Language and Law

A resource book for students

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Chapter B1

Linguistic Features of Legal Language

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B1 LINGUISTIC FEATURES OF LEGAL LANGUAGE

In this unit, we look at the main features that have been attributed to the variety usually known as 'legal English'. We do this initially by working through Crystal and Davy's (1969) justly celebrated analysis of two examples of common legal documents: an endowment assurance policy and (what was then called) a 'hire purchase agreement'. Then we extend our discussion into a review of descriptive accounts by other influential scholars, including Mellinkoff (writing earlier than Crystal and Davy) and Tiersma (who later extended Mellinkoff's general approach). Once we have introduced key features of legal language, we raise questions of significance and method. Crystal and Davy's description of legal language predates large-scale corpus analysis in linguistics. We suggest some ways in which the analysis of legal language can be enhanced using such techniques.

The language of legal documents

Although Crystal and Davy (1969) do refer to historical forces at work in the development of legal styles, their account of legal language is mainly a synchronic one (i.e. a study of the language system as it exists at a selected point in time, usually the present). While their analysis is synchronic, however, it is no longer contemporary. Their chapter was published in an influential volume of 'investigations of linguistic style' that contrasted major situational varieties in English of the late 1960s. That is half a century ago – a long time, even in relation to a slow-moving linguistic variety such as legal style.

What is still valuable in Crystal and Davy's approach, however, is that the authors consider all the main aspects of language that play a role in creating style. Their analysis is guided by native-speaker impressions but builds up a picture by describing linguistic features: they start with questions of layout, work through sentence grammar and vocabulary, and conclude with general points about meaning. We can introduce the main areas of linguistic analysis of legal language by considering each of their categories.

Layout

The established perception of the layout of legal documents is that they are dense on the page, lack punctuation, and appear formal and archaic because they use fonts and devices associated with antiquarian styles of presentation and publication.

Some historical support for this view comes from the fact that much legal writing is not spontaneous, but copied from **form books**, or templates for writing documents that have evolved over centuries and been shaped by changing editorial and printing conventions. Such form books are either devised in-house by particular law firms or bought commercially. Important features of layout and design Crystal and Davy draw attention to include:

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- solid blocks of text, sometimes a whole document consisting of one sentence, with 'few concessions to the convenience of the reader' as far as layout is concerned (Crystal and Davy 1969: 197);
- occasional, apparently ceremonial use of larger Gothic font;
- upper case used for first words of some paragraphs (e.g. WHEREAS, WITNESSETH) or words in the middle of sentences (e.g. AND), possibly echoing a decorative convention of the medieval manuscript tradition;
- capitalisation of particular words (mostly nouns), a practice that remains an established feature of modern German but was never consistent in English and became obsolete in general use by the late eighteenth century;
- no, or relatively little, punctuation; and
- some idiosyncratic spellings (e.g. legal 'judgment', rather than general English 'judgement').

Grammar

Crystal and Davy begin their account of sentence grammar with the observation that sentences in legal documents are often long and grammatically complex. Sometimes, a whole block of text may consist of only one sentence.

Their main insight is, however, a functional one:

> Reduced to a minimal formula, the great majority of legal sentences have an underlying logical structure which says something like 'if X, then Z shall be Y'. There are of course many variations on this basic theme, but in nearly all of them the 'effects' component is essential: every action or requirement, from a legal point of view, is hedged around with, and even depends upon, a set of conditions which must be satisfied before anything at all can happen.
>
> (Crystal and Davy 1969: 203)

Various formal features are capable of expressing, or being exponents of, this core rhetorical structure, whose function is to define legal relations. We can illustrate some of those formal features using a short sentence taken from a life assurance policy recently received by one of the authors:

(1) If the policy has not been dealt with it will be converted into a paid-up policy.

In a legal document, even a relatively straightforward but grammatically complex 'if, then' sentence of this kind is likely to be loaded with **adverbials** that specify conditions and concessions. Those adverbials may take the form of clauses (e.g. embedded *when*, *because*, clauses . . .), adverbs (e.g. *promptly*), or adverbial phrases (e.g. *in a reasonable period*). They may also be coordinated with one another by *and* or *or*, if there is more than one of them. Such adverbials tend to cluster at the beginning of sentences but may occur elsewhere in sentence structure.

