Plain, Clear, and Something More?

Criteria for Communication in Legal Language

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Abstract

Legislation may be presumed to be intended to transmit a message to those whose conduct it aims to affect. That message achieves its purpose only insofar as it is intelligible to its recipients. Drafters should make every effort to use plain language, but not all meaning can be transferred in plain language. The true criterion is clarity.

'Mediation' and 'conciliation' are examples of definitions created by legislators which do not correspond with categories in practice. Historical research illuminates cultural differences which affect transmission of meaning. Recent practice also illustrates the possibilities of creative methods for resolving disputes and the dangers of unnecessary prescription.

Imprecise thinking of legislators precludes transmission of precise meaning, as does preference for word-for-word translation. 'Highest Common Factor' language is no substitute for natural target language.

No efforts of legislators or translators can prevail against political power. 'Ignorance of the law is no excuse' overrides the imperative to transfer meaning.

If research is to be effective, it must be not only comparative but interdisciplinary.

Keywords: plain language, legislative drafting, definition, mediation, ignorance of the law.

A. Introduction

Every morning, when I get my emails up, there is one from the Law Society, my professional body, trying to keep me up-to-date. Recently it included a note from Nick Parker, a language consultant.[1] It was exceptionally well written. It also stated a fact which I hope will end a lot of argument. Is plain speech worthwhile? Thank you Mr Parker for this:

> One client I worked for recently saved over £6 million in call centre call-handling time by rewording a slab of distance-selling regulation legalese.

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1 N. Parker, *Law Society Gazette*, 5 April 2013.

So plain speech really does pay! But is plainness the necessary quality we all seek, or is there something more?

Just a few days later, Richard Heaton, the British Government officer who oversees the drafting of legislation, published a report calling for legislation to be made easier to understand, saying:[2]

> Excessive complexity hinders economic activity, creating burdens for individuals, businesses and communities. It obstructs good government. It undermines the rule of law.

Who could disagree? We can discount the lawyer-blogger who responded at once that he was gleefully preparing for the welter of litigation that would ensue.[3] Advocates of plain language understand its purpose well:[4]

> Plain language is not a dialect of the standard language but a relationship between the text and its audience. Text that will be plain for one audience will not be plain for another.

And some recipients will seem wilfully uncomprehending, like the charming old woman client I had as a young solicitor, who gave me instructions for the sale of her house from her hospital bed. I sent the contract with her daughter for her to sign, giving careful instructions about how the signature should be witnessed. I would never have taken the chance if it had been her will and I learned not to risk any document again, because I had attached a note: 'sign where you see your initials in pencil'. Needless to say, despite her daughter's protest, she insisted on signing in pencil.

I taught in Papua New Guinea for five years and practised there as a barrister in all the courts other than village courts, from which lawyers were excluded. The problems of language were more than enough to satisfy even the greediest student of linguistics. The language of the higher courts and of the law they employed was English. Most of the parties who came before them, even if they had no English, had some command of one of the two pidgins which then prevailed: Tok Pisin and Hiri Motu. But many of those charged with offences in the lower, magistrates', courts spoke only their tok ples, the language of their own community. At the last count, they numbered over 800 quite distinct languages.

A village man, who spoke only his tok ples, had been convicted by a magistrate of having sexual intercourse with an underage girl. He appealed to the High Court on the ground that the magistrate had heard no evidence of the girl's age. That was enough to ensure that the appeal succeeded, but the judge took the opportunity of giving general instructions to magistrates on taking a plea. They

2 'When Laws Become Too Complex', 16 April 2013.

3 There are better calls for caution, F. Bennion, 'Confusion Over Plain Language Law', 16 *The Commonwealth Lawyer*, 2007, pp. 63-68.

4 M. Adler, 'The Plain Language Movement', *in* P.M. Tiersma & L.M. Solan (Eds.), *The Oxford Handbook of Language and Law*, Oxford, Oxford UP 2012, pp. 67-85, at 68.

must ensure that the defendant knew the full meaning of 'Do you plead guilty or not guilty?' All elements of the offence must be explained. It was not enough to translate the English into 'Did you do it?' The offence in this case required the girl to be under the age of 16 and for the accused to know she was. If she had been over 16 and had not consented, that would have been a different offence. The judge suspected that the magistrate's clerk had put to the defendant in his tok ples the simple question: 'Did you do it?' What he should have asked was: 'Did you have sexual intercourse with the complainant?' then 'Did she consent?' and then 'Did you know she was under the age of consent?' – all in the defendant's tok ples.[5]

Now nothing could be *plainer* than 'Did you do it?' But that message did not do the job. So it is not plainness that ultimately counts but clarity – the quality of transferring a message from one mind to another comprehensively and with no distortion. Plainness is good but clarity matters more.

B. Clarity in the Source of Language

There is no hope of sending a clear message in the target language if the source is not clear. The lack of clarity may be, and usually is, unintentional. But not always, as shown below in Part H.

