SENSE AND NONSENSE IN THE LAW

Towards clarity and plain meaning

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SENSE AND NONSENSE IN THE LAW/Towards clarity and plain meaning[1]

1 The unbearable heaviness of legal texts

'Tibi auctor sum ut velum dimittas!' These words were addressed to a student by the learned but - or: and? - slightly eccentric Professor Jean Charles Naber. The incident took place in the early years of the last century, when Naber still gave his Roman Law lectures in Latin. The student did not immediately grasp that what the Professor asked him to do, was to draw the curtain so as to get rid of the sun. Professor Naber therefore repeated his request. Instead of drawing the curtain, the student - as well as his fellow students - wrote down the words, which apparently were so important that the Professor repeated them[2]. This anecdote illustrates that lectures in a language other than one's native tongue are not novel in this University.

The reader should not worry: I am not going to address my esteemed audience in Latin. I will rather do so in English, which according to some is the new *lingua franca* in scientific and academic circles[3]. Whereas English is a language which we all pretend to understand and to speak, legal English is a different matter[4]. Even when English judicial decisions are often written in easily understandable - and occasionally entertaining - language[5], this is not necessarily the

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[1] I have profited from the helpful linguistic remarks made by Peter Morris (Molengraaff Institute).

[2] Taken from J.E. Spruit, Jean Charles Naber 1858-1950/Historische notities omtrent een singulier personage, in: G.C.J.J. van den Bergh, J.E. Spruit, M. van de Vrugt (eds), *Rechtsgeleerd Utrecht/Levensschetsen van elf hoogleraren uit driehondervijftig jaar Faculteit der Rechtsgeleerdheid in Utrecht*, Zutphen: Walburg Pers, 1986, p. 133, 150.

[3] See Willem H. van Boom, *Efficacious enforcement in contract and tort*, The Hague: Boom, 2006, p. 51: 'English is the language of international, interdisciplinary and comparative private law. So, it is the language I will be trying to speak in the coming years'. In the same sense: Nedim Peter Vogt, The international practise of law and the Anglo-internationalisation of law and language', in: *Festschrift Ansay*, The Hague: Kluwer, 2006, p. 455-460, and J.C.C. Rupp, *Van oude en nieuwe universiteiten/De verdringing van Duitse door Amerikaanse invloeden op de wetenschapsbeoefening en het hoger onderwijs in Nederland, 1945-1995*, The Hague: SDU, 2007, 462 p. However, see also Matie-Jeanne Campana, Vers un langage juridique commun en Europe?, in: Rodolfo Sacco & Luca Castellani (eds), *Les multiples langue du droit européen uniforme*, Turin: L'Harmattan, 1999, p. 7-34.

[4] See Heikki Mattila, *Comparative legal linguistics*, Dashwood: Ashgate, 2006, p. 221-254.

[5] 'Broadchalk is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was Yew Tree Farm. It went back 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the Bank'. These

case. Let me give you an example. In a recent case the English High Court held that the principle that there is no extinguishment of restrictive covenants by unity of seisin where the dominant and servient properties are held by the same trustee on different trusts - the trustee in such a situation remaining under a duty as trustee of the dominant land to require that the use of the servient land complies with the covenant - applies where both properties are held by a public authority for different statutory purposes. Where a local authority holds the dominant land for one purpose and the servient land for another, a blanket rule requiring such common ownership to operate to extinguish all restrictive covenants would prejudice the performance by the local authority of its statutory duties and fulfil no useful purpose[6].

This quotation, taken from a law review edited, I am afraid, by myself, shows that English in the hands of judges and lawyers can become unbearably difficult to understand. Not only English, in fact every language in such hands runs the risk of becoming unintelligible. In this lecture I intend to analyse some elements of the difficulty we have in understanding the law. There is a great deal to be said about sense and especially about nonsense in the law. I will focus on the following points.

First, I will give some examples of fuzzy legal texts. I will also demonstrate that problems with comprehending legal texts may not only result from fuzzy wording, but also from an absence of clarification and from difficult terminology and constructions (No. 2). I will then raise the question why lawyers make use of archaic terminology and incomprehensible constructions (No. 3). Fortunately, there are always voices of reason who advocate a return to clear and plain wording. The Plain legal language movement unites these voices in the English-speaking world. The French *clarté* and the Italian *chiaro* movements on the European continent do the same. Not everywhere are such movements to be found, however. Mysteriously absent is a *Klarheitbewegung* in Germany. In the Netherlands a *klare taalfront* is lacking as well (No. 4). Having provided an overview of these movements and their achievements, I will then try to demonstrate that clarity has also become a legal issue (No. 5). Unfortunately, striving for plain legal language/*clarté* is not completely unproblematic, as I will indicate by the example of clear versus plain texts (No. 6). Nor am I myself inclined to follow the movement's precepts in every regard, for instance in its rejection of Latin *formulae* (No. 7). In my conclusion I will formulate three kinds of suggestions for the future. First, these are mainly measures of a substantive nature to be undertaken. Second, I will give some organisational recommendations. Third, my plea will also be of a methodological nature (No. 8).

Although my main concern will be with legislation, I will occasionally also look at other sources of law, such as case law, doctrinal works and (standard) contracts. The plain legal language

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opening sentences of Lord Denning's opinion (which already divulge the outcome) in Lloyd's Bank Ltd v Bundy, [1975] 1 *QB* 326, [1974] 3 *All ER* 757 is one of the most famous quotations from English case law.

[6] The quotation is from University of East London Higher Education Corp. v. Barking and Dagenham London Borough Council and Others, (2005) 3 *All ER* 398, as reported in *ERPL* 2005, p. 890.

movement covers the whole of the law, including administrative law and criminal law, but owing to my professional background I will draw most of my examples from private law. As for the geographical origin, the common law jurisdictions where it all started will be my main inspiration. The civil law jurisdictions will be represented by France, Germany, Italy and the Netherlands.

2. Should elephants be wrapped? What may be wrong with legal texts

I now first turn to the use of difficult, obscure, vague, fuzzy, ambiguous and undetermined words and sentences. What should one do? Before setting out to discuss this matter, it is perhaps appropriate to ask ourselves what we are complaining about. I ask the reader to engage with me in a little exercice. For that purpose, we are going to convert this lecture into a seminar for half a minute.

Seminar question

Please think of one occasion in which you came across - in a contract, a statute or a judicial decision - a word or a passage which you did not understand. And kindly discuss this with your neighbour on your left-hand side.

Thank you very much. You may hand in your answers at the end of this lecture. Let me try to capture some of the examples which you may have been discussing with your neighbour.

(a) Fuzziness

First, there is the obvious category of fuzzy drafting. This may concern all legal texts: contracts, judgments, statutes, etc. Let us consider an example again taken from English law[7]. In *Black-Clawson v Papierwerke*[8], the House of Lords had to interpret the following legislative provision:

Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings[9].

Even the most prominent Law Lord who heard the case had to admit:

I find the first few lines very obscure[10].

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[7] The number of examples taken from English texts is partly due to the fact that these texts do not need translation.

[8] [1975] 1 *All ER* 810.

[9] *Foreign judgments (reciprocal information) act (1933)*.

