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SHOULD LEGAL LANGUAGE BE REFORMED?

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ABSTRACT. ***Should legal language be reformed?*** If we want to make legal language a clearer and more efficient means of communication, we have to identify all the elements that are most likely in the path of clear comprehension. Some aspects of legal language present great difficulties for lay persons. Comprehension can be made difficult by linguistic elements and not elements that are specifically legal. As it was so often proved, to identify the problem is relatively easy but to find a solution is another matter. In what follows we will try to identify some of the more common elements of legal English that, according to our study, have been found to distort comprehension.

Key words*: legal discourse, specialist community, utterance, discursive pattern*

REZUMAT. ***Este necesară o reformă a limbajului legal?*** Dacă dorim ca limbajul legal să devină o metodă cât mai clară şi eficientă de comunicare, atunci trebuie să identificăm acele caracteristici care, cel mai probabil, sunt de natură să împiedice înţelegerea. Unele aspecte lansează provocari mai mari decat altele; mai mult decat atât, înţelegerea poate fi impiedicată de aspecte lingvistice care nu ţin neapărat de domeniul legal. În abordarea de faţă, ne propunem să evidenţiem câteva dintre cele mai comune aspecte ale limbii engleze din domeniul legal care credem noi că împiedică înţelegerea.

Cuvinte cheie: *limbaj legal, comunitate de limbaj, enunţ, model discursiv*

1.0. Some of the most important questions in the law deal with meaning, especially the interpretation (or "construction") of documents like the Constitution, statutes, contracts, deeds and wills. In many ways, interpreting a legal document is not that different from understanding any other writing. Yet there are some interesting, and very important differences.

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David Mellinkoff (1963) shows that the claimed precision of legal language is largely a "myth". He has been joined more recently by critical scholars who emphasize the indeterminacy of language. There is no doubt that lawyers tend to exaggerate the precision of legal language. The huge number of lawsuits each year over the meaning of some word or phrase in statutes and other legal documents, virtually all written by lawyers, is reason enough to question the legendary precision of legal language.

What makes precision so difficult to obtain is not merely the indeterminacy of language, however. For the most part, legal language can be made precise enough for ordinary purposes. While one can be amazed by the large number of disputes regarding the meaning of legal language, it is equally possible to wonder at the vastly larger number of legal documents that function more or less as they should. An equally important impediment to precision in legal language is the fact that there may be competing considerations at stake. Often the legal drafter is forced to choose between the flexible and the precise, knowing that each direction has its own attractions and dangers. In other cases, he/she may deliberately opt to be imprecise for strategic reasons.

Some aspects of legal language present great difficulties for lay persons. Comprehension can be made difficult by linguistic elements and not elements that are specifically legal. As it was so often proved, to identify the problem is relatively easy but to find a solution is another matter. Technical words and jargon arise precisely because they facilitate communication within a profession. But in the case of legal affairs the problem, is communication with the public. Language that may be useful to a lawyer becomes a mystery to the lay person. Linguists, for instance, use a specific vocabulary (like *phrase marker* or *conversational implicature*) but they do not have to explain it to the public, and everybody seems to live quite happily without that knowledge. In contrast, people who have legal problems have the right to understand the meaning of the contracts that they sign because they will be, subsequently, held legally responsible. To make sure that people understand a legal document, it should be as free as possible of technical terms and jargon. However, if technical terms are required in order to avoid ambiguity, they should be explained in ordinary language. It comes as no surprise that archaic, formal and unusual vocabulary and syntactic constructions may also be problematic for lay persons, even if they sometimes serve the function of making the text more exact[2].

