SEMINAR

"Clarification and easification of legislative drafting"

Institute of Advanced Legal Studies, University of London – 25 March 2015

In association with Clarity, the International Association for Plain Legal Language

On 25 March 2015 a Seminar titled "Clarification and easification of legislative drafting" was held at the Institute of Advanced Legal Studies (IALS) – University of London. The Seminar was organized by the Sir William Dale Centre at the IALS in association with Clarity, the International Association for Plain Legal Language and Dipartimento di Studi e dell'Integrazione Internazionale (DEMS) – University of Palermo.

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 and they have opened a new agenda for the Institute: the use of teachings from linguistics in applications useful to legislative drafting. "Clarification and easification of legislative drafting" was one of the numerous events on the "Legislation and Language" project that was launched in 2013 and witnessed the participation of eminent scholars and experts in the field of law and language. This time the Seminar was organized in association with Clarity, the International Association for Plain Legal Language in the Law and chaired by its UK representative and international secretary, **Daphne Perry**.

The important theme of 'making legislative drafting clearer and easier' has been discussed from various perspectives and different fields of research, involving plain language drafting, legislative drafting and multilingual systems, easification and simplication strategies applied to legislative drafting.

The 1st speaker was **Daniel Greenberg** (Parliamentary Counsel, UK) who, in a deliberately exploratory and provocative presentation, asked whether the plain language movement has anything useful to contribute to the development of legislative drafting. These are the questions he posed to the audience: once the inevitable limitations on the value of plain language in legislation have been acknowledged and allowed for, does it remain potentially useful within those limitations or does it become a complete irrelevance? Worse, does it risk providing a tempting distraction in an increasingly gimmick-hungry administrative environment; and does it risk leaving legislation in a more potentially dangerous state, with readers tricked into thinking they understand what is in fact obscure, than if the obscurity were apparent from the outset? The discussion was supported by various examples taken from his direct experience working as an adviser in the Office of Speaker's Counsel, House of Commons.

The 2nd speaker was **Helen Xanthaki** (Professor in Law and Legislative Drafting at the IALS, SAS, University of London, and Director of the Sir William Dale Centre for Legislative Studies) and she proposed 'a layered approach as a means of legislative easification'. As she explained, easification is the manner of expression and presentation of legislative communication that enhances accurate receipt by the intended audience. Easification requires awareness of the groups of receivers of the communication and the consequent pitching of that communication at the appropriate level. In the case of legislation easification is now becoming possible, since user testing by TNA and OPC has

revealed that the readers of legislation can be classified into three groups: lay persons without any legal training; members of the regulating professions without legal training but with a good understanding of the topic and content of the regulatory package; and lawyers and judges. Having identified who the readers of legislation are, drafters can begin to think about how to pitch the legislative text appropriately. But is it possible to communicate legal norms to these three reader groups by use of the same text? And, in any case, do all three groups need to receive the same information? Then, she demonstrated that to achieve easification a user-centered approach is necessary: the drafter must first identify the clusters of users of the specific legislative text by means of the OPC user profiles [lay persons; regulatory; legal professionals]; determine whether they all require to receive the whole of the regulatory story; classify what part of the regulatory message is relevant to each group; and divide the text into three parts on that basis. Part 1 speaks to lay users; expresses the main regulatory message; and uses unsophisticated language. Part 2 speaks to regulatory professionals; conveys additional specialist data; and uses semi-sophisticated language. And Part 3 speaks to the legal professionals; and conveys legal data in legal jargon, with the caveat of a continuing strive to use plain language where possible.

The 3rd speaker, **William Robinson** (Associate Research Fellow, IALS) discussed the theme of clarification in legislative drafting from the UE perspective. Thanks to his long experience in the field of European Union law and language, working first at the Court of Justice of the European Union and then at the European Commission, Robinson showed how the EU institutions face formidable challenges to make their legislation work in the legal systems of all the 28 Member States with their differing legislative cultures and embracing over 500 million citizens. As the style of drafting of EU legislation has evolved since the early days from a pure civil-law style to a hybrid style with some common-law features the challenge of making EU legislation clearer has changed too. In this regard, EU institutions' task is complicated by factors such as: (i) the lack of separation between the policy and the text; (ii) the decentralised drafting procedure involving staff who speak 24 different languages and are drawn from 28 Member States with different legal cultures; (iii) the fact that all 24 language versions of EU legislation are authentic and have the same status and that drafting solutions must work equally well in all those languages. Eventually, he observed, the EU institutions have taken various steps to make the actual text of legislation clearer by "thinking of the reader" and also publish a growing range of explanatory materials.

The 4th speaker **Jenny Gracie** (Lawyer linguist and French Court-Approved Translator and Interpreter) talked about clearer legal writing in France. Starting from the fact that politicians in France have spent many years discussing and writing about clarity in French legislation, she wondered whether culture has led to their approach to this topic being different from that in the UK. She provided a summary of attempts that have been made in France to achieve clear *legislation,* including 1789 French Declaration of Human Rights – by decision of 2002 the French Constitutional Council ruled that Articles 4, 5, 6 & 16 give rise to a constitutional objective that the law be intelligible; 1804 Napoleonic Code on civil law – speech of 1801 by Portalis: 'When the law is clear, it must be heeded; when it is unclear, more work should be carried out on the provisions'; 1954 French constitution - by decision of 2002 the French Constitutional Council declared that there is a principle of clarity and it had to consider clarity of legislation (deriving from Article 34); 2005 Guide on drafting legislation and regulations (1st edition). Then, she ended her presentation

posing some questions: Has the French approach been effective? s there room for improvement? And just what impact does terminology have, if any?

The 5th speaker at the Seminar was **Giulia Adriana Pennisi** (University of Palermo and Associate Research Fellow, IALS) who discussed the theme of clarification in legislative drafting from the linguistic point of view. As she pointed out, the challenge in the construction of legislative discourse is the nature and extent of specification of legal scope in the expression of legislative intentions. Legislative expressions are required to be clear, precise and unambiguous, one the one hand, and all-inclusive, on the other. A clever balance between the two is the essence of the craftsmanship of legislative intent. As in most technical discourses, especially those which have public implications, we need at least two versions: one for the specialists, and the other, for the ordinary citizens. In order to explain this point, she analyzed legislative texts taken from common law jurisdictions and deconstructed them by means of 'easification' and 'simplication' linguistic approaches. She demonstrated that the two versions, one 'easified' and the other 'simplified', would serve two different communicative purposes: one legislative, and the other informative, with their own respective mechanisms, depth of specificity and level of readers accessibility. In order to make the specialist versions easier for processing and interpretation, she suggested 'easification' (Bathia 1982) of legislative provisions, keeping them clear, precise, unambiguous, and all-inclusive, and as transparent as linguistic resources permit.

The number of attendees was incredibly high and popular demand has been very vocal in calling for more of these sessions of dialogue between drafters and linguists belonging to different institutions and international organizations.