at least French, German and Italian versions).

Canada has the specific situation of having not just two languages, but actually two legal systems represented inside the same national state. As one example of the importance of this situation, Mathieu Devinat (*Imposing Meaning in Civil Law: A Lexicographical Analysis of Legal Definition*) showed that there are important differences in the role of legal definitions in the two systems, common law laying more emphasis on the interpretation of the definition in courts than on the definition by the lawmaker as such. Knowing these differences makes it necessary to relativize the ability of definitions to help making statutes more intelligible: Experience shows that interpretive history will in reality always modify the meaning of the definition beyond what may be gathered from the text as such. A second example was the paper by Josée Baril (*Les aides à la lecture des texts législatifs : facteurs de transparence ou d'opacité?*). She showed a number of elements like summaries, subheadings and margin notes built into Canadian statutory texts in order to help the reader of the statutes find her way through the text. These instruments have to a large extent been developed because the different language versions of the Canadian statutes are presented in parallel format, making it necessary to navigate not only within one version, but also between them.

Switzerland as the second example of a multilingual jurisdiction has only one legal system, but national statutes are written in at least three different languages. This fact has had the effect that the element of intelligibility of the statutes has acquired much importance, partly due to the necessary translation process, which presupposes a fairly high degree of specificity in the formulation. Consequently, the Swiss chancellery at federal level has a linguistic service monitoring the quality of drafts and statutes. Andreas Lötscher (*Conceptual and Textual Structure in Legislative Texts*), who is a member of this service, presented insights in the possibilities of optimizing statutory texts from the structural point of view. Like Eamon, he stressed the fact that simplicity cannot be a primary goal for statutory writing, due to the purpose and context of the text. Instead, he gave top priority to the goal of achieving transparency and showed a number of practical operations, all

aimed at optimizing transparency. Flückiger (*L'ambiguë clarté de la loi : les conflits entre les principes de bonne qualité legislative*) also elaborated on the conflicts between simplicity and precision (*concrétisabilité*) in the light of the Swiss situation, also opting for precision when in doubt.

And as the last example of countries with a situation different from that of the Anglo-Saxon countries, experiences from Sweden were presented. Sweden is in general a monolingual jurisdiction, like the US or England. But the Swedish society contains a strong impetus towards a high degree of democratisation of law. Therefore, like in Switzerland, a central linguistic service of a considerable size and with a central administrative position has been set up. Barbro Ehrenberg-Sundin (see above) from this central service presented the different initiatives set forth by the service and their rather impressing impact on statutory and also on administrative language in Sweden.

A central question of general character across national languages in connection with statutes (due to its more direct relation to general aspects of statutes as a textual genre) is the question of vagueness and its impact on the possibility of achieving precision and clarity. This question was treated with different intensity in a substantial number of papers. The organisers had devoted one section solely to this topic under the heading "Fuzziness in legal language". In this section, Lucia Morra and Piercarlo Rossi (*Metaphor in legal language: clarity or obscurity*) treated the role of metaphors as constructors of concepts that cannot be referred to by a referential expression. Metaphors contribute to vagueness, until their meaning potential has been limited by the application of the metaphor in practical reasoning. Christopher Williams (*Fuzziness in legal English: what shall we do with 'shall'*) showed on the basis of empirical studies that the global rejection of the use of *shall* in statutory texts propagated by much of the literature on optimizing legal language is not justified: the word is not more vague than its alternatives, and the modality, which carries the actual vagueness, is a contextual necessity of such texts. Finally, Jan Engberg (*Indeterminacy and dynamics of meaning in normative texts*) and Louis Wolcher (*Rules and Statements*) stated on the basis of modern cognitivist semantic theories and philosophy of language that rules of statutory interpretation must take into consideration the inherent vagueness and indeterminacy of all linguistic elements, also in the area of law. Consequently, such a thing as an objective and fully stable meaning independent of the actual reader cannot be used as basis for the grounding of methods for interpreting statutes. But the topic was also treated by papers in other sections. Along the same lines as Engberg and Wolcher, Kessler (*Objectivity and subjectivity in interpretation of legal documents*) argued for finding a middle ground between objective meaning and subjective intent when establishing methods for constructing the meaning of contracts, wills, etc. Along the same lines as especially Wolcher, Ross Charnok (*Lexical indeterminacy, contextualism and rule-following in common law adjudication*) showed that inherent lexical indeterminacy and context-sensitivity of meaning leads to a necessary dynamicity of legal meaning depending on agreement among the legal community rather than on any kind of objective lexical meaning. The