[10] Quoted by Ross Charnock, Clear ambiguity, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for*

But it is not only pompous sentences such as this which strike us as unreadable. Nor is it only in English that we find examples. A French statutory provision reads:

Lorsqu'un propriétaire bailleur d'un fonds de terre ou d'un bien rural décide ou est contraint d'aliéner à titre onéreux sauf le cas d'expropriation pour cause d'utilité publique, même si l'aliénation est projetée sous forme d'adjudication faite en vertu 1o soit d'actes de partage intervenant amiablement entre cohéritiers 2o soit de partage d'ascendants 3o soit de mutations, profite, quel que soit l'un des trois cas ci-dessus visés, à des parents ou alliés du propriétaire jusqu'au troisième degré inclus et sauf, dans ces mêmes cas, si l'exploitant preneur en place est lui-même parent ou allié jusqu'au même degré du propriétaire, il ne peut être procédé à cette aliénation[11].

Worse is to come. From an Ohio statute I quote:

Subject to division (b)(4) of this section, if, within six years of the offense, the offender has been convicted of or pleaded guilty to one violation of division (a) or (b) of section 4511.19 of the Revised Code, a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, a municipal ordinance relating to operating a motor vehicle with a prohibited concentration of alcohol in the blood, breath, or urine, section 2903.04 of the Revised Code in a case in which the offender was subject to the sanctions described in division (D) of that section, section 2903.06 or 2903.08 of the Revised Code, former section 2903.07 of the Revised Code, or a municipal ordinance that is substantially similar to former section 2903.07 of the Revised Code in a case in which the jury or judge found that the offender was under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or a statute of the United States or of any other state or a municipal prdinance of a municipal corporation located in any other state that is substantially similar to division (A) or (B) of section 4511.19 of the Revised Code, the judge shall suspend the offender's driver's or commercial driver's licence or permit or nonresident operating privilege for not less than one year nor more than five years[12].

As Nicola Langton argues:

some of the main reasons why legal English is generally considered incomprehensible included not only very long sentences and producing information in lists, but also extensive use of unknown/uncommon words, complex sentence structures, passives, and unusual negative sentences[13].

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clarity/Practice and tools, Bern: Lang, 2006, p. 65, 68.

[11] Article 790 *Code rural* (1982), quoted by Catherine Bergeal, in: Wagner & Cacciaguidi-Fahy 2006, p. 203-204.

[12] Art. 4507.16 (B)(2) Ohio *Revised Code*, quoted by Judge Mark Painter, *Legal wrtiting 201*, <www.judgepainter.org>.

[13] Nicola Langton, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 361, 362.

and a little later:

Common reasons for the texts being difficult to read include information overload, unusual sentence and grammatical constructions, excessive clausal embedding, inaccessibility of the legal reasoning[14].

Nor is academic writing much better. As an American author observed some seventy years ago:

There are two things wrong with most legal writing. One is style. The other is content[15].

To some extent, law schools with their instruction in 'legalise' are to blame. One author offers us the following definition of 'legalise':

Legalise is the language of lawyers that they would not otherwise use in ordinary communications but for the fact that they are lawyers[16].

As the same author remarks:

'Plain language is language that is understandable. What is clear, or what is plain (...) can only be decided by the audience. (...) Plain language is more a process'[17].

It is not always too much, it can also be too little.

(b) Texts which are too short

Yet another problem arises when legal texts, rather than being too long, are too short and therefore unclear. By way of example I refer to a problem concerning the interpretation of standard form contracts which arose in the early 1950s in Dutch transport law. Under Article 9 of the Dutch *Algemene Vervoer Condities* (General Transport Conditions) the carrier at the time was responsible for the goods unless he showed that he and his employees had taken reasonable care. However, under para 2 under (d) there was no liability:

for damage to goods which are unwrapped or not sufficiently wrapped (...).

Hence the question whether or not the carrier can ever be held liable for goods which by their

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[14] *O.c.*, at p. 363.

[15] Fred Rodell, Goodbye to law reviews, 23 *Virginia Law Review* 38 (1936), quoted by Judge Mark Painter, *Legal wrtiting 201*, <www.judgepainter.org>.

[16] Cheryl Stephens, *What is really wrong with legal language*, <http://www.plainlanguagenetwork.org/Legal/wills.html>.

[17] Cheryl Stephens, *An introduction to plain language*, <http://www.plainlanguagenetwork.org/stephens/intro.html>.

very nature are transported unwrapped, such as elephants[18]. How can the issue be decided? This question led to a long stalemate between three Courts of Appeal. Because the interpretation of standard form contracts was considered to be a matter of fact, and not of law, no appeal in cassation lay to the *Hoge Raad*. The Amsterdam and Hague courts were of the opinion that what mattered was the intention of the drafters of the clause, which clearly had been to deny liability. The Arnhem court came to a different conclusion, allowing liability, by using a grammatical interpretation. In the end, the drafters had to amend the General Transport Conditions to solve the problem, which would not have arisen had they considered it beforehand[19]. Even better would have been the publication, with the text of the General transport conditions, of Comments which give examples and arguments, as in the case of the *Principles of European Contract Law*[20].

(c) Legal terminology and deviating common parlance, or vice-versa

A third category is that of legal terminology deviating from common parlance. The plain meaning is not only a question of difficult words. If the Real Madrid forward Ruud van Nistelrooij were ever to contemplate joining the local FC Utrecht, the newspapers would anticipate such a move by reporting on the various stages in the negotiation process, where Van Nistelrooij would be represented by his 'zaakwaarnemer' or agent. If a law student were to call the agent a 'zaakwaarnemer', he would most probably fail his exam. This is because in *legal* terminology 'zaakwaarnemer' (intervener) stands for the agent who acts without being bound to do so by contract[21]. The agent for Van Nistelrooij surely acts on the basis of a contract with Van Nistelrooij and therefore legally cannot be called a 'zaakwaarnemer'.

One may question whether this is not turning matters upside down. Instead of arrogantly pretending that everyone has got it wrong and that one should adapt to legal parlance, I would advocate the reverse and recommend my legal brethren and sisters to adapt to common parlance[22]. The notion of 'zaakwaarnemer' should be allowed for agents who are contractually bound to act and a new term should be coined for the old-fashioned intervener who is not bound

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[18] The example is taken from J.C.M. Leyten, Moeten olifanten verpakt worden?, *NJB* 1970, p. 1337-1348 (see also *NJB* 1971, p. 24-27).

[19] I earlier used this case in my (Leyden) PhD thesis *Standaardvoorwaarden/Rechtsvergelijkende beschouwingen over standaardisering van kontraktsbedingen en overheidstoezicht daarop*, Deventer: Kluwer, 1978, p. 509-512.

[20] See No. 8 under (a) below.

[21] As the *Principles of European Law on Benevolent intervention in another's affairs* state: 'This Book does not apply where the intervener: (a) is authorised to act under a contractual or other duty to the principal;' (Article 1:103).

[22] This is in line with Instruction 54 of the Dutch *Aanwijzingen voor de regelgeving*, to be dealt with in No. 4 under (e) below.

to do so[23].

A similar plea may be made for the notion of 'ontslag van rechtsvervolging' (dismissal of the criminal charge(s)) which in the eyes of the public at large has no sense, whereas 'vrijspraak' (acquittal) does. In legal terminology, 'vrijspraak' as we all know, only stands for the situation where the Public Prosecutor has not been able to legally and convincingly prove the defendant's guilt, whereas 'ontslag van rechtsvervolging' means that no criminal act has in fact been committed. Although the accused is better served by the latter, he will usually not perceive this and may actually have preferred an acquittal. If public perception is such, why not adapt legal terminology to common parlance?[24]

(d) Legal constructions, equity for example

A fourth and last group of the layman's difficulties with legal language is that of legal constructions. In the Netherlands, a fair number of authors support the idea that the derogating force of good faith is not necessary, because this is inherent in the interpretation of the contract[25]. I for one rather support the Dutch legislator who has the following scenario in mind. First, the rights and obligations of the parties to the contract are established by way of interpretation. Only then do rules of equity come into consideration, which may or may not disallow a party to avail himself of such rights[26]. I support this construction, not because of its legal superiority - the two constructions will usually have the same outcome - , but because it is more in line with lay thinking concerning contracts.