Much has been written about problems of translation which arise from the imperfect fit of one word (or a phrase) in the source language (SL) with its near but only approximate equivalent in the target language (TL). It is common experience that in many cases no one word equivalent exists, but scientific opinion now insists that anything in the SL can be put into the TL if you have words and patience enough and no practical constraints.[6]

A fundamental problem is that of unintentional obscurity arising from the failure of the creators of the word or phrase in the SL to give enough thought to what they wanted the word to mean. This happens when legislators share an idea but have not thought it out. The drafters and translators then have no chance of scientific accuracy, because there is none to represent. The best they can do is create something like the nonsense of the original, like translating *Finnegans Wake*. An example is to be found in the European Mediation Directive (the Directive).[7]

Article 1 declares that: "The objective is… ensuring a balanced relationship between mediation and judicial proceedings". 'Balance' and its equivalents in any language can mean nothing here. Balance has nothing to do with the Directive's

5 It is not impossible that the judge in Papua New Guinea was familiar with the scholarly attention that had recently been given to this very question. M. Gotti, 'Text and Genre', *in* Tiersma & Solan (Eds.), *Oxford Handbook of Language and Law*, Oxford, Oxford University Press 2012, pp. 52-66, at 58, discusses it, citing P. Carlen, *Magistrates' Justice*, London, Martin Robertson 1976.

6 My views are set out most fully in K.K. Sin & D. Roebuck, 'The Ego and I and Ngo: Theoretical Problems in the Translation of the Common Law into Chinese', *in* R. Wacks (Ed.), *Hong Kong, China and 1997: Essays in Legal Theory*, Hong Kong, Hong Kong UP 1993, pp. 185-210.

7 24 May 2008 Directive 2008/52/EC. The following sections are a revision of parts of a lecture 'Arbitration, Mediation, Conciliation: Pitfalls of Prescription', 2nd International Conference on Language and Law, Caserta, Faculty of Law, University of Naples 2, 10 May 2012 [Caserta].

purpose. The metaphor[8] of the scales betrays the clumsy thinking of the politician, who may be defined as "someone who professionally strives to maintain a balance between good and evil", or should we be kind and translate that into "between principle and expediency"? Is what is to be sought an equal number of disputes referred to litigation and its alternatives? Should both be considered equally desirable? Even if that metaphor of the balance could be given any meaning, what value would it serve?

Yet what is needed is perfectly clear: the best possible working relations between the courts and private dispute management in the provision of the best possible means of disposing appropriately of those differences between parties which become disputes they cannot settle themselves.[9] Conflicts best dealt with by litigation should go to the courts. All the others should be distributed in the most efficient way between appropriate forms of arbitration and mediation.

Litigation and its alternatives are not competing *interests* to be weighed against each other. Of course, that may be how they are seen by some of the lawyers and others who make their living from them, though the Directive is not meant for them.

C. Problems of Definition

Drafters often need to define their terms. If their language is prescriptive, and if they want to tell people what they must or cannot do, the audience has a right to know precisely what is in and what is out. It would be unfair to wait until a difference arose and make some random victim bear the burden of interpretation.

Definitions often work by dividing similar phenomena into distinct categories. Many who should know better have succumbed to the temptation to create categories first and then to force reality into them. Recently there have been attempts to use the words 'mediation' and 'conciliation' to label distinct categories. Scholars have done that and others have picked them up for it. It matters more, though, and is harder to correct, when legislators do it.

I. Mediation and Mediator

The Directive, which relates to cross-border disputes, provides a splendid example. Apparently oblivious of any concern that control may hamper natural development, the drafters of the Directive would try to codify the meaning and limit the usage of some basic terms:

8 Failure to detect a metaphor, or to be aware of its power, lies behind some problems of ambiguity: R. Poscher, 'Ambiguity and Vagueness in Legal Interpretation', *in* Tiersma & Solan (Eds.), *Oxford Handbook of Language and Law*, Oxford, Oxford University Press 2011, pp. 129-144, discussing Quine's hard chairs, hard cases, and hard choices.

9 As Rix L.J. said in *Rolf v. De Guerin* [2011] EWCA Civ 78: 'As for wanting his day in court, that of course is a reason why the courts have been unwilling to compel parties to mediate rather than litigate; but it does not seem to me to be an adequate response to a proper judicial concern that parties should respond reasonably to offers to mediate or settle.'

> Article 3(a) 'Mediation' means a structured process… whereby two or more parties to a dispute attempt by themselves, on a voluntary basis,[10] to reach an agreement on the settlement of their dispute with the assistance of a mediator.

What helpful meaning can possibly be attached to the word 'structured' here? All attempts to mediate a settlement have a structure. That structure – perhaps better thought of as a process – must be specific to the dispute and exist within a particular culture. What restrictions would these would-be lawgivers like to impose to make the process fit their Procrustean bed?[11]

And article 3(b) defines 'mediator' as:

> any third person who is asked to conduct a mediation in an effective, impartial and competent way.

That presumably is prescriptive: if you fit it you are a mediator, if you do not you are not. But what if the appointment says 'unbiased' rather than 'impartial'? Does that prevent the third person from being a mediator? And what if a definition merely requires the third party to be 'neutral', as the Swiss Rules of Commercial Mediation do in their English version?

> Mediation is an alternative method of dispute resolution whereby two or more parties ask a neutral third party, the mediator, to assist them in settling a dispute or in avoiding future conflicts.