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topic was finally touched upon without being central in a number of other papers, but it was my impression that to a certain extent the speakers at the conference were reluctant to accept the consequences of introducing inherent vagueness and indeterminacy when thinking about especially statutory interpretation. At least it was very difficult to start a discussion about the solution of the dilemmas presented by the papers on the role of vagueness. Here there is certainly a point where future cooperation between linguists and lawyers could be of use for the development of a sensible methodology.

A relevant question in connection with the topic of the conference (clarity and obscurity in legal language) is the question of how to test the actual intelligibility of statutes. In much work on intelligibility in other fields than law, it is common sense that intelligibility of texts is dependent on the relation between the text and the receiver, a fact that Lötscher also mentioned as context for his studies of textual instruments for achieving transparency in legal texts. Consequently, in order to find out whether a text is intelligible, the text has to be put to the test by the intended receivers and for the intended purposes. Intelligibility cannot be tested via mere textual analyses. In the case of instructional texts, where the work on intelligibility has been performed for the longest time, this is done via usability testing. In such tests the testable goal is whether the subjects are able to perform the action treated in the instructions, for example installing and managing a television set. In my opinion, it will be necessary to copy this development in the field of law. However, such a development must be performed in accordance with the special features of the situation of legal statutes. This presupposes especially two things: To consider the design of such tests (how can we test the intelligibility of statutes?) and (maybe preceding such considerations) to decide the goal to be tested (what does it mean for a statute to be sufficiently intelligible?). Only this way we may achieve actual better understanding of statutory texts.

In the discussions at the conference, there was a considerable degree of consensus on the imminence of these problems. But very few papers actually treated the topic in any detail. Instead, focus in the papers was on one of two aspects:

- On textual aspects considered as being relevant for the intelligibility of the texts, primary at the level of stylistics and formatting of the text (but without testing their real influence)
- On ways of structuring the process of monitoring the intelligibility of statutory texts (but again without testing actual influence)

In this respect, the paper by Vicki Smolka (*Testing draft regulations and legislation in Canada*) constituted an exception worth mentioning in this report. Her paper showed that testing of legislation is possible, but rather difficult and time consuming. Especially the time factor had been stressed previously in the conference by e.g. Moran in his paper, where he stated that it would in many cases be difficult to test legal drafts while they are in the parliamentary process, primarily because the drafts are changed over and over again in the process and it is difficult

to decide which version to test. However, the paper by Smolka showed that by performing tests we can assess the effect of the different methods applied in order to optimize intelligibility and thus also say something more general about the effect of the methods. The tests reported in her paper showed three main results:

1) It does matter for intelligibility how a legal text is formally structured;
2) Plain language is easier to use for drafters and to understand for citizens than traditional legal style;
3) A substantial problem in understanding statutory texts is to understand the legal concepts, due to the special content structure and argumentative character of the field.

Such results are important, because they show that thinking about style is a relevant, but not a sufficient means in order to obtain statutes that are intelligible for all citizens. Furthermore, they can help us find out what elements are actually efficient and what elements are not. And finally, they show that we need to take seriously the discussion about the goal: What does it actually mean for at statute to be intelligible for all citizens? To what degree is it possible? Would it be more sensible, as suggested in more than one paper at the conference, to make statutory texts intelligible for as many citizens as possible and to aim primarily at citizens with substantial interest in the topic and a basic level of relevant knowledge? The papers in this very well organised and highly interesting conference gave some hints on possible answers to these questions. But there is still a lot of work to be done.

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