(e) A problem of today?

As will be apparent from the examples given, incomprehensible legal texts are a phenomenon of all time and not just of the present day[27].

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[23] This is not as easy as it may sound. Finding an English wording for 'zaakwaarneming' caused quite some problems for the Study group for a European Civil Code (the Von Bar group). It finally came up with the not entirely convincing 'Benevolent intervention in another's affairs' - Christian von Bar, *Benevolent intervention in another's affairs (PEL Ben.Int.)*, Munich: Sellier, 2006, 417 p.

[24] In this direction see also G.C.J.J. van den Bergh & Jan M. Broekman, *Recht en taal*, preadvies Koninklijke Notariële Broederschap, Deventer: Kluwer, 1979, p. 55-60.

[25] One of the most ardent supporters of this theory is H.C.F. Schoordijk - see among others his 'Derogerende werking van de goede trouw en openbare orde, *WPNR* 6082 (1993), *Emeritaal werk* (Nijmegen, 2006), p. 79-87.

[26] Asser-Hartkamp II (12th ed., 2005) Nos. 312 ff.

[27] Rose-Marie Gerbe, Le présent de l'indicatif dans le discours juridique français, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, 493 p. 265, 299

3. Complaints about delivered goods: why legal texts are poorly drafted

Why do lawyers use archaic words, non-understandable jargon or their own Mandarin terminology? In this section, I will discuss some - not all - of reasons why they do so.

(a) 'The magic of the word'

It is clear that, first of all, some reasons can be found in history. In Roman and medieval times, form requirements played a big role. For the valid transfer of ownership in a property, for the validity of a marriage or a will, or for some contracts the exact wording of the formulae had to be reverted to[28]. It is quite understandable that when such form requirements were no longer set, the custom to rely on time-honoured words was not immediately abolished[29].

Likewise, it has been argued that a formal setting enhances the power of the issuing party. Thus, it has been observed:

Quand on parle au nom de l'Etat, investi du pouvoir de faire ce qui est interdit au commun des mortels, on ne peut plus s'exprimer comme ce commun des mortels lorsque ceux-ci s'occupent de leurs toutes petites affaires privées. Des formules apprêtées, sacrées s'imposent. Ce n'est plus un homme qui écrit, c'est l'Autorité[30].

Quite the opposite idea has also been expressed in French: that

les lois sont faites pour les hommes et non les hommes pour les lois[31].

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quotes a law review article from the first half of the nineteenth century with the title 'Discours sur les vices du langage judiciaire'.

[28] More examples from various parts of the world during various ages are provided by J.M. van Dunné, *De magie van het woord/Juristen en hun omgang met teksten*, commemoration-day address Rotterdam, Arnhem: Gouda Quint, 1987, p. 11-27.

[29] Heikki Mattila, *Comparative legal linguistics*, Dashwood: Ashgate, 2006, p. 233: 'For greater certainty, today's common-law lawyers repeat all the phrases and expressions traditionally used in contracts and other documents that they draw up. They are unwilling to move away from the phrases and expressions whose content has been fixed by the work of law courts over time. By way of precaution, American and English lawyers formulate their documents in exactly the same way as beforehand: why take risks?'.

[30] André Moufflet, *Vie et langage*, Paris: Larousse, 1956, p. 171-172, quoted by J.D.M. Leliard, *Het kleed van Themis/Beschouwingen over de rechtstaal in het Nederlandse taalgebied*, Antwerpen: Maarten Kluwer, 1979, p. 11.

[31] Portalis, as quoted by J.M. van Dunné, *De magie van het woord/Juristen en hun omgang met teksten*, commemoration-day

These words, of course, are from Portalis, the great man of the French 1804 codification of civil law[32].

(b) The statutory likeness

Sometimes, certain standard form contracts are used on such a large scale, that they tend to function as legislation. In such a case, the users will not readily derogate from 'the law' as they see it, which has the additional advantage for them of a uniform interpretation. Especially in insurance matters, some standard policies have remained unchanged for centuries[33]. Because daily parlance does have a tendency to change over time, this necessarily means that the forms concerned will have become archaic and obsolete.

(c) Every-day life in the office

A more modern explanation for the existence of inappropriate legal texts is that practicing lawyers, when they are for instance requested to draft a will or a company's articles of association, will simply take a model out of the drawer or from the computer and copy it. New developments, unless they threaten to make them liable, do not automatically lead to the necessary changes.

*(d) The **contra proferentem** trap*

Sometimes the origin of unreadable texts paradoxically lies in attempts by the courts to come to the aid of contracting parties. This has happened especially in common law jurisdictions. One of my favourite cases to illustrate this is Szymanowski v Beck, decided by the King's Bench in 1923[34]. When a buyer of cotton reels complained that the reels did not have the length of 200 yards per reel as agreed upon - but instead measured only 188 yards - the seller invoked the following contract clause 'the goods delivered shall be deemed to be in conformity with the contract, unless the buyer shall claim the contrary within 7 days'. Because of World War I, the buyer only complained only after 18 months. So was he bound by the clause? This is how the House of Lords, per Lord Shaw of Dunfermline, found a way to circumvent the clause: 'The

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address, Rotterdam, Arnhem: Gouda Quint, 1987, p. 41.

[32] J. Portalis, Discours préliminaire, in: P.A. Frenet, *Recueil complet des travaux préparatoires du code civil*, I, Paris, 1827, p. 463, 469.

[33] In my PhD thesis on p. 117, I quote Ch. Wright and C.E. Fayle who in their *A history of Lloyd's/From the founding of Lloyd's coffee house to the present day*, published in 1928, observe that 'every marine policy subscribed at Lloyd's to-day incorporates, practically without alteration, and with only three important additions, a form in use two hundred and fifty years ago' (p. 142-143).

[34] [1923] 1 *KB* 457.

expression "the goods delivered" cannot apply to goods which were not delivered'. Nice as it may have been for the court to catch out the seller as to his own conditions, this nevertheless proved a Pyrrhus victory: once the decision had been handed down, as one may imagine, the seller's conditions were immediately expanded so as to cover the situation where goods are not delivered. So in the long run, the decision did not turn out to be beneficial for the transparency of these sales conditions.

A second example is another favourite case of mine, Adler v. Dickson[35]. Here Lord Denning found a way around an exemption clause, by holding that not the shipowner, who was protected by an exemption clause in his transport conditions, but the master and the boatswain of the ship - the SS Himalaya - were liable in tort towards a passenger who due to their carelessness had fallen from the gangway (the master and the boatswain had recourse against the shipowner, who therefore became indirectly liable). Once again, the outcome resulted in an addition to the shipowner's standard conditions, this time excluding liability for torts committed by employees[36].

A third example, this time maybe carrying a good joke somewhat too far, is Hollier v Rambler Motors[37]. In that case, the exclusion in insurance conditions that

(t)he company is not responsible for damage caused by fire to customers' cars on the premises

was not considered applicable to a fire started through negligence.

Contracts will not only be adapted after they have been constructed in a negative way from the drafter's point of view. Draftsmen may also act pro-actively and adapt the terms to prevent judicial intervention in advance. Not only do the drafters of standard form contracts act in such a way, but legislatures also fear unfriendly construction by the courts[38] and try to prevent this by regulating every conceivable loophole. The result is very lengthy contracts which are almost unreadable. As opposed to most judicial decisions, contracts and statutes in common law jurisdictions therefore do not always - or rather: hardly ever - make pleasant reading[39].