How often will the appointment bother to state the obvious: that the parties require the mediator to be competent and effective? If it does not, is the third person not a mediator for the purposes of the Directive? What is going on here?

Of course, the Directive is not itself legislation. It is a corporate statement of policy of all the Member States. It needs national legislation to incorporate it into local law, which all Member States were expected to accomplish by 21 May 2011. France, for example, has already incorporated a straight translation into the French Civil Code.[12] The United Kingdom has its own regulations.[13] The EU now works in 24 official and 5 semi-official languages. Further research is needed to show how those languages use their words for what happens in private dispute management and further thought about the nature of dispute resolution, with recognition of its variations in cultures different in time and space. The time element is integral to the problem. No legislation can control how linguistic usages develop, and it takes little imagination to foresee how unintended consequences are bound to result.

10 'Voluntarily' would be plainer and until recently more natural. English seems to be losing its adverbs on a daily, regular, and deplorable basis.

11 The Hong Kong Mediation Ordinance 2012 has the same requirement of 'structure'.

12 Decret No. 2012-66 of 20/1/2011.

13 Cross-Border Mediation (EU Directive) Regulations 2011 (SI 2011/1133).

II. Mediation and Conciliation

In ordinary English, mediation and conciliation have the same meaning. They are synonymous and interchangeable. This linguistic reality is recognised in the UNCITRAL Model Law on International Commercial Conciliation,[14] which is intended to provide uniform rules for the conciliation process, to encourage the use of what it consistently calls conciliation, and to ensure greater predictability and certainty in its use. Article 3 defines 'conciliation' to include both processes:

> 'Conciliation' means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ('the conciliator') to assist them in their attempt to reach an amicable settlement.

But brave efforts have been made to insist on a distinction between mediation and conciliation. The Italian legislation, in incorporating the European Directive, introduces a linguistic distinction, using *mediazione* for the process and *conciliazione* for the product. The Swiss Rules of Commercial Mediation try to draw a more familiar distinction:

> The mediator facilitates the exchange of opinions between the parties and encourages them to explore solutions that are acceptable to all the parties.... The mediator does not make proposals like a conciliator.

So at first sight there appear to be three current usages: (1) 'conciliation' includes both, or (2) 'mediation' includes both, or (3) a distinction is made. The choice between 1 and 2 is unimportant. Of course, it would be pleasanter and give us greater self-respect, no doubt, if we could all agree to one or the other, as chemists do with sulphur dioxide. But the practical problems arise when we create two categories and have to choose into which we put phenomena, when that allocation has practical effect.

Unless the categories are both comprehensive of all relevant phenomena and are mutually exclusive, and the criteria for allocation of all the phenomena between them are not only clear but agreed, the process is not only flawed but dangerous. It is easy to show that any attempt to create two categories – mediation and conciliation in the English language – are quite artificial. Often the distinctions are unconsciously culturally specific.[15]

A good example comes from Sanja Tseveenjav's article 'Mediation in Mongolia', which makes this suggestion:[16]

> Conciliation and mediation can be differentiated – the former referring to settlement efforts made during the court proceedings, whereas the latter

14 Adopted by UNCITRAL 24 June 2002.

15 For a quite different approach: The People's Mediation Law of the People's Republic of China 2011.

16 S. Tseveenjav, 'Mediation in Mongolia', 77 *Arbitration*, 2011, pp. 332-336, at 332.

> refers to out-of-court settlement processes, i.e. mediation in its classical sense as employed, for example, in the United Kingdom.

That should not be assumed to be an oriental peculiarity. A Dutch mediator has made a similar suggestion. John M Bosnak cites the Directive article 3(a):[17]

> [Conciliation] includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

And he suggests that: "maybe mediation practitioners and scholars should agree that the word 'conciliation' should be exclusively allocated to this type of judicial settlement activity". But the text does not have '[Conciliation]'. It says 'Mediation'. And the concern about judges attempting to mediate in a case before them has a quite different history in Civil Law jurisdictions from those of the Common Law, where the concern has not arisen in the same way.

There would appear to be no obvious direct route for cross-fertilisation between Mongolia and The Netherlands. How could what seems to be an idiosyncratic definition sprout in such different climates? Was it born in the Directive or has it a history? Why should it matter whether or not the mediation process is carried on by a judge during the litigation? It is commonplace for English lawyers that judges will grasp an opportunity to assist the parties to settle and has been for as long as history relates. The answer may be found in the separate histories of the *compromissum* in practice in France (and other Civil Law jurisdictions) and in England, and in the quite different influence which the jurists had.

D. A Historical Explanation

It all starts with Justinian's *Digest*:[18]

> The Lex Julia prohibits a *iudex* from accepting appointment as *arbiter* in a matter in which he is *iudex*.

The *iudex* was a person appointed by the praetor, by the State, to try a case to a conclusion according to law. An *arbiter* was appointed by the parties and had discretions which a *iudex* did not. Both *iudex* and *arbiter* were private persons. They needed no legal qualifications. Neither can be called a judge. But it would be a contempt for a *iudex* to prefer his own opinion of what was just over the outcome prescribed by the law of the State.