Example (2) shows an adverbial towards the beginning of our illustrative sentence:

(2) If *at the end of the year* . . . the policy has not . . .

Example (3) shows that the adverbial may itself be modified:

(3) *If at the end of the year specified in (a) above* . . . the policy has not . . .

Example (4) shows an adverbial added elsewhere in the sentence, in this case after the main verb:

(4) If at the end of the year specified in (a) above the policy has not been dealt with *as in (a) or (b) above* it will be . . .

Incidentally, example (4) highlights, but deviates from, one of Crystal and Davy's other observations: typical avoidance in legal documents of **anaphora**. Anaphora means reference back to earlier discourse referents using pronouns or abbreviated forms (*he*, *she*, *it*, *they*, etc.). It is almost obligatory in most styles of English in order to avoid excessive repetition. By contrast, use of pronouns is extremely unusual in legal documents, in order to avoid creating ambiguity (the pronoun *it*, used in this example, is particularly problematic in this respect). Avoiding pronoun **coreference** conveys a distinct impression by creating a repetitive and mechanical form of cohesion within and between sentences. Instead of 'it' in example (4), the most likely legal choice would have been to repeat the noun phrase 'the policy':

(5) If the policy has not been dealt with . . . *the policy* will be converted . . .

Example (6) illustrates further complexity introduced into sentence structure by the fact that the main ('then . . .') clause also allows for added adverbials. Here is the second half of the example sentence in full:

(6) . . . it will be converted into a paid-up policy under provision 3 unless the conditions of that provision are not satisfied in which case a cash sum will be payable.

Note that here, an 'unless' clause adds another condition, which is in turn modified by a relative 'in which' clause. The resulting effect, of a kind usefully modelled diagrammatically by Crystal and Davy (1969: 203–5), shows complex relations of dependence, sometimes with several full or non-finite adverbials operating at the same, subordinate level. In this way, even relatively short sentences in legal documents, not much longer or more complicated than the one analysed above, may consist of, for example, the following functional elements:

If [Adv *and* Adv S V Adv *or* Adv], (then) Adv *or* Adv S V Adv *and* Adv.
Adv = adverbial
S = subject
V = verb

Part of the challenge in interpreting legal documents, which can be considerable, is to understand the logical structure of statements expressed by complex grammatical relations.

If we shift from functional analysis of relations within the sentence (subjects, objects, adverbials, etc.) to **constituents**, other patterns emerge:

> One of the most striking characteristics of written legal English is that it is so highly nominal; that is, many of the features in any given stretch are operating within nominal group structure, and the long complicated nominals that result are noticeable by contrast with the verbal groups, which are relatively few, and selected from a restricted set of possibilities.
>
> (Crystal and Davy 1969: 205)

Nouns tend not to be modified by adjectives (or premodified generally), and use of intensifying adverbs such as *very* in front of adjectives where adjectives do occur is almost never found.

By contrast, **postmodification** (i.e. use of adjectives, phrases or clauses after a word they depend on) is common. Sometimes such postmodification is highly detailed, and achieved frequently by reduced relative clauses: *the premium(s) in arrears together with any charge for loss of interest required . . .*, *payment will be made equal to interest on . . .*, *a rate decided from time to time*. Common within such **non-finite postmodification** (i.e. modification attached following the item being modified, and not amounting to a full clause) are examples that also show archaism: *herein contained*, *hereinbefore reserved*, *printed hereon*. Most distinctive of all is that postmodifying elements are inserted into sentences at whatever point offers the clearest indication of precisely what is being modified. An aim to achieve precision or avoid ambiguity, Crystal and Davy (1969: 205) observe in their discussion, 'always takes precedence over considerations of elegance, and unusual sequences are as a result common'.

Verbal groups in legal documents are notable for several characteristics:

- ❏ frequent negation (typically with a prohibitive meaning);
- ❏ a high proportion of non-finite forms (e.g. past participles); and
- ❏ high frequency of finite forms that follow the pattern:

modal auxiliary (usually *shall*) + BE + past participle

Shall is to be expected because this modal is used to express the obligatory consequence of a legal decision, rather than as a marker of future tense or to add emphasis (which are this modal's main functions in other varieties). Tiersma (1999) points out that unnecessary insertion of auxiliary verb form *do* is also common (e.g. 'I do appoint'), though both *shall* and AUX *do* are now discouraged in much current guidance on drafting.