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[35] [1954] 1 *WLR* 1482.

[36] This exemption became known as the Himalaya clause (named after the case of the same name). It was later codified in the Dutch Civil Code - Article 6:257.

[37] [1972] 2 *QB* 71, [1972] 1 *All ER* 399.

[38] Because of the exclusionary rule - see my paper 'Looking at Hansard's: should courts be allowed to switch on the light?/some observations on constructing statutes in the light of their parliamentary history', in: Adam Brzozowski, Wojciech Kocot, Katarzyna Michalowska (eds), *W kierunku europeizacji prawa prywatnego/Ksiega pamiatkowa dedykowana profesorowi Jerzemu Rajskiemu - Towards Europeanization of private law/Essays in honour of Professor Jerzy Rajski*, Warsaw: Beck, 2007, p. 111-118.

[39] Which may have been one explanation for why the Plain legal language movement started in common law jurisdictions.

It has been remarked that since the *Unfair Contract Terms Act* (1977) it is no longer necessary to indulge in such 'gymnastic contortions' (these words are taken from Lord Denning)[40]. This reminds us of the fact that a legislator who does not keep the law in tune with modern times gives the courts a standing invitation to turn to lawyer's tricks to outwit the lawyers.

4. The laws of Brobdingnag: towards plain language and clarity

I now turn to the question of how to combat incomprehensibility in legal texts. Jonathan Swift is well known for his 'Gulliver's Travels'. The most famous of these travels takes Gulliver to Lilliput. Slightly less known is that within two months after his return, Gulliver undertook a new arduous voyage, which this time took him to Brobdingnag. Among the various elements of the society which he studies there is the law.

No Law of that Country must exceed in Words the Number of Letters in their Alphabet; which consists only of two and twenty. But indeed, few of them extend to even that Length. They are expressed in the most plain and simple Terms, wherein those People are not Mercurial enough to discover above one Interpretation. And, to write a Comment upon any Law, is a capital Crime. As to the Decision, their Precedents are so few, that they have little Reason to boast any extraordinary Skill in either[41].

This often quoted passage points to the necessity of keeping legislation brief. It also recalls the idea of some great legislators of the past that the interpretation of their Digests or *Allgemeines Landrecht der Preussischen Staaten* will lead to the downfall of their law. Can laws indeed be limited to twenty two words? Well, that probably is demanding too much, but something in this direction can surely be done.

Clear legal language has been an ideal for various millennia, from ancient history[42] to medieval and post-medieval times[43]. The present plain meaning movement started in the second half of the

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[40] Ross Charnock, 2006, p. 99.

[41] Jonathan Swift, *Gulliver's Travels*, Oxford: Blackwell, 1965, p. 136.

[42] G. van den Bergh p. 13 tells us how Lycurgus convinced his friend Thales, one of Crete's wisest men, to come to Sparta. Thales was a famous lyric poet, who knew how to achieve what the most prominent legislators try to achieve. Because his songs were incitements to obeisance and unity, had settled melodies and rhythms, which were very pleasant to the ear, and also had a calming effect on one's mind, his audience were increasingly comforted and persiaded to follow the path of virtue instead of wickedness.

[43] In 1539 France promulgated the *Ordonnance Villers-Cotteret*, Article 110 of which reads: 'Et afin qu'il n'y ait cause de douter sur l'intelligence desdits arrêts, nous voulons et ordonnons qu'ils soient faits et écrits si clairement, qu'il n'y ait ni puisse avoir aucune amiguïté ou incertitudene lieu à

twentieth century in the common law countries (a). It then spread to the European continent, of which I shall single out two jurisdictions: (b) France and (c) Italy. Although Germany is almost absent where clarity in legislation is concerned, the case law on the transparency of private contracts offers some striking insights (d). Unlike in Germany, academics in the Netherlands have occasionally devoted some attention to clarity (e). On the European level, clarity is also an issue (f).

(a) Common law. In the current debate in English speaking communities, Plain legal language is the oldest movement, starting in the 1950s. It has five objectives: coherence, comprehensiveness, consistency, clarity and care (as to the physical appearance of the writing and as to the reader)[44]. Of more recent origin is the Clarity movement, which started in the United States in the 1980s. 'Of late, clarity is acting as an umbrella term for the concepts of plain language, the improvement of legal draftiung in public law and simpler, more ordinary use of language in private law'[45].

Here is a sample of results obtained in various common law jurisdictions:

Australia

in Australia, a four-member task force, including a legislative drafter and a plain-language expert, have rewritten part of Australia's Corporations Law under an express mandate to simplify it. Among other things, their new version cuts one main section from 15,000 words to 2,000 words, eliminates many unnecessary requirements, and redesigns and reorganizes the entire text for easier access. Throughout the process, the various drafts were tested (...) on a wide range of potential users. And the proposed bill was submitted for public comment before it was introduced.[46]

New Zealand

In New Zealand, the government has rewritten the Income Tax Act in plain language as a way to save administrative costs and compliance costs.[47]

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demander interprétation' (quoted by Ross Charnock, in: Wagner & Cacciaguidi-Fahy 2006, p. 65, 66).

[44] Ros MacDonald, Writing better decisions: plain English in decision writing, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 331, 334-336.

[45] Anne Wagner, Sophie Cacciaguidi-Fahy , Searching for clarity, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 19.

[46] Kimble, 1994-1995, p. 59.

[47] Kimble, 1994-1995, p. 58.

United States

'In a study of medical-consent forms, readers of the original form were able to correctly answer 2.36 questions out of 5; on the revised form, they could answer 4.52 questions out of 5, for an improvement of 91%. In addition, the mean response time improved from 2.65 minutes to 1.64 minutes'[48].

(b) France[49]. In France, *Marianne*, *COSLA* and *LARA* are the keywords in the movement towards the transparent use of language. On 3 January 2005 the Marianne programme was started. This is a Charter for the rights and duties of public services. Inspired by local predecessors and by the British *Charter Mark*[50], the Directorate-General for the reform of the State has taken a number of measures to ameliorate the communication between the public service and the citizen:

Les prescriptions de base sont simples: accès plus facile, accueil attentif et courtois, réponse compréhensible, réponse systématique, suivi constant et évaluation de la démarche[51].

This Charter, adapted to the circumstances of the trade or industry concerned, has been introduced by such diverse agencies as the *Poste* and the *Bibliothèque Nationale de France*. It aims at promoting a better communication between public offices and users by the use of a personalised emblem (Marianne).

One of the measures which were taken was the foundation, in 2001, of an Orientation committee for the simplification of administrative language (*Comité d'Orientation pour la Simplification du Langage Administratif - COSLA).* The committee consists of civil servants, but also of representatives of organisations such as the Consumer Organisation *UFC-Que Choisir?* Members have also been appointed for their individual expertise. To this category belong Alain Rey and Josette Rey-Debove, the authors of the *Robert*, one of the best known French encyclopedia's[52], and Bernard Pivot, famous for his literary television programmes. The *COSLA* has been endeavouring to promote the simplification of the language and an improvement in the dialogue at public counters. It has thereto simplified a number of forms and formulations.

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[48] Joseph Kimble, Answering the critics of plain language, 5 *Scribes Journal of Legal Writing* 1994-1995, p. 51, 63.

[49] See Arnaud Suspene, Clarification et simplification du langage administratif en France - L'expérience du COSLA: un aspect de la réforme de l'Etat, in: Anne Wagner, Sophie Caccia-guidi-Fahy (eds), *Legal language and the search for clari-ty/Practice and tools*, Bern: Lang, 2006, p. 391-411.