17 J.M. Bosnak, 'The European Mediation Directive: More Questions than Answers', *in* A. Ingen-Housz (Ed.), *ADR in Business II*, Alphen aan den Rijn, Wolters Kluwer 2011, pp. 625-657, at 642. All of this article and, indeed, all of this collection of essays, repay careful reading.

18 D 4.8.9.2.

That prohibition never applied in England. There judges commonly took a matter away, with the consent of the parties, to handle it privately as arbitrator, which included attempting mediation. But in France, for example, the prohibition continued. If it was not what the parties wanted, they invented a way round it. First in Bourgogne in AD1249 and then commonly in the 14th century, the parties' lawyers would draft the *compromissum* so that the dispute was submitted to an *arbiter, arbitrator seu amicabilis compositor*.[19] Huguccio had pointed out at the end of the 12th century that there was a difference between an *arbiter* and an *arbitrator*.[20]

> So he is not an *arbiter* but an *arbitrans* or *arbitrator* and it is not called an award, *arbitrium*, but a settlement, *arbitratus*, a kind of agreement.

That is the point to keep in mind. The result of the mediation process is not a judgment imposed on the parties but the product of their own agreement. It follows logically that the product of an agreement cannot be appealed against. The parties are stuck with it because that is what they have declared to one another that they wanted.

Civil Law jurists might argue that a submission must be one thing or the other, but the parties were not concerned then with such theoretical niceties, any more than they are now. Their culture had always known the inclusive process whereby the 'arbitrators', call them what you will, had used every means at their disposal to arrive at a settlement. 'Bottom up' custom prevailed over 'top down' law.

For us, today a process has to be either mediation, where a third party is agreed on by the parties to try to bring them to a settlement, whose only force comes from their subsequent agreement, or arbitration, where the third party adjudicates and the parties are bound by their previous agreement to abide by the award. But, well into the 17th century in England, there was one routine process which everybody then called arbitration, in which the parties asked third parties to help them resolve the dispute by whatever means they could.

Nowadays much is made of the need for mediators and arbitrators to be neutral and impartial. In the USA, there are elaborate rules which discourage the appointment of those with previous acquaintance of either party.[21] There is nothing God-given about this. It was not always so. Many societies have preferred what the Greeks called a *koinē*, someone common to both parties, equally the friend of both, or, as in 1344 Pope Clement VI declared himself to be, when acting as mediator between Edward III of England and Philip VI of France: *persona*

19 The story is fully told by A. Lefèbvre-Teillard, 'Arbiter, Arbitrator seu Amicabilis Compositor', *Revue de l'Arbitrage*, 2008, pp. 369-387; E. Déprez, 'La Conférence d'Avignon (1344): L'Arbitrage Pontifical entre La France et L'Angleterre', *in* A.G. Little & F.M. Powicke (Eds.), *Essays in Medieval History Presented to Thomas Frederick Tout*, Manchester for the Subscribers 1925, pp. 301-320, at 304.

20 Lefèbvre-Teillard 2008, pp. 372-373.

21 The law is more practical in England, *e.g. A & Ors v B & Anor* [2011] EWHC 2345 (Comm).

privata et amicus communis, acting in a private capacity and as a friend of both sides.[22] It was usually clear by implication and often expressed that the third parties were chosen just because they were already 'friends to both sides'.

Most often, each side appointed one or often two such 'friends'. The two or four then got together and discussed everything they thought was relevant, not only what we would now divide into matters of fact and law but also anything they knew about the background of the dispute, including the reputations of the parties generally and their families and what was being said in the community about the dispute. They argued and did deals, consulting their parties as appropriate. If they could come to some agreement, even if only of parts of the dispute, they submitted it to the parties. If the parties accepted it, well and good. If not, the 'arbitrators' might make an award about whatever was still in dispute.

However agreement was achieved, the record commonly says that the parties then agreed on the award – with a kiss or a feast – but, if one was not happy with the award, it depended on the power of the arbitrators to enforce it. Of course, people then knew the difference between the concepts of mediation and arbitration, but the *process* they used did not keep them separate.

The resolution of a dispute by arbitration was not primarily a legal outcome. It was more real than that. The parties had publicly acknowledged that their dispute was over.

So the wishful thinking of legislators that practitioners and scholars should adopt categories with hard edges and give them distinguishing names which all will accept is unrealistic. Practice is still determined by custom. Though the law may seem to speak the same, what happens in reality is better thought of as a kaleidoscope than a template.

The confusion does not arise from reality but from an insistence on forcing language into unnatural shapes. In reality, perhaps in all cultures, those we now call mediators have commonly moved backwards and forwards, using whatever skills they had to help to bring about a settlement. In many attempts to mediate, you would have to record what happens to be able to spot when a mediator moves from one mode to another, perhaps by no more than a slight hint.[23] The prescriptive commentator would be saying, stopping the playback: "Ah, that's mediation there – whoops, nearly slipped into conciliation, there she's gone, over the line, back again but, of course, all is now tainted with conciliation". In something so consensual as alternative dispute resolution, what the parties want and what they think their community should offer them will prevail over any top-down prescriptions.