Lexis

The most common perception about vocabulary in legal documents is that of **archaism**: both the use of fossilised forms (words and constructions no longer current in other varieties) and use of words and phrases that are still found but which retain specialised,

older meanings in law. Crystal and Davy (1969: 207) highlight WITNESSETH and *aforesaid* in their two sample documents. Combined with archaism is a preponderance of words of French origin, or of Latin origin via French, by comparison with words of Anglo-Saxon origin (a phenomenon discussed in Mellinkoff 1963). Similar imbalance occurs in other varieties of English concerned with learning or science, but results in a marked stylistic feature of legal English: that of **etymological doubling**. Such doubling, or chaining, involves collocation (i.e. juxtaposition) of synonyms or near synonyms coordinated by *and* or *or*: examples include *made and signed*, *breaking and entering*, *terms and conditions*, *able and willing*. Tiersma (1999) suggests that legal draftsmen simply got into a habit of using **word-pairs** in order to ensure inclusion of something, even if the reader was unfamiliar with one or other of the words used for it, rather than because some legally significant nuance had developed between the two words. The practice, Tiersma argues, survived simply because of legal conservatism.

Etymological doubling of this kind differs from another, ultimately more significant feature of legal documents: the (much criticised) particularisation of any given general concept by means of a long list of alternative words within the same semantic field, in an apparent effort to ensure mention of all possibilities (e.g. *the tenant shall affix to the wall no painting, hanging mirror, clothes hook, decoration, device, accoutrement . . .*); such listing tries to be exhaustive but can have a very different effect: that of drawing attention to any item missing from the list, and opening up each word in the list to legal dispute as to its meaning and scope (see Thread 5).

Vocabulary and meaning

More significant than either of these local features, however, as regards how style intersects with meaning, are the different kinds of vocabulary found in legal documents. A very wide range of terms is inevitable since almost anything can become a topic for legal stipulation. Within this very wide vocabulary, however, there are four notable kinds, each of which may be interpreted differently. The boundary between the four types is not precise or static (and our description here involves some simplification); but broad differences between them need to be recognised as creating an important field of contrast within legal language that does not exist in most other varieties:

1 Like other professions, law has its own specialised **terms of art**. These are technical words and phrases (such as *rescission*, *abatement*) whose use is restricted to law, and which have fixed, often complex legal meanings. Some are borrowed from Latin and Law French (e.g. *mens rea*, *estoppel*). Such terms cannot usually be replaced by other words without losing some essential aspect of their accumulated legal meaning and significance.
2 Closely related are words (e.g. *consideration*, *convenient*, *extortion*, *emolument*, *objectionable*, *provenance*, *promise*, *summary*, *trust*, *relief*, *instrument* and many others) that have a technical meaning in law but also one or more non-technical, different meanings in wider usage. Tiersma (1999) calls such words **legal homonyms** (in a sense of homonymy that does not require separate etymology, but is based on distinct meanings associated with two or more domains of use). Disambiguation of legal homonyms depends on context and register. Use of such

words can appear anomalous to a layperson, suggesting they must convey some different meaning from their meaning in other varieties of English.

3 Many other words function technically in certain legal texts but are not legal homonyms because they have not acquired a stable and distinct legal meaning. Definitions are often offered for such terms in a 'glossary of terms' or 'definitions clause' in the relevant document. But such definitions are not like definitions in a descriptive dictionary, which reflect usage. Rather, legal definitions are prescriptive guides to meaning, supported by authority to dictate what meanings will be accepted. By convention, such defined terms are often either capitalised or written in boldface in contracts and other documents, to indicate which ones they are.

4 Words and phrases not in any of these categories are generally referred to as **ordinary words** (of English). Such words include *building*, *dress*, *street*, *biscuit*, *foreign* and many others. Because legal statutes and private law documents concern all kinds of people, objects, events and processes, such words come from almost any sphere. Most never become the crux of an interpretive dispute. But if they do, it falls to the courts to decide what their correct meaning is for the purpose of the legal proceedings in question (through a process of 'construction' that we discuss in Thread 6).

