Talking law: Clarity, transparency and legitimacy in rule-making

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INTRODUCTION

Talking law. Clarity, transparency and legitimacy in rule-making

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The Theory and Practice of Legislation has been publishing research aimed at making a contribution to understanding, interpreting and assessing the quality of legislation. Many special issues have been dedicated to the examination of legislation, both at national and international levels. To this day good quality legislation has remained most relevant, against a background of multi-level governance, persistent crises in which legislation is enacted at a faster pace than ever before, and common accusations of a larger gap between citizenry and governments. It is against this background that we propose to the readers a special issue focusing on the *clarity, transparency and legitimacy in rule-making* with a special attention to legal language.

Good quality legal language is a precondition for obtaining compliance from addressees and increasing comprehensibility by citizens. Understanding what is required and what can be expected of legal language in different rule-making contexts is, in turn, a fraught terrain which requires both empirical and normative awareness. Yet the legal language of national and international legislation and regulation, alongside court rulings, remains an under-appreciated commodity, which is more often than not abused or even completely ignored, rather than problematised and improved. From a scholarly perspective, understanding legal language with an eye to connecting (normative and linguistic) clarity with substantive transparency (towards embodied users) and their relevance to legitimacy can generate important knowledge about the functioning of legal institutions. From a practical perspective, legal language is the litmus test for legislators and regulators in order to convince their addressees of the acceptability of their proposals.

This special issue highlights two main messages emerging through a set of diverse contributions: first, legal language is a multi-faceted problem including matters of argumentation and persuasion, comprehensibility, ethics, transparency, and accountability; second, all these dimensions can only be

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addressed when seeing legal language in the context of its underlying normative goals, which cannot be reduced to compliance. These points emerge clearly from the articles in this issue in which scholars and practitioners of law reflect on the problems and potential solutions for improving legislation, regulation, legally non-binding instruments, legal rulings and machine-based legal decisions. As all studies demonstrate, legal language should be a fundamental issue of concern with serious consequences in the long-term affecting rule of law, legitimacy and ultimately citizens.

In her article 'On enhancing the quality of legislation: The Italian experience', **Laura Tafani** argues for transparency of the legislative process by pointing at the need for more citizen and stakeholder involvement, especially in times of crisis. Tafani takes as a starting point the critical observation that legislation in Italy is far from perfect, which has led over the years to dissatisfaction towards regulatory instruments and much mistrust in the institutions producing, implementing and enforcing legislation. As a former legislation quality officer at the Italian Senate, Tafani points by means of concrete examples at the enactment of urgent 'decree laws' in a way which is not always compatible with an appropriate legislative design. In her view, this has led to legislation which is not clear, consistent and homogenous. Against this background, Tafani urges for bringing together insights from law, linguistics, economics, statistics, social and behavioural sciences in order to shape regulatory acts that are capable of obtaining compliance. Finally, Tafani underlines that such an ambitious goal as better law-making can only occur if there is a shift in the political culture and a different vision of relevant institutional actors.

In 'Persuasive rather than "binding" EU soft law? An argumentative perspective on the European Commission's soft law instruments in times of crisis', **Corina Andone and Florin Coman-Kund** propose a theoretical-analytical framework combining insights from law and argumentation theory for the analysis and assessment of EU (Commission) soft law instruments, ultimately improving their quality. They highlight that argumentation is at the core of these legally non-binding instruments and underline its essential role for persuading the addresses as a means to enhance compliance, particularly during crisis periods when fast and effective action is urgently needed. Andone and Coman-Kund use insights from argumentation theory and EU law to examine closely the role of the argumentation in improving the intrinsic quality of EU (Commission) soft law instruments and outline a toolbox comprising four parameters that need to be considered in the drafting and evaluation of these instruments: (1) the content of the argumentation, (2) the design of the arguments, (3) the factors influencing argumentative effectiveness, and (4) the soundness of argumentation.

Marissa Ooms' contribution 'Risk-based due diligence reporting in global mineral supply chains and the rule through transparency' problematises the

suitability of soft law-based due diligence practices to 'help fulfil normative objectives and ideals associated with the "rule of law"' in contentious global value chains. Transparency practices under the Organisation for Economic Co-operation and Development (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas are extensively analysed and recast as a form of *rule through law*, which fails to constrain the operation of large corporations but rather *assists* them in shaping themselves and their environment. The observed internal orientation of transparency practices, Ooms argues, makes them structurally unable to fulfil the promises of participation, reflexivity and accountability that are often associated with human rights due diligence in policy debates.

Finally, two papers discuss the clarity, explanability and the relationship between these notions and the justifiability of decisions affecting individuals, in new and more established contexts. In 'Algorithmic explainability and legal reasoning', **Zsolt Zödi** examines the issue of explainability of legal decisions taken by software. He argues for narrowing down this 'semantically overloaded' concept to avoid an undesirable overlap with many ethical issues and values. Zödi suggests that arguably the concept of explainability should be used only for individual automated decisions especially when made by software based on machine learning, i.e. 'black box-like' systems. In his view, this is a viable way to draw parallels between legal decisions and machine decisions, by placing the problem to a great extent within legal theory and partly within linguistics. It is only in this way that Zödi sees a solution to understanding why and how decisions are justified, both by humans and by machines, whether such a justification is needed after all, and when it is convincing.

In the final paper in the issue, 'Plain legal language by courts: mere clarity, an expression of civic friendship or a masquerade of violence? On the use of plain legal language by Dutch courts from a legal–ethical perspective', **Iris van Domselaar** casts the Dutch experience with 'clear language' in adjudication against the different dimensions of language as representation and language as *activity*, according to which 'plain legal language is to be understood as legal professionals doing particular things with words'. For judges to be 'civic friends' to justice seekers, the paper argues, and hence increase their legitimacy when taking tough decisions, more is required than 'merely clear' language. The article thus invites plain language advocates to engage expressly with the non-linguistic aspects of accessibility in order to do justice to the normative significance of the project. It also, appropriate for a closing piece, ultimately cautions against the dark side of legitimacy-enhancing uses of legal language, namely the possibility that clarity and transparent engagement may hide the necessary violence implicit in the law.

The papers included in this special issue have been presented at the interdisciplinary symposium held at the University of Amsterdam on 21–22

January 2021. Organised by Corina Andone (Faculty of Humanities) together with Candida Leone, Anna van Duin and Iris Domselaar (Faculty of Law), and focusing on 'Talking law in the EU: Clear language, rule of law and legitimacy in the European legal space', this event brought together legal and linguistic perspectives on legal language which helped explain the essential factors affecting the working and effectiveness of EU legal language, and look for appropriate ways to address them. We would like to thank in particular Helen Xanthaki not only for her contribution to the event, but also for facilitating the publication of this special issue. We also acknowledge Patricia Popelier's engagement throughout the publication process.

Disclosure statement

No potential conflict of interest was reported by the authors.