22 Déprez 1925, p. 304.

23 Perhaps using the analytical methods of E. Stokoe, 'Overcoming Barriers in Intake Calls to Services: Research-Based Strategies for Mediators', 29 *Negotiation J*, 2013, pp. 289-314 and her other recent publications.

E. A Recent Proof

The Directive does not demand the registration or professional qualification of mediators but some have seen a danger even in Article 4:

> 1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other quality control mechanisms concerning the provision of mediation services.

A recent article tells what its authors call "a cautionary tale against the unintended negative consequences of misdirected regulation".[24] It concerns a difference between British American Tobacco (BAT) and Pall Mall Export Clothing (PM). BAT owned some clothing brands and licensed PM to exploit them. BAT wanted to sell the brands and PM wanted to buy them. The only difference between them was the price. Both parties wanted to avoid litigation and any alternative that would be costly and time-consuming. Their advisers considered together all the alternatives and rejected traditional arbitration and mediation. They chose instead a process which took advantage of both but in the reverse order from what one might expect. In a procedure well-known now in the Common Law world as 'arb-med', the arbitrator-mediator held a hearing as arbitrator, which took one morning. At lunch time, he made an award fixing the sum he deemed appropriate. But he did not declare the award. Instead he put it in a sealed envelope. When they all met again in the afternoon, he had been transmogrified into a mediator. With his help – and with the sealed award sitting there in front of them – they were able to agree on a figure.

They could have opened the envelope. The temptation must have been strong. But BAT's representative expressed the preference of both parties:

> We had shaken hands. Both of us were happy with the outcome. If we opened the envelope, that situation would most likely change. One of us would suddenly have become unhappy.

When parties know that there will be haggling, they invariably exaggerate their claims. As long as they are not shamed into admitting that, they know they must compromise to some degree and are happy to come down to their own genuine estimate and some way further to save money, for the sake of efficiency, for peace, even in the hope of future good relations and perhaps further business.

The figure in the envelope was clear, simple but clumsy. The compromise the parties had struck was, in the words of the arbitrator-mediator:

24 K. Bryan & M. Weinstein, 'The Case Against Misdirected Regulation of ADR', *Dispute Resolution Magazine*, Spring 2013, pp. 8-11.

> a multi-faceted deal, and they worked it out together. It was much better for them than whatever one-dimension number I had written in the envelope. This deal pleased them both. Outcomes don't come better than that.

The trend not only in the USA but in some Western European jurisdictions is for greater prescription, for putting restrictions on who may practise as a mediator and who may be appointed arbitrator. Professional training is suggested as a prerequisite. Parties should not be allowed to appoint their own 'friendly' arbitrators, even one for each side with an impartial umpire.

A moment's thought reveals the limits to such schemes.[25] Whatever the legislation, however clearly it is expressed, if both sides to a difference want to arrange for themselves how they prefer to have it resolved, there is nothing that will stop them. Whatever procedure the law provides for their dispute, if both sides agree they can always quietly walk away.

F. Word-for-Word

Translators' aspirations to satisfy the simplistic demands of those who employ them to find simple word-for-word or phrase-for-phrase equivalents lead them on a wild goose chase. A moment's thought reveals the nature of the problem. Surely it would be hard to find a simpler, more universal concept than 'summer'. Legislators find no difficulty in defining 'summer time'. But would their one- or two-word translation do for the summer time 'when the livin' is easy'?

One day, the EU may want to control the sale of *paella*. When it does, the languages of the EU other than Spanish will have a problem. They will not have a one-word equivalent. Should they just stick with *paella* as a calque? Any alternative might require a recipe. At least there will be no difficulty in finding out whether the translation has worked. There would be no shortage of volunteers to apply a simple test.

Susan Šarčević has given a neat body of examples:[26]

> The concept of *décision* in French law corresponds with two or more specific concepts in German law (*Entscheidung* and *Beschluss*) and three in Dutch law (*beschikking*, *besluit*, *beslissing*). Although etymological equivalents such as *dettes* and *debts* or *contrat* and *contract* signify the same object, they are not identical at the conceptual level. Moreover, within the same language a single term sometimes designates different concepts in different legal systems. For instance *domicile* has one meaning in English law and quite different meanings in American jurisdictions.

25 D. Yarn, 'The Death of ADR: A Cautionary Tale of Isomorphism through Institutionalization', *Penn State Law Review*, Vol. 108, 2003-2004, p. 929.

26 S. Šarčević, 'Challenges to the Legal Translator', *in* Tiersma & Solan (Eds.), *Oxford Handbook of Language and Law*, Oxford, Oxford University Press 2012, pp. 187-199, at 190, and note her consideration of the disastrous effect of different interpretations of *dol* and *wilful misconduct* on the application of the Warsaw Carriage by Air Convention, p. 196.