[50] <http://www.cabinetoffice.gov.uk/chartermark/>.

[51] Arnaud Suspene, Clarification et simplification du langage administratif en France (2007), p. 395.

[52] Alain Rey is also the author of *L'amour du français/Contre les puristes et autres censeurs de la langue*, Paris: Denoël, 2007, 301 p. (recommended reading).

Notions such as 'nom patronymique' were changed into 'nom', 'insolvabilité' in 'impossibilité de payer', 'instaurer' in 'mettre en place'[53]. *COSLA* has also introduced a *Guide d'aide à la conception et à la diffusion des formulaires administratifs*, the computer program *Logiciel d'aide à la rédaction administrative (LARA)* and a *Lexique des termes administratifs*[54]. The Prime Minister presents an annual *Rapport au Parlement sur l'emploi de la langue française*[55].

(c) Italy[56] - The second country on the European continent where a powerful clarity lobby has gained momentum, is Italy. Already in 1993, Minister Sabino Cassese brought into circulation a style guide for public offices. The *Codice di Stile delle Communicazioni Scritti ad Uso delle Amministrazioni Pubbliche* was inspired by developments in English-speaking jurisdictions, but is original in its lengthy theoretical introduction[57]. One example may illustrate the simplifications realised under this heading. The following text was simplified:

'L'Ufficio Trattamento Economico in indirizzo, cessarà la corresponsione degli emolumenti a decorrere dal 1o maggio 2001'.

The simplified text reads:

'Dal 10 maggio 2001 il nostro Ufficio sospenderà i pagamenti'[58].

In May 2002, the *chiaro* project was initiated to combat bureaucratic jargon. The project warns against archaic texts such as 'il succitato articolo' (the article quoted below), complicated constructions such as 'in merito a' (concerning) and 'effetuare una verifica del modulo' (to control a form), negatively formulated sentences, words with a special meaning such as 'abrogazione tacita' (tacit abrogation) and Latin expressions such as 'ex ante'.

(d) Germany

Although German legislation may have many qualities, simplicity is not one of them (German laws are often described as 'Professorenrecht'). In German administrative law and criminal law,

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[53] Suspene (2007), p. 404.

[54] A commercial edition was published in 2005 under the title *Petit Décodeur* by the Editions Robert.

[55] Suspene 2007, p. 409.

[56] See Girolamo Tessuto, Simplifying Italian administrative language: an overview, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 413-430.

[57] In 1994 a second edition was published under the title *Semplificazione del Linguaggio Amministrativo* and in 1997 Fioritto published a third edition: the *Manuale di Stile/Strumenti per Semplificare il Linguaggio delle Amministrazioni Pubbliche*.

[58] Tessuto 2007, p. 416.

no such thing as a Plain Legal German movement can be detected. Private law, however, does deploy the notion of *transparency*. Elsewhere, this is not a common notion; the Index of the leading Dutch handbook by Wessels/Jongeneel/Hendrikse on standard form contracts[59] only mentions it once, even though it did play an important role in the judgment of the European Court of Justice in the case of Commission v the Netherlands[60]. In German publications the number of references is much higher, although even there doctrinal works until the 1980s hardly mention it at all. Now its use is widespread, as is demonstrated by an article by Eckart Gottschalk in the *Archiv für die civilistische Praxis*[61].

A problem with the transparency principle is how to measure whether or not contract terms are readable. Gottschalck mentions two methods which have been developed so as to do so. The first is the Flesh method which originated in the United States. This method - perhaps inspired by Swift? - counts the average number of letters per word and the average number of words per sentence. It has been introduced in the state of Massachusetts as a - legal - test for the legibility of general insurance conditions[62]. In Hamburg, psychologists have developed a more sophisticated test for the comprehensibility of legal texts. The test has four elements: simplicity, system, brevity and stimulating riders ('anregende Zusätze'). The latter means that
ein Schreiber oder Redner bei seinem Publikum Interesse, Anteilnahme, Lust am Lesen oder Zuhören hervorrufen, zum Beispiel durch Ausrufe, wörtliche Rede, rhetorische Fragen zum "Mitdenken", lebensnahe Beispiele etc.[63].

The importance of these thoughts on transparency is obvious. By way of Article 4, para. 2 and Article 5, para. 1 of the Unfair contract terms directive, the transparency order is also relevant for the other EU jurisdictions[64].

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[59] B. Wessels, R.H.C. Jongeneel, M.L. Hendrikse (eds), *Algemene voorwaarden*, Deventer: Kluwer, 2006, 717 p.

[60] C-144/99. The Advocate-General in this case was 'not convinced that the Netherlands law governing the matters covered by the Directive [on unfair contract terms] complies fully with the Directive, or, in any event, that it does so with "sufficient clarity and lack of ambiguity - as enjoined by the Court- to ensure that the persons concerned" are made fully aware of their rights and, where appropriate, afforded the possibility of relying on them before the national court', a view which was endorsed by the Court.

[61] Eckart Gottschalk, Das Transparanzgebot und allgemeine Geschäftsbedingungen, *Archiv für die civilistische Praxis* 2006, p. 555-597.

[62] Eckart 2006, p. 594.

[63] Eckart 2006, p. 593.

[64] See Charlotte M.D.S. Pavillon, ECJ 26 October 2006, Case C-168-05 *Mostaza Claro v. Centro Móvil Milenium SL* - The Unfair Contract Terms Directive: the ECJ's third intervention in domestic procedural law, *ERPL* 2007, p. 735-748.

(e) The Netherlands

In the Netherlands, a clear legal language still seems far away. On the level of the administration, only the *Aanwijzingen voor de regelgeving* (Directions for legislation) are a means to channel interest in plain language. In legal writing, Wim Duk has paid attention to the question[65]. In the Dutch language territory the Belgian PhD thesis by Hendrickx on the linguistic advisory opinions of the (Belgian) Council of State ('Raad van State') is of interest[66]. The only recent analysis in the Netherlands was carried out by Wim Voermans[67]. This author suggests that the problem of poorly drafted legislative texts has never been prominent on the Dutch political agenda: 'In the Netherlands one can live with badly drafted legislation on the understanding that no one will read legislation of his own free will'[68]. By way of frightening example, he quotes a provision in the State Taxes Act[69].

The Netherlands does possess a number of linguistic provisions in the *Aanwijzingen voor de regelgeving* (Instructions for legislative drafting), such as:
Provisions are drafted as succintly as possible (Instruction 52).

Unless this is inevitable, provisions are not formulated with the use of the verbs '*shall*' or '*must*' (Instruction 53)[70].

Common parlance is followed as much as possible. (Instruction 54, para 1).

Foreign words (...) are avoided („,,)(Instruction 57).

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[65] See W. Duk, *Recht en slecht*, Nijmegen: Ars Aequi, 1999.

[66] Karl Hendrickx, *Taal- en formuleringsproblemen in de regelgeving/De taalopmerkingen in de adviezen van de Raad van State*, PhD thesis Leuven 2002, Bruges: die Keure, 2003. Since its inception in 1946 the Council of State has made, according to this thesis, more than 30,000 recommendations concerning proposed legislation. One of the three important criteria which are used to test such legislation is the legibility of the texts. The Council mainly comments on the conformity between the Dutch and French versions of a legislative Act.

[67] W.J.M. Voermans, Weten van wetgeving, *RegelMaat* 2004, p. 155-160.

[68] Voermans 2004, p. 156.

[69] Article 6, para. 1 *Algemene wet inzake rijksbelastingen*.