Some of the best evidence that people have trouble with legal terminology has been noted from the fact that jurors, after they have received their instructions, all too often turn to dictionaries for enlightenment. Jurors

[2] The idiosyncratic legal uses of *(afore)said, same* and *such*, to mention a few anachronisms, are no longer part of ordinary language and thus reduce understanding. The same holds for forms composed of *here-, there-* and *where-*, such as *hereof, therewith* and *wherein*. (Tiersma, 1999:204)

do this even though the rules prohibit them from consulting any outside source (which includes dictionaries). If we want to make legal language a clearer and more efficient means of communication, we have to identify all the elements that are most likely in the path of clear comprehension. In what follows we will try to identify some of the more common elements of legal English that, according to our study, have been found to distort comprehension.

It is widely accepted that one of the things that make legal language hardest to understand is its unusual vocabulary. We cannot deny the fact that some technical terms are relatively well known (*defendant, judge, jury*), but others are at best vaguely known by many people (*beyond a reasonable doubt, negligence* or *wrongful imprisonment*). Many terms seem familiar but they have an unexpected meaning for the lay person (as in *aggravation* or *file complaint*). Still other vocabulary items are completely unknown to those who do not have an education in law; they include words like *estoppel, lis pendens, per stirpes, testator* and *tort – feasor* (Tiersma, 1999:204).

Many people have limited exposure in their daily lives to highly literate vocabulary. But formal or highly literate vocabulary also causes comprehension difficulties. Not everyone knows what *initiate* or *terminate* means, but virtually any speaker of English understands *begin* and *end*. Lawyers, of course, hear such terms much more often and are better educated than the average person, so they may not realize the extent of the problem. Research suggests that the profession's frequent reliance on impersonal constructions, often using nouns in place of pronouns like *I* and *you*, is another factor that makes legal documents hard to understand.[3]

2.0. Legislative statements have a conventionalised communicative purpose mutually shared by the practising members of the specialist community. This shared communicative purpose is largely reflected in the way legislative statements are conventionally written and read by the members of the community, particularly in the way some of the syntactic and discoursal resources are used in this genre. The typical use of complex–prepositions, binomial and multinomial expressions, nominalisations, the initial case descriptions, a large number and variety of qualificational insertions make syntactic discontinuities somewhat unavoidable in the legislative statements and, to a large extent, account for the discourse patterning that is typically displayed in such provisions.

[3] Consider a contract of sale in which a consumer buys an automobile; the contract might provide that *vendor shall have the right to modify this clause with thirty day's notice to vendee*. As the buyer, can I modify the clause? Am I the **vendor** or the **vendee**? It is clearer, of course, if the more ordinary terms *buyer* and *seller* are used. But clearest of all is to personalize it by stating that *we have the right to modify this clause after giving you thirty day's notice.*(Tiersma, 1999:205)

In spite of the fact that legal language may produce confusion with lay persons, many of the attempts to reform legislative writing in the Western world have largely been ineffective because of their failure to recognise the legislative provision that reflects a sphere of practical reasoning which needs to be understood in its own terms. Legislative writing has a long and well–established tradition and the style of legal documents has become firmly standardised with the inevitable result that the legal draftsmen tend to become comfortable with tried and tested linguistic expressions and style of writing over a period of time. It is also true that there have been some improvements in style that have taken place in the past few decades, especially in the way textual – mapping devices are used to reduce information load at a particular point in the provision (see Bhatia, 1987), but such reforms have been few and far between and, hence have gone unnoticed by ordinary readers.

On the part of the specialist community, therefore there is a need to show two kinds of concern. First, a need to show greater awareness of their loyalty to the real readers of legislative documents. Second, a need to use linguistic resources more consistently, particularly in the case of those where certain linguistic forms are traditionally associated with some very specific meanings (see Swales and Bhatia, 1983). This is particularly desirable in the use of what specialists call "proviso–clauses". This practice will create fewer problems of interpretation for many of the readers, the specialists as well as non-specialists.[4]

Many of these aspects of legal style serve little or no function besides making that an utterance or writing is in some sense legal, or at least associated with the profession. That should be harmless enough. If lawyers want to pronounce *defendant* in their own idiosyncratic way, or spell *judgment* without an *e*, no one will be the worse off. But other stylistic features produce more harm. For one thing, emphasis on group cohesion necessarily excludes those who do not belong and who have not learned to "talk like lawyers".[5]

The legal code is not designed to cover a single instance of human behavior, but rather a range of related behaviors in a delimited range of situations. The main problem is saying neither too much, and thus having an oppressive legal code, nor too little, and so licensing instances of behavior that are unacceptable. This is of course very much a language problem. Goldman (1986: 51) makes the very important point that many legal concepts, such as

[4] There is also a greater need to make more effort to use long syntactic discontinuities more sparingly, perhaps as an exception rather than a rule.