Word-for-word just does not work. Nor should it be the goal of scientists, those of us who aspire to be scientific in our study and creation of language. Sometimes it works and we can breathe a sigh of relief. But we should be alert to when it does not and then have no qualms in providing an alternative that does. That may require an explanation rather than a translation. If one word is obligatory, and sometimes a calque is acceptable, it should have attached to it a glossary explanation. But at all times, there should be a simple imperative: the meaning has to be recreated in words of the TL – in the real language targeted, not a translator's construct.[27]

The Selden Society, the learned society devoted to the study of English legal history, has provided examples of a misguided preference for what the translators would no doubt call literal translation. Every one of its 127 annual volumes is a monument to careful scholarship. But the original texts in Latin or French were, in earlier volumes, translated into something which no person ever spoke or wrote or could understand accurately without reference to the original. For example, in the volume for 1890, a typical translated passage reads:[28]

> Tort and force and all that is against the lord's peace and the lord's damages of a mark and shame of a half-mark and every penny thereof defendeth Walter of the Cross, who is here, against Thomas of Bayngrave, who is there, and against his suit and all that he surmiseth against him.

It is the word 'surmiseth' which gives the game away. Not since the 17th century has 'surmise' meant in English the same as the original insular French: *mette sur*. By choosing it, no translator could hope to convey an accurate, if any, meaning to a contemporary reader. The full phrase in the French is: *e quant que yly mette sur*. It is easy to put that into real English: 'and whatever he accuses him of'. Why choose 'surmiseth against'? A simple misunderstanding by non-professionals, however distinguished their scholarship, of what is required of a translation?

Fortunately that fashion has passed. How different a modern volume is translated![29]

> *Del houre qe sun baroun qest sun chief est de plein age suffit a trover suirte.*
>
> Since her husband who is her boss is of full age it is sufficient if the writ mentions the finding of sureties.

Not only the totally idiomatic 'boss' for *chief*, but the expansion of *trover suirte* to 'the writ mentions the finding of sureties'.

27 H. Vermeer's *skopostheorie* develops ideas about transmission of ideas into the cultural as well as the linguistic world of the TL.

28 F.W. Maitland and W.P. Baildon (Eds.), *The Court Baron*, Vol. 4, Selden Society, 1891, p. 43.

29 P.A. Brand, *The Earliest English Law Reports*, Vol. IV, Selden Society, Vol. 23, 2007, p. 509.

G. Highest Common Factor English

Lawyers are skilled users of language. They always have been. Now more than ever, though, their world is multilingual. The paradox is that the more the use of English dominates business and its law, the more diverse the influences on that English are and the more pervasive are the forces which push towards the creation and use of a new language for non-native speakers of English. With the spread of this new apparently simplified language come increased dangers of partial comprehension and blurring of necessary distinctions.

'Eurospeak' and other 'reduced' languages are here to stay. It would be better to use for them terms which carry no pejorative connotation. I like 'HCFs', Highest Common Factor Languages. They lack the characteristics of natural languages: the cultural, referential connections made automatically by native speakers, and the continuous development which makes possible more sophisticated transmission. It will take many years to develop any HCF to compete with any natural language in what it can do to transmit messages clearly.

Anyone who uses a big database soon gets to know its shortcomings. The corporate intelligence of its creators combined with the technical limitations of even the most modern technology ensure that its usefulness falls far short of what the ordinary intelligence of its users require. One need only cite the risible results of any of the automatic translation providers, for example, from a recent book catalogue:

> In-8 demi-chagrin noir, dos à quatre faux-nerfs orné de fleurons dorés, marque du lycée Condorcet au plat supérieur....
>
> In-8 black half-sorrow, back with four false-nerves decorated with gilded florets, mark of the Condorcet College to the higher dish....

It is not likely that even the most sophisticated dictionary will satisfy all the demands which some would now place upon it. Even IATE, *Inter-Active Terminology for Europe*, the magnificent new multilingual term-bank of the European Union, cannot be expected to solve all problems. One of Karen McAuliffe's informants, a *référendaire* at the European Court of Justice, told her:[30]

> You are so bound to what has been said before that you can hardly ever use a new verb or express the same thing in a slightly different way, in case the GTI doesn't pick it up.

The GTI is the ECJ's computer program to which all newly created text must be submitted for approval.

How heart-warming, therefore, was the recent speech of the German President, Joachim Gauck, in which he called on the British to accept gladly and

30 K. McAuliffe, 'Language and Law in the European Union: The Multilingual Jurisprudence of the ECJ', *in* Tiersma & Solan (Eds.), *Oxford Handbook of Language and Law*, Oxford, Oxford University Press 2012, pp. 200-216, at 206.

proudly their responsibilities in Europe.[31] He said that Europe needed one common language and that had to be English. The adoption of English must not be allowed to discourage multilingualism but:

> I am convinced that, in Europe, both can live side by side. The sense of being at home in your mother tongue, with all its poetry, as well as a workable English for all of life's situations and all age groups.

If that altruistic offer were adopted, each national language, the many varieties of English included, would be allowed to develop more naturally, affected less by the influences of HCF English (and French by the French equivalent). Yet the adoption of English as the official common language would not solve all the problems, though it would confront reality and hugely reduce costs. Each Member State (except Ireland and the United Kingdom) would still have to translate all European legislation into domestic law in its own language.

H. The Perversions of Power

The insistence on plain language has been shown to be essential but not sufficient. The drafter's aim must be accuracy of reception. The language must be clear enough to justify the assumption that the message has got through.

But is even that enough? Every receiver has a separate idiolect. Is it fair to assume that it is enough to send out a message that would be understood accurately by a *reasonable* recipient rather than the individual whose comprehension is now in question?