[70] In English-speaking countries 'shall-free legislation' is also an objective, see: Christopher Williams, Fuzziness in legal English: what shall we do with *shall*?, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 237-263. The same is true for France, see Rose-Marie Gerbe in the same volume, p. 281.

Abbreviations are only used when this cannot reasonably be avoided (...)(Instruction 60).

Formulating a rule in the form of a fiction is avoided as much as possible. (...) (Instruction 61).

The use of the expression '*and/or'* is avoided (Instruction 63).

There is a political momentum to promote the communication between the government and the citizen[71]. The programme *Bruikbare rechtsorde* for instance aims at stimulating and facilitating ministerial activities to redress the extensive degree of regulation[72]. But its focus so far is not on language. If the government of a Member State, such as that of the Netherlands, were to focus more on language, inspiration could be drawn from the various programmes described above. A concrete example from another jurisdiction is the Simplus programme which is in use in Québec[73].

(f) Europe

At the European level, clarity is also an issue, witness the case of the Commission v The Netherlands quoted above under (d). In legal writing, simplification is advocated as well[74]. It should be added that clarity is also an element in the European Union movement towards better regulation[75].

5. Clarity as a legal problem

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[71] On this element see Mark Van Hoecke, *Law as communication*, Oxford: Hart, 2002, 224 p.

[72] *Naar een responsieve overheid*. Beginselen en minimumnormen voor openbare internetconsultatie in het departementale voorbereidingsproces van regelgeving, 2007.

[73] Claude Coulombe, Benoit Robichaud, in: Wagner/Cacciaguidi-Fahy (2006), p. 431-448.

[74] See for instance Tito Gallas, Politique de transparence et accès du public aux documents: une interprétation plus facile du droit communautaire?, in: Rodolfo Sacco (ed), *L'interprétation des textes juridiques rédigés dans plus d'une langue*, Turin: L'Harmattan, 2002, p. 89-102; J.G.J. Rinkes, *European Consumer Law: making sense*, inaugural address Maastricht 2005, Zutphen: Paris 2006, p. 17: 'European Consumer law should be made simpler and more readily accessible'.

[75] White Paper on Governance COM(2001)428 followed by the Mandelkern Expert Group on Better Regulation and the Guidelines on Impact Assessment COM(2002) 276, as revised in 2005 and 2006 - see Jonathan B. Wiener, Better regulation in Europe, in: Jane Holder & Colm O'Cinneide (eds), *Current legal problems 2006*, Oxford: Uinversity Press, 2007, p. 447-518. and <http://ec.europa.eu/enterprise/better_regulation/simplification.htm>.

The introduction of plain language in legal texts is basically a practical matter. However, it is not just a policy question; it may also turn into a legal issue. The clarity of a text may emerge in various forms of litigation, and it may lead to organisational measures which require administrative or legislative action. For a discussion of the organisational measures I refer to the previous section. Legal clarity questions may be raised by (a) The Council of State, in (b) constitutional, (c) criminal, (d) private and (e) European cases.

(a) Council of State

First, the clarity of legal texts is usually one of the elements in the test to which legislative proposals are subjected by the Council of State and similar bodies[76].

(b) Constitutionality

Second, the clarity of a legal text - or rather the absence thereof - may be raised from the point of view of the constitutionality of statutes and decrees. In countries such as Belgium, France, Italy and Spain, decrees have been held to be unconstitutional on the ground that they violate the constitutional requirement of clarity[77]. Very clear is the French decision of the *Conseil constitutionnel* of 29 July 2004 which lays down that:

le pincipe de clarté de la loi, qui découle de l'article 34 de la Constitution, et l'objectif de valeur constitutionnelle d'intelligibilté de la loi, qui découle des articles 4, 5, 6 et 16 de la Déclaration des droits de l'homme et du citiyen de 1789, lui [le législateur, EH] imposent, afin de prémunir les sujets de droits contre une interprétation contraire à la Constitution ou contre le risque d'arbitraire, d'adopter des dispositions suffisamment précises et des formules non équivoques[78].

(c) Criminal law

Third, another forum where the clarity of a legal text may be reviewed is that of criminal proceedings. Usually, citizens are presumed to know the law. This presumption, however, may in some jurisdictions be rebutted by proving that the legislative text is so unclear that it is incomprehensible. Such a fate befell Italian tax law provisions. In 1988 and 1995 the Italian Constitutional court ruled that ignorance of the law may constitute an excuse for a citizen when

[76] See Catherine Bergeal, La qualité de la réglementation en France: question politique ou juridique?, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 203-236.

[77] In France, after the principle of clarity turned into a constitutional principle, 'la clarté juridique est devenue une véritable obsession'.

[78] Quoted by Samuel Xavier, La contribution du Conseil constitutionnel à la transparence du discours juridique, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, 493 p. p. 175, 192-193.

the formulation of the law is such as to lead to obscure and contradictory results[79].

(d) Private law

Fourth, private law does provide a number of instances where clarity is at issue. Earlier I mentioned the German notion of transparency as an example[80].

(e) European law

Finally, but once again the enumeration is far from exhaustive, the clarity issue may arise before the European Court of Justice, witness the case against the Netherlands which I have referred to earlier[81].

6. Plain versus clear

I now turn to a number of possible objections to the movement towards plain meaning and clarity[82]. In this section I will consider objections of a general nature and then, in section 7, I will turn to those pertaining to the function of legal language as a form of communication between lawyers.

In 1976, two Dutch business firms entered into a contract for the sale of a machine to cut flower beds. In the written contract document they included the term

Until the end of 1976, the buyer has the right to return the machine for Dfl. 20,000 excluding VAT.

The interpretation of this clause gave rise to one of the most celebrated cases in Dutch contract law, Ermes v. Haviltex[83]. In this case, the *Hoge Raad* laid down a rule on how to interpret a written contract[84]. This rule has been used over and over again in hundreds of cases[85]. The case

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[79] Tessuto 2006, p. 413.

[80] Nr. 4 (d) above.

[81] See No. 4 under (d) above.

[82] For a broader catalogue of criticisms - and a rebuttal - see Joseph Kimble, Answering the critics of plain language, *Scribes Journal of Legal Writing* 1994-1995, p. 51-85.

[83] HR 13 March 1981, *NJ* 1981, 635 (note C.J.H. Brunner).

[84] 'How a written contract regulates the relationship between the parties and whether that contract leaves a gap that must be supplemented cannot be determined on the basis of a purely literal interpretation of the provisions of the contract. To answer that question, it is necessary to have regard to the meaning that the respective parties in the given circumstances could have reasonably attached to these provisions and to that which in that respect they could reasonably have expected from each other. In this case, the parties' social position and

raises one point which is relevant for our discussion. The contract term just quoted certainly is plain. But is it clear? It obviously is not: the parties litigated over the question whether or not the buyers should have an argument for returning the machine or whether this was at the discretion of the buyer. Plain language and clarity: they apparently do not completely overlap.

This dichotomy has been recognised in the plain language literature: 'A reading of well-known cases in contract law shows that ordinary language is more likely to create difficulties of interpretation than is the use of traditional legal terminology'[86]. To illustrate this with the case of the [[steekschuim]] cutting machine: Had the clause been drafted by a lawyer, it would probably either have read: 'Until the end of 1976, the buyer has the right to return the machine for Dfl. 20,000 excluding VAT, on the ground that the machine does not function properly' or 'Until the end of 1976, the buyer has the right to return the machine for Dfl. 20,000 excluding VAT, at his discretion'.