[5] Furthermore, long and complex sentences with unusual word order and other odd features make legal language convoluted, cumbersome, and hard to comprehend. Unless they have a legitimate function that cannot be otherwise conveyed, these stylistic features of legal language have little to commend them.

accident and liability, are based upon concepts which appear universal across human languages, for instance happenings which have an agent and those which do not. The basic concepts of the rights and obligations of a member of a community are deeply embedded in the fabric of language itself, and existed before there were codified laws (Gibbons, 1994: 3).

Legal proceedings are usually concerned with testing the applicability of the generalizations found in the legal code to individual instances of behavior or to particular cases. This is managed with very small exceptions through language, so for example trials are linguistic events. Language is then central to the law, and law as we know it is inconceivable without language. Many lawyers pride themselves upon their mastery of language, and regard such mastery as a critical skill for legal professionals. There are well-established formalized social processes for legal disputation through which judgments are obtained. These do not appear to be different in type from other decision-making processes of a political or administrative type. Furthermore, while there is a discourse or genre for disputation, Goldman (1986: 55) makes it clear that there is not a specific legal register or jargon.

3.0. One characteristic of the law in pre-literate cultures is the relative lack (although not a total absence) of *codification* of the law. This means that few concepts have undergone the process of reification (usually nominalization) into specific legal terminology which is typical of literate societies. Goldman (1986: 56) also shows how even trained anthropologists can be sufficiently ethno-centric as to mistake the absence of codification for the absence of the concept.

Danet and Bogoch (1994: 101) directly address the relationship between literacy and the language of the law. They examine the development of the language of wills in a society where literacy was becoming more established. The linguistic consequences of these developments are several, for example in a spoken will assumptions can be made about shared knowledge – those present will know when the will was made, and what property the testator has. In a written will such assumptions are less valid, so such details as dates, and specific details of property must be included. Those present at an oral will would also naturally be addressed directly, using for example the second person pronoun, while this is less appropriate in the more objective written will. Danet and Bogoch show (1994: 112) that neither the presence nor the ordering of the stages of wills had fully stabilized in Anglo-Saxon England as each seems to be generated afresh with little of the uniform routinised language of the modern written will – in other words, the codification process was not complete. This lack of a codified genre to perform the function of bequeathing is also reflected in meta-comments upon the text itself.

The advantage of codifying law, precedent and other legal documents in a stable written form are obvious. It means that the legal system is less dependent upon the memories or judgments of the individuals. Halliday (1985a&b) suggests that some of the linguistic consequences of written codification are increased nominalization, grammatical metaphor and lexical density. Increased nominalization entails nouns replacing verbs, which is related in turn to grammatical metaphor, since processes (e.g. 'to pay') which are most naturally expressed as verbs often become nouns (e.g. 'the payment'). Halliday (1985a) also suggests that increased complexity at the phrase level is usually accompanied by reduced syntactic complexity in the sentence or clause complex. Unfortunately, unlike scientific English, the language of the law appears to have the worst of both worlds, combining complex phrases with complex sentence syntax. Both Maley (1987) and Bhatia (1994) provide examples from legal documents and explanations of this phenomenon, and elsewhere Gibbons (1990) has detailed the complexity of police cautions.