Even words which the legislators manifestly wanted to be unambiguous can be manipulated by judges to reach an interpretation which suits their political preferences. A problem specific to the USA arises from attempts by employers to impose on employees clauses in their contracts of employment which require them to take any claim arising out of their employment to industrial arbitration, which they all believe can be trusted to be more favourable to employers than the courts are.

In *Circuit City Stores v. Adams*,[32] the US Supreme Court by a 5:4 majority required a man who worked in an electronics store to submit to arbitration a claim against his employers. The legislation allowed employees to litigate if they preferred, despite the arbitration clause, but only if they were "seamen, railroad employees, or *any other class of workers engaged in interstate commerce*". The five more conservative judges chose the interpretation more favourable to the employers that Adams did not fall within that class and therefore had to submit his claim to arbitration. This decision depended on a peculiar approach to inter-

31 Reported in *The Guardian* 23 February 2013.

32 532 US 105 (2001); L.M. Solan, 'Linguistic Issues in Statutory Interpretation', *in* Tiersma & Solan (Eds.), *Oxford Handbook of Language and Law*, Oxford, Oxford University Press 2012, pp. 87-99, at 89-91.

pretation adopted – when it suits them – by reactionary judges.[33] They say that the words of the legislation must be given only the meaning they could have had at the time it was passed. If there were no electronics then, the legislation could not have intended to include electronic store workers, however easily they could be shown to form another class of workers engaged in interstate commerce.

Of course, the legislation was intended to protect the workers within its definition at the time it was passed. But could any fair-minded reader doubt that the legislators also intended to include workers who thereafter did the same sorts of job as business and technology developed? What other meaning would a non-lawyer give to 'any other class of workers engaged in interstate commerce'?

The constitutional theorists divide into the originalists, whose interpretation allows the legislators no foresight, and those who seek their meaning from their purpose, declared or supposed – 'teleologically'. But both sides often conveniently limit the scope of their enquiry by fighting over the distinctions between what are sometimes called 'speaker-meaning' and 'word-meaning'. That allows them to turn a blind eye to the real test: 'reader-meaning'.[34]

How different is the approach of the ECJ in interpreting EU treaties? The linguists do not agree.[35] ECJ judges are rarely eager to disclose their policy.

I. Intentional Obscurity

For generations now, lawyers have been drafting clauses for clients to put into their contracts, intended to protect them from every conceivable liability they can get away from. That works in a hire-purchase agreement, where the consumer has no chance of negotiating terms. But it does not work where the contract is between two companies, each with its own form. Then there are bound to be clashes. The lawyers might prefer to negotiate some compromise before the contract is signed, but the clients will not. They do not want to pay for what they suspect is legal busy-work. They would rather get on with their business and leave it to chance: 'If a conflict arises, we'll sort it out then', is a reply all solicitors get used to. But conflicts do arise, and conflicting clauses, or different interpretations, must be faced.

The problem is potentially even more disastrous when countries agree to leave a gap or a contradiction or an ambiguity in a treaty, just because they know that they will never come to an agreement if they press for its resolution as a condition of signature.

The slightest difference of wording may have the most terrible unforeseen consequences. Few disputes are of more immediate consequence, or more intransigent, than that about the withdrawal of Israeli forces from the West

33 Not on gun law, of course. No one even raises the possibility of reading the Second Amendment to restrict the right to bear arms to those guns available when it was passed.

34 B.H. Bix, 'Legal Interpretation and the Philosophy of Language', *in* Tiersma & Solan (Eds.), *Oxford Handbook of Language and Law*, Oxford, Oxford University Press 2012, pp. 145-155, at 154, and the mass of learning on Hans Vermeer's *skopostheorie*.

35 C.J.W. Baaij, 'Fifty Years of Multilingual Interpretation in the European Union', *in* Tiersma & Solan (Eds.), *Oxford Handbook of Language and Law*, Oxford, Oxford University Press 2012, pp. 217-231, at 225-226.

Bank. No determination has yet been agreed of the differing interpretations of UN Resolution 242 of 1967. There is said to be a conflict between the English and all the other versions of the clause that, in English, calls for 'the withdrawal of Israeli forces from territories occupied in the recent conflict'.

No advocate of plain language could fault that used by any of the parties to the drafting of this disputed clause. It is plain but not clear. But could any scientist in the field of linguistics have any doubt that there is only one meaning that could be taken seriously? Why then the problem?

The US and Israeli Governments argue that the lack of a definite article before 'territories' means that Israel is not required to give *all* the territories back. In English there is at least an argument that the words are ambiguous. But the other official languages of the United Nations – Arabic, Chinese, French, Russian, and Spanish – use a definite form unambiguously. The French version reads:

> Retrait des forces armées israéliennes des territoires occupés lors du récent conflit.

It is true that there is no definite article in the English, while the French (and Arabic, Chinese, Russian, and Spanish) clearly include it. This is no quibble. If the Resolution requires Israel to withdraw from 'the occupied territories', then Israel is in breach; but not if the absence of the definite article in English gives the true meaning.