7. Litis finiri oportet: a plea for - a little - Latin

'Litis finiri oportet'. Litigation - like this lecture - should come to an end. Latin is nowadays no longer a language which is known by every cultivated person, let alone by the man on the Clapham Omnibus. So surely we should abolish these words in legal terminology? This brings me to the question of who should profit from the clarity discussed above. My premise so far has been that the addressee of the plain language and clarity movement is the one-off reader, who will take in the text only once. It is not certain how many will belong to this group. Surely where legislative and administrative regulations are concerned, it has been estimated that few citizens will take the trouble to read a legislative/administrative text at all. So why take the trouble to change archaic texts?

Even if a text is only read by a limited number of people, I suggest that it should be understandable to the addressee. A sentence of life imprisonment is usually addressed to only one person, and yet everyone will agree that the text of this sentence should be as clear as can be imagined. When the addressee does not understand the decision himself, he may address his lawyer, who should also be able to read the decision and confer its meaning to her client.

But surely there are also repeat readers, such as lawyers, law students and others who have to deal with legal questions on a daily basis. For such professionals Latin may still play a role

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knowledge of the law that may be expected of such parties may be of significance' (translation taken from Nicole Kornet, *Contract interpretation and gap filling: comparative and theoretical perspectives*, PhD Maastricht, Antwerp: Intersentia, 2006, 483 p.).

[85] For recent discussions on the appearance of a slightly modified test after the case involving a collective labour agreement see R.J. Tjittes, *WPNR* 6709, 2007, p. 417-423 and H.M. Veenstra, Uitleg van een collectieve regeling tot vergoeding van massaschade, *NTBR* 2007, p. 2-8.

[86] Ross Charnock, Clear ambiguity, in: Wagner & Cacciaguidi-Fahy, 2006, p. 65-103.

especially in international communication, because English is not always appropriate. 'Lites finiri oportet' is a maxim which is most probably better known among lawyers than an equivalent in English[87]. The same is true of maxims such as *nemo auditur suam turpitudinem allegans*[88] and *in dubio pro reo*[89]. It has sometimes been argued that each European 'language has its own Latin and its own way of using it'. But research by a Finnish research team has established that 'There is a common core of legal Latin: a number of Latin expressions and maxims are known everywhere'[90]. Seen from the point of view of plain language, there is nothing against keeping this custom of reverting to Latin maxims among lawyers[91]. This is not against the clarity thinking, which to the contrary advocates distinguishing audiences in various groups.

8. Sense and sensibility

In this lecture, in keeping with the character of a valedictory speech, I have tried to answer some of the questions which legal texts do raise. But in line with an inaugural lecture, which should set an agenda for the coming years, I have also raised more questions. Let me try to bring these together in this final section. I have divided my suggestions into three categories: those of a substantive nature, those of an organisational nature and those of a methodological nature.

(a) Sense

Let me begin with some suggestions for the future drafting of legal texts. First, the Directions for legislative drafting should be taken seriously. After a suggestion by my colleague Ivo Giesen, their scope of application should be extended to self-regulation***. They may even be applied by way of analogy to other private instruments. Taking the Directions seriously means that the drafters should be obliged to consider improvements on the basis of international scholarship, as assembled in the plain language and clarity movement. My suggestion is to allow legal

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[87] See J.J. Brinkhof in J.E. Spruit and M. van de Vrugt (eds), *Brocardia in honorem G.C.J.J. van den Bergh/22 studies over oude rechtspreuken*, Deventer: Kluwer, 1987, p. 15-20.

[88] R. Feenstra, in: Spruit and Van de Vrugt (eds), 1987, p. 30-36.

[89] See M. van de Vrugt in Spruit and Van de Vrugt (eds), 1987, p. 123.

[90] See H. Mattila, De aequalitate Latinitatis jurisperitorum/Le latin juridique dans les grandes familles de droit contemporaines à la lumière des dictionnaires spécialisées, *Revue internationale de droit comparé* 2002, p. 717-758; Heikki E.S. Mattila, in: Barbara Pozzo & Valentina Jacometti (eds), *Multilingualism and the harmonisation of European law*, Alphen aan den Rijn: Kluwer Law International, 2006, p. 28.

[91] See also Antoine Masson, *Les usages du latin à la Cour de Justice des Communautés Européennes*, seminar Université du Luxembourg 14 November 2007.

terminology to follow common parlance and not the reverse.

Some unresolved issues are the following. Is it be possible to develop a test for measuring the clarity of legislation?[92] Can such a test be turned into a computer programme?[93] Which grammatical rules contribute to simplification?[94] Are metaphors permitted in legislation?[95] What should be done if the substance-matter is so intricate, that any simplification is simply impossible without giving up some elements of its nuanced contents[96]. Or formulated differently: is 'plain language' the same as 'clear language'?[97]
Of a more speculative order is the next suggestion. Why not restore some literary beauty in legal texts. The French *Code civil* was renowned for its grace - Stendhal is reputed to have read in it every day in order to obtain inspiration for his novels. The modern *Principles of European Tort Law* and similar instruments may reflect modern science, but a bit more esthetic and a little less *Professorenrecht* would do no harm. This idea is by no means uncontested. According to a Belgian author:

Fraaiheid door woordkeuze, synoniemen, metaforen en treffende epitheta is van estetisch belang en mag, wegens haar emotief aspect, in een taal die enkel mededeling van positieve gedachten zonder storende connotaties wil zijn, geen rol spelen[98].

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[92] Such as the Flesch test in the United States - see Rudolf Flesch, *How to write, speak and think more effectively*, Signet, 1960.

[93] On this see, for example, Nathan McDonald, Mustor management: exploring the role of graphical tools in achieving greater clarity in instruction, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 449-478.

[94] See, for example, among others Rose-Marie Gerbe, Le présent de l'indicatif dans le discours juridique français, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 265-302.

[95] See Lucia Morra, Piercarlo Rossi and Carla Bazzanella, Metaphor in legal language: clarity or obscurity?, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 141-174.

[96] See Ross Charnock, Clear ambiguity, in: Anne Wagner, Sophie Cacciaguidi-Fahy (eds), *Legal language and the search for clarity/Practice and tools*, Bern: Lang, 2006, p. 65-103.

[97] Brian Hunt, Plain language in legislative drafting: an achievable objective or a laudable ideal, (2003) 24 *Statute Law Review* 112-124.

[98] J.D.M. Leliard, *Het kleed van Themis/Beschouwingen over de rechtstaal in het Nederlandse taalgebied*, Antwerp: Maarten Kluwer, 1979, p. 97.

Prose may not always be the most appropriate format for legal texts[99]:

'poetic forms can in various ways benefit communication and prevent confusion, thanks to the fact that they emphasize important words and impart to them firmness, permanence and cogency. These effects of poetic forms play an important part in the various systems of social control that uphold legal order as a whole'[100].

The gist of the Haviltex case was rendered by Advocate-General - as he then was - Hartkamp in the form of a sonnet, the last two verses of which read as follows:

Wie weet nog dat het in dit rechtsgeding
om 't snijden van steekschuim voor bloemen ging?
En wie wat steekschuim voor bloemen is?

Wie dat van groot belang acht heeft het mis,
In 't recht telt niet het wezen maar de schijn,
niet: hoe het is, maar: hoe het lijkt te zijn'[101].

[Who knows that in this case
The issue was the cutting of flower beds?
And who what is cutting for the flowers beds in question?

Whoever considers this to be of great importance has got it all wrong
In the law it is not the essence but appearance that counts.
Not: how it is, but how it appears to be].