4.0. The preceding outline of three central areas of legal discourse has attempted to show how the discourses of law are integral to a particular kind of legal system and legal culture. Any reformation of legal discourse must take into account the contingency between language change and legal, i.e. institutional change. That is not to say that such change is neither possible nor desirable; only that reform can only be achieved by the cooperation of relevant government and legal authorities and with recognition of the adaptation and compromises involved. In a review article, Danet (1990) has outlined developments in the plain language movement in the USA, England, Australia and some European countries. Her review of the literature indicates that the plain language movement has made substantial progress in the simplification and reorganisation of many business and government documents.

The task of simplifying legislation remains more intractable and virtually untouched, despite government initiatives (Eagleson, 1991). It is not simply a matter of conservatism; amending existing legislation in any volume of the Statute book is a daunting and expensive task. But the more difficult problems arise from the institutional situation outlined above. Given the detailed, explicit nature of much legislation, a change in words can result in a change of meaning and consequent uncertainty. More general rules would be simpler and more comprehensible but there are attendant problems of vagueness and applicability. Yet there are signs that governments and their draftsmen

are prepared to do what they can (Bhatia, 1987 b; Eagleson, 1991) and may in the future do even more.

Reform of the discoursal procedures of the courtroom also raises questions of structural reform, since discoursal patterns and traditions of advocacy are derived from the adversarial system and the rules of evidence. Realistically, governments are unlikely to contemplate dismantling the adversary system, which in any case is for many people a valuable and cherished institution, encapsulating traditional values like "the golden thread" of British justice (see Carroll, 1993). But here again concessions are being made, when a glaring need for them arises, as it has in the question of the evidence of children (see Brennan, 1998). There is a real possibility that some relaxation of evidentiary requirements may create a more flexible and productive atmosphere for these particularly vulnerable witnesses (see Carroll, 1994; Eades, 1993).

No one would deny that the language of the law should, wherever possible, attempt to shorten the gap between it and everyday language that is the source of much incomprehension, frustration and frequent disadvantage. That task will be made easier if observers and critics of the legal process are able to distinguish between the criterial forms of legal language, that is to say, those that are integrated deeply into institutional structures, practices and ideologies and which may or may not be open to reform; and those that are unhelpful, peripheral and therefore dispensable.[6]

All in all, the movement advocating plain English has made substantial progress in improving the language of consumer contracts. Yet there are many areas in which lack of comprehensibility still creates problems for the public. Lawyers, of course, tend to defend their technical vocabulary as essential to communication within the profession, even if it may be difficult for the lay public to understand. Reality, as usual, is more complex. Some features of legal language are definitely archaic. One of the main justifications for continued use of antiquated vocabulary is that it is more precise than the modern equivalent. However, this is virtually never

[6] The legal lexicon differs in many ways from ordinary speech and writing. Each of these differences must promote the main goal of any language: clear and effective communication. Not surprisingly, archaic language is generally unnecessary and fails this test. Jargon and technical terminology are more problematic because they actually facilitate in-group communication while greatly reducing comprehension by the public. More moderate voices might reject the conspiracy theory, but nonetheless suggest the legal vocabulary is full of hoary words and phrases, many survivors from Anglo – Saxon, Latin and Law French days, that should long ago have been relegated to the history books.

true.[7] There is no doubt that legal language has improved considerably over the past decades, at least in certain areas. Nonetheless, the Plain English Movement still has plenty of work to do.

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[7] A vital document is a medical consent form, where a patient acknowledges the risk of some medical treatment and authorizes a doctor to proceed. They are often drafted by lawyers. Research indicates that patients do not understand these forms very well and that use of plain language principles improves readability. The same issue arises when someone signs a form consenting to allow the police to search a building or vehicle. Also drafted by lawyers, these forms likewise tend to be in legalese rather than plain English. Releases of liability raise similar concerns. Ordinarily, organizers of risky ventures like scuba diving, automobile racing, or skiing require participants to sign such releases before they are allowed to engage in the activity. Somewhat unexpectedly, here judges are less likely to presume that if you signed it, you must have read and understood it. (Tiersma, 1999:228)

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