No agreement is likely to be found in the suggestion, which has been seriously made, that all the other versions suffer from mistranslation. Nor can any other country be persuaded to accept the interpretation preferred by Israel – and the USA and those countries it influences. That is not the usual way of interpreting plurals, for example, in legislation that provides for 'freedom of navigation through international waterways'. There might well be opposition to an Arab state inhibiting navigation through just one international waterway of its choosing. And could the oaf with a pit-bullterrier argue that DOGS MUST BE KEPT ON A LEAD meant only some dogs?

There is a rule of interpretation which is otherwise invariably applied: that in case of ambiguity all versions of a treaty are studied together to resolve it by reconciling the texts. But the counter argument is that the Resolution was introduced by the United Kingdom. It was created in English. The version voted on was in English. Therefore, only the English version is authentic.

Would it be unscholarly to imagine that the representatives of more than one of the powers at the time saw the problem but preferred not to raise it?

II. Ignorantia Iuris Haud Excusat

One last topic illuminates the problem of politics and legislative intent. The meaning of legislation creating criminal offences is never found by asking what it was reasonable to expect the accused to make of it. The court seeks the intention of the transmitter only, not the recipient. Why? Lawyers reply with the well-known maxim: ignorance of the law is no excuse. The original is in Latin, though very late, being recorded for the first time in England, I believe, as late as the

17th century, first as *ignorantia iuris non excusat* but soon taking on a more aggressive form: *ignorantia iuris haud excusat* – ignorance of the law is no excuse at all – or *ignorantia iuris neminem excusat* – ignorance of the law excuses nobody. Why was the maxim expressed so forcefully? Because lawyers were uncomfortable with not being able to justify it? Most non-lawyers would expect that you would be acquitted if you could prove that you did not know you were committing an offence. Morally, if you do not know that what you are doing is wrong, what blame attaches to your act? What right has the state to punish you? Of course, even in our imperfect world, if convicted you can expect to be treated more leniently if you can prove your ignorance. But is that enough? We do not convict those who are mentally ill or too young to know right from wrong.

The answers to these questions show the true nature of law. The earliest answer, as old as the maxim itself, is the usual one: if we allowed ignorance to be pleaded as a defence, it would be too easy for wrongdoers to escape conviction. That is not really an answer to the problem which would arise if someone came out of the forest, who had never lived with others before, and took a loaf in ignorance of the law of theft. Moreover the usual answer assumes too much. Is it likely that wrongdoers would plead ignorance successfully? They would not get away with it. There are many other ways in which an accused can avoid conviction if the court can be persuaded of the truthfulness of an excuse. If you are charged with theft, you may be acquitted if you can persuade the court that you had no intention of permanently depriving the owner of the thing stolen. If you are found with my wallet in your pocket, you can always try that defence. I would not bet on you succeeding. Similarly, you would not be likely to persuade the court that you did not know that theft was a crime. But why should you be stopped from trying?

The true answer must be that the law is not primarily concerned with whether it does justice to the individual. The law's primary concern is not justice but order. Whatever the theory, the interests of the state are paramount in practice. But the morality of punishing the morally guiltless should worry us. Even if we accept that the interests of the community demand that ignorance of the law be no excuse, surely that imposes on drafters and interpreters and translators alike the moral obligation to send a clear message.

The ability of those with power to control the meaning of language needs no George Orwell to bring it to our notice. What language could be simpler, plainer, or clearer than that which the many millions of followers of the three great Abrahamic faiths accept as the direct commandment of their different versions of the same god: "thou shalt not kill"? The Koran expressly modifies that legislation to exclude capital punishment and the other scriptures provide many exceptions. And the Buddhist rulers of Sri Lanka must recently have found an accommodating interpretation of their own scriptures.

Millions of graves attest to the truth that, however clear the message, clarity will not prevail over wilful misinterpretation in the interests of those with power, which even the gods are helpless to prevent.

I. Conclusions

The fundamentals are not at issue. Language is code, whether speech, sign, or writing. That code has a purpose: to transmit a message. The efficacy of that transmission depends on the will and the ability of the transmitter to code the message in such a way as to exploit the ability of the recipient to understand it. We will all continue to use words as best we can to communicate what we hope to get the recipient to understand.

The more I try to understand how people communicate in managing disputes, the more I am convinced of the need for interdisciplinary enquiry. Comparative research is essential and is richer and has more colour if it is viewed not through the monocular microscope, however powerful, of a single discipline, whether law, history, anthropology, psychology, or even language. If we are to work most effectively, we shall not only have to draw on every obviously relevant discipline but also constantly keep an eye out for developments in those we have not yet recognised as potentially fruitful, particularly, perhaps, in the behavioural and neurosciences. How much more rigorously shall we be able then to test and so rely on the results of one another's work.

Would it be too bold to suggest that some of the difficulties which arise for EU translators would disappear if they stopped searching for simple equivalents and recognised what other linguists have had to do who deal, for example, with sign language for the deaf? They make no attempt to translate word-for-word or phrase-for-phrase but take what they call a holistic approach to the transfer of meaning. That is what happens when any English speaker who knows some French tries to ensure that their translation is understood by the monolingual motor mechanic who, in the small French town on their holiday trip, is trying to fix their slipping clutch.