Less speculative is the following idea. The *Principles of European Contract Law* owe much of their popular success to the fact that the black letter rules are accompanied by Comments and Notes[102]. In the Comments, illustrations of the various rules are given which are often taken from existing case law. The Notes inform us to what extent the Principles are in line with - or derogate

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[99] See for an analysis of aboriginal law in Australia: Bernhard Grossfeld and Josef Hoeltzenbein, Poetic legal dreams: cross-cultural pioneers, 55 *American Journal of Comparative Law* 47-66 (2007).

[100] G.C.J.J. van den Bergh, *Themis en de muzen/De functie van de gebonden vormen in het recht*, diss. Amsterdam, Haarlem: H.D. Tjeenk Willink, 1964, p. 157-158.

[101] A.S. Hartkamp, Plato's grot, *Karakters* Nr. 1, April 1996, p. 8, 9.

[102] Ole Lando, Hugh Beale, *Principles of European Contract Law I and II*, The Hague: Kluwer, 2000, 561 p.; Ole Lando, Hugh Beale, *Principles of European Contract Law III*, The Hague: Kluwer, 2003, 291 p.

from - national law. On this point the PECL are superior to their two close competitors, the *UNIDROIT Principles of International Commercial Contracts*[103] and Gandolfi's *Code européen des contrats*[104]. The *UNIDROIT Principles* do not contain Notes and the *Gandolfi Code* does not even contain Comments. From the Gandolfi Code, however, it can be learned that setting out the various alternatives and the reasons for choosing the one opted for may also be attractive. Whatever their content, the introduction of explanatory notes, if possible in the form of the PECL Comments with a whiff of Gandolfi arguments, would simplify the interpretation of (standard) contracts[105].

Plain language has often been described as a process[106], which brings us to a second set of recommendations.

(b) Sensibility

Second, on the organisational level, the formation of national commissions merits consideration. These, after the French example, should not only consist of civil servants but include representatives of society. One of their tasks should be to simplify legal forms and re-educate civil servants. In the Netherlands, the *Bruikbare rechtsorde* programme could be used to fit in a clarity component.

A specific issue is caused by European linguistic pluriformity. This is something to be dealt with in the imminent future. Let me just mention some ongoing research, which by and large has not yet adopted the clarity idea. A promising project is the *Uniform terminology for European contract law* group. Two years ago, the group published a volume in which especially the three papers on methodology are of interest[107]. Piercarlo Rossi develops a fiery plea for the development of a 'deep grammar' to solve all linguistic problems in harmonising legislation[108]. Barbara Pasa argues that such uniform terminology already exists in the area of European consumer law[109]. Theodor Katsas finally advocates using a comparative method in legislative

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[103] *UNIDROIT Principles of International Commercial Contracts*, Rome: UNIDROIT, 1994, 256 p.; *UNIDROIT Principles of International Commercial Contracts*, Rome: UNIDROIT, 2004, 385 p.

[104] Giuseppe Gandolfi (ed), *Code européen des contrats/Avant-projet, Livre premier,* Milano: Giuffrè, 2001, 576 p.; Giuseppe Gandolfi (ed), *Code européen des contrats/Avant-projet, Livre deuxième I,* Milano: Giuffrè, 2007, 197 p.

[105] See also No. 2 under (b) above.

[106] Cheryl Stephens, *An introduction to plain language*, <http://www.plainlanguagenetwork.org/stephens/intro.html>.

[107] Gianmaria Ajani & Martin Ebers (eds), *Uniform terminology for European contract law*, Baden-Baden: Nomos, 2005, 384 p.

[108] *Uniform terminology for European contract law* 2005, p. 23-47.

[109] *Uniform terminology for European contract law* 2005, p.

interpretation[110]. Multilinguism has often been welcomed as an instrument to enhance the interpretation of European texts[111]. And this is how the new Member States have been welcomed linguistically:

The recent expansion of the EU into eastern Europe, whose linguistically rich landscape has too-often in recent history been the scene of gross human rights violations, has provided the EU with a wonderful opportunity to re-conceptualize language as being something more than a medium through which commerce is conducted and to recognize that it is at the core of what it means to be a human being[112].

And finally, the importance from a clarity point of view of good translation should be kept in mind[113].

(c) Methodology

Third, on the methodological level, I advocate co-operation with representatives of other disciplines, such as linguists and psychologists[114], in order to improve the quality of legal texts.

Acknowledgements

Having come to the end of this lecture, I would like to address some of those with whom I have cooperated over the past years - and with whom I hope to continue cooperation in the imminent future. In order to keep the list within bounds I have opted for the following procedure. I have selected ten classes of persons with whom I have had contacts over the years. From each group I will address one person whom I deem representative of his or her class (there is no opt-out).

49-87.

[110] *Uniform terminology for European contract law* 2005, p. 89-101.

[111] See Isolde Burr & Thomas Mann, 'Die Charta der Grundrechte der Europäischen Union als Paradigma einer sprachenvergleichende Auslegung im Europarecht', in: Isolde Burr & Gertrud Gréciano (eds), *Europa: Sprache und Recht/La construction européenne: aspects linguistiques et juridiques*, Baden-Baden: Nomos, 2003, p. 33-49.

[112] Richard L. Creech, *Law and language in the European Union/The paradox of a Babel 'united in diversity',* Groningen: Europa Law Publishing, 2005, p. 158.

[113] See Sieglinde Pommer, *Rechtsübersetzung und Rechtsvergleichung*, PhD thesis Vienna 2003, Frankfurt: Lang, 2006, 172 p.

[114] See already Robert P. Charrow & Veda R. Charrow, Making legal language understandable: A psycholinguist study of jury instructions, 79 *Columbia Law Review* 1306 ff. (1979).

The first class is that of my teachers and lecturers. From this slowly vanishing group I wish to mention **Auke Bloembergen**, 'an Utrecht man in Leiden'. Not only did he supervise my PhD on unfair contract terms which I defended at the University of Leiden nearly thirty years ago. Bloembergen was also responsible for creating a climate of legal research there. An excellent representative of my present colleagues at the Molengraaff Institute is **Katharina Boele-Woelki**, who almost single-handedly organised the movement towards the European harmonisation of family law and who showed us the way to interdisciplinary research.

My professional contacts have not been limited to the Molengraaff Institute, that 'Burg van IQ aan de Gracht' as it was once nicknamed. I have also profited from my cooperation with other colleagues in the Law Faculty such as **Constantijn Kelk**, the Faculty's first Faculty Law Professor. Together with him, I had the privilege, over a ten-year period, of selecting the faculty's new deans. From the many colleagues in other Law Faculties, I wish to thank **Michael Faure**, the ever-cheerfull Director of the successfull *Ius commune research school*, and **Christoph Grigoleit**, my German colleague who at present is co-chairing, together with myself, the Common Core project on change of circumstances.

Over the past 40 years, I have had the pleasure of working with several generations of students, many of whom have become colleagues and friends. One such former student is **Hans Nieuwenhuis**, who not only served as a Professor of Law in Tilburg, Groningen, and presently (again) in Leyden, but also as a Judge in the *Hoge Raad*. His major reputation, however, has been gained through his many publications, such as his *Waartoe is het recht op aarde?*[115]. A special category of students is formed by the PhD candidates whom I have had the pleasure of supervising. By way of an example I would like to mention **Niels Frenk**, currently employed by the Ministry of Justice and Professor of Law at the *Vrije Universiteit* in Amsterdam and one of the finest persons one can imagine.

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Coming finally to the broad group of family, friends and relatives, it is without doubt that I owe most to my lovely wife **Ellen Hondius-Schoots**. I wish to thank her for the support she has always given me.

Thank you all.

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[115] Hans Nieuwenhuis, *Waartoe is het recht op aarde?* , The Hague: Boom, 2006, 197 p.

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TABLE OF CONTENTS