The status of some expressions within this classification may be unclear. Some seemingly fundamental words of law, such as *beyond reasonable doubt*, are held for legal reasons to be 'ordinary words of English' even though they may sound like technical terms. Some idiomatic phrases are first used by an individual judge but become by frequent repetition quasi-technical expressions: the *innocent bystander* in contract law; *bane and antidote* as characteristics attributed to an allegedly defamatory statement; or *a shield not a sword* as a characterisation of promissory estoppel. What makes the four broad categories important in a description of legal English is how each is treated differently in tackling a problem of interpretation; solutions to such problems range from prescriptive definition through to cumulative modulation of a disputed word's meaning over time as a way to evolve the best (*convenient*, to use a legal homonym) match to a complex mix of facts and legal requirements (Hutton 2014).

Alongside this complication of several different *kinds* of vocabulary items, Tiersma (1999) also notes that semantic relations that hold between vocabulary items in a given semantic field can be specific to legal language. For example, legal discourse can create oppositions through **antonyms** that are not opposites in general usage. One of his examples is *speech* and *conduct*, two terms that overlap in ordinary language. Generally, speech appears to be a kind of conduct; if the word has an opposite, then that word would be *writing*. American courts, by contrast, will typically treat *speech* and *conduct* as opposites: if something is 'speech', First Amendment free speech protection applies; but if behaviour is deemed to be 'conduct', then such protection will not be available. Tiersma points out that this contrast can be confusing to a layperson, for example when burning an American flag is held to be free 'speech'.

Style and typicality

Crystal and Davy conclude their 1969 analysis with an essential observation: that much in the style of legal documents is not ornamental, but functional. Tiersma

(1999), for example, draws attention to the fact that legal style differs depending on whether it is spoken or written for several reasons: partly because spoken language, even oral courtroom argument, is less highly structured and formal than writing; partly because hurried interaction between legal professionals in speech creates an insider-style, clipped, telegraphic, and full of abbreviations; and partly because mixed spoken–written styles such as that of judicial opinions generally adopt a more reflective, discursive style than contracts or wills.

The question accordingly arises: how far are features identified in any given analysis of legal language 'typical'? And what are they 'typical' of? The vocabulary and grammar of a constitution or a treaty will differ from those of a will, phone contract or law report. Page layout is not dense on the page of a modern statute, or unpunctuated in the way it may be in a tenancy agreement. Within 'courtroom discourse', style varies between different legal participants and at different stages of a trial.

Crystal and Davy, of course, did not present their account as a description of legal language, only of legal documents. Their study offered generalisations based on data – their examination of actual texts – combined with **native-speaker intuitions** and understanding of the historical development of legal discourse. For their chapter, the selected data consisted of two private law documents, which they considered 'reasonably central in a linguistic sense' even though they recognised that 'like any other variety, the variety analysed is blurred at the edges and changes imperceptibly into something else' (Crystal and Davy 1969: 195).

Research into legal style is now more likely to use a larger **corpus**, especially a corpus in which texts are tagged, or labelled, for both qualitative and quantitative analysis by subtypes reflecting legal function (will, statute, contract), jurisdiction (which country a document is operative in), and date. Inevitably, an element of idealisation will still enter into any attempt to describe 'legal language'. That is inherent in deciding the corpus of texts that provides the data set from which generalisations will be made. Broad contrasts can be ventured between text types at a high level of generality (e.g. 'legal documents differ from novels or history books'). But the limits of such general statements are exposed if equivalent generalisations are made within either of the fields compared.

Forty years after Crystal and Davy, Coulthard and Johnson (2007: 35) begin their discussion of 'the language of the law' with the statement that 'anyone who hears the term legal language thinks immediately of grammatically complex, sparsely punctuated, over-lexicalised, opaque written text'. But for them, this is a starting point rather than a conclusion. Equipped with modern **corpus linguistic techniques**, they are able to go beyond induction from small samples of data to investigate linguistic patterning far more confidently than would have been possible earlier: 'is the characterisation accurate', they ask, 'and, if so, how did it come to be so?' (Coulthard and Johnson 2007: 35). Researching legal style now, either using search tools developed in an existing legal database (such as Westlaw, JustCite or Lexis) or by searching a linguistically constructed corpus of selected legal texts is likely to adopt a more quantitative approach than Crystal and Davy's pioneering summary (for discussion and illustration of corpus methods in relation to registers, genres and styles, see, for example, Biber and Conrad 2009).