Language and Law

A resource book for students

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Chapter B2

Functions of Legal Language

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B2

FUNCTIONS OF LEGAL LANGUAGE

B2

In this unit, we consider the functions served by legal language, rather than describing what it looks or sounds like. Because *function* has different meanings in different subfields of linguistics (and still more meanings in social theory), first we disentangle the word's relevant meanings. Then we outline accounts given by two influential writers on legal language of the goals and functions served by specific features of legal style. Some aspects of each of these accounts celebrate the effectiveness of legal language; others imply that unless legal language continues to be reformed away from its historical stylistic conventions, it will remain to some extent dysfunctional. We consider arguments on each side. In Unit C2, we consider contemporary campaigns for reform of legal language more directly.

Legal language from a functional perspective

Answering the question *why* legal language is idiosyncratic by comparison with other varieties is complicated by the uncertain meaning of the word *function* across its varied use in linguistics and social theory.

In linguistics, **functional** often means essential in creating a signifying contrast at a relevant level of linguistic structure. For example, there are many aspects of sounds articulated by speakers, but only some of those sounds enter into significant contrast with others (e.g. distinguishing /p/ from /b/ at the beginning of *pat* or *bat*). At sentence level, form and function are also distinguished. A basic English sentence may consist, in terms of form, of a noun phrase followed by a verb phrase: NP VP. But the functions served by those constituents in creating meaning must be characterised in different, functional terms, such as SVO (subject, verb, object). At the communicative level, functions have also been categorised. For example, Halliday identifies three 'macro' functions realised by a range of formal elements: **ideational**, **interpersonal** and **textual**. The detail and complexity of function in linguistics have been extensively discussed in a whole tradition of linguistics: that of functional or functionalist linguistics (for examples, see Jakobson 1960; Halliday 2004).

In connecting linguistic forms and functions with wider social structures, the role of a particular use of language may be considered 'functional' in further ways (and in sociology there is also a much examined field of 'functionalism').

- A dialect or sociolect may signal membership of a regional, class or occupational group. It may function to affirm membership of that group or to contrast with (or if there is no mutual intelligibility between varieties, potentially exclude) other social groups of speakers.
- Use of a particular linguistic register may not only reflect, but actively create, the relative technicality, formality or intimacy of a situation: the relationship between conversational participants may be shaped over time by strategic register choices,

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rather than determined in advance by a pregiven register requirement associated with a given situation.

- ❏ The function of a language variety *as a whole* might be viewed as creating, maintaining or altering social relationships. For example, ways of talking to or about women or minorities may function to dominate or subordinate such groups. Legal language might create and maintain a benign system of social order or serve the interest of an existing ruling class.

Language use contributes to social relations in various ways, including by functioning as a kind of **symbolic capital** (Bourdieu 1992). If we wish to discuss legal language from a functional rather than formal perspective, therefore, we need to keep different dimensions in mind, including whether we are talking about the function of particular words, speech acts (e.g. issuing an order or giving a verdict), courtroom language rituals, or the whole linguistic variety in comparison with others. Given long-standing acknowledgement of the idiosyncrasies of legal language, we should also be alert to the issue of possible dysfunction, which we return to at the end of this unit.

'Fit for purpose' depends on views of purpose

The most influential, scholarly accounts of legal language as a variety share an important starting point. They recognise that understanding the variety's functioning requires looking at legal language as **situated social action**: choice of forms cannot be understood independently of what those forms are used for. Each account starts with formal description of linguistic features and patterns, but moves to observations about functions served by the linguistic features identified. Because such functions inevitably combine communicative, legal and wider social considerations (e.g. the place of law in a democracy), there is often a speculative dimension. Inevitably, linguists must frequently acknowledge their lack of familiarity with the professional functioning of the discourse they are analysing, for example what a will, pleading or statute must accomplish in order to have legal effect and be 'functional' in a legal as well as linguistic sense.

Once specific functions are identified, further questions need to be asked, including whether those functions could be achieved equally, or more effectively, by a different style of discourse. Accounts of legal language accordingly often combine linguistic description with evaluation: occasionally admiration for the effectiveness of legal language, given the difficulty of the challenges it faces, but more often criticism and polemic advocating new levels of clarity to be achieved by 'plain language' reforms (which we consider in Unit C2).

Below, we outline arguments made by two influential US lawyer-linguist scholars, David Mellinkoff and Peter Tiersma, who link:

- ❏ what legal language is like (description);
- ❏ why legal language is like that (explanation, usually historical);
- ❏ what roles legal language performs (functional account); and
- ❏ what effects it has (professional and social assessment).

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Mellinkoff's The Language of the Law

Mellinkoff (1963) is widely considered the first major study of what 'the language of the law' is (though he himself acknowledges antecedents in various fields). Mellinkoff outlines nine main characteristics, related principally to vocabulary and grammar. In addition, he devotes a separate chapter to what he calls 'mannerisms of the language of the law'. These are distinctive features that have investigable historical origins but appear less easily explicable in terms of modern legal function. Such mannerisms include legal language being 'wordy, unclear, pompous, and dull'. Together, these and other aspects give legal language what Mellinkoff calls its 'uncommon touch': they set legal language apart from other discourse styles despite the English and US legal systems he is describing being, with a specialised meaning Mellinkoff alludes to, 'common' law systems. For Mellinkoff, legal English is 'a zone where the language of law loses contact with speech'.

As regards how legal language functions, there are two steps in Mellinkoff's reasoning:

1 His first step is to contextualise stylistic choices (e.g. a form of words was introduced when English law was conducted largely in Law French, or Latin, or a combination of both languages with English; or some aspect of legal language is a carry-over from a period of widespread illiteracy in which there was a different balance between oral and written proceedings).
2 His second step assesses the continuing significance or consequences of such stylistic choices. These can be either within the law or how the legal system fits into society. One example is that selection of linguistic forms based on an earlier tradition of usage fits with the dependence of legal reasoning on previous interpretations and judgments (because of the common-law system of **legal precedent**). A contrasting example is that particular forms may be chosen to mystify some aspect of law, so that it remains incomprehensible to many people who are nevertheless subject to law.

Among the characteristics of legal language emphasised by Mellinkoff is law's attempt at 'extreme precision'. This, he suggests, results in unusual word order when phrases are inserted into a sentence less to be idiomatic than in order to minimise risk of ambiguity. But he also makes a contrasting observation: that law's use of language is intentionally **vague**. Legal language, he argues, favours expressions that are sufficiently flexible in meaning that they can be interpreted in new and unforeseen situations, as the social facts with which law has to deal vary. Tension between such contrasting aims leads to complex consequences. The linguistic conservatism suited to the development of law by means of authority and precedent can make communication between lawyers and their clients difficult, if members of the public perceive archaic forms as a closed, insider discourse suited to use between lawyers but which excludes outsiders.

Tiersma's analysis of legal language

The other especially influential thinker on this topic has been Peter Tiersma. Tiersma's analysis ranges across a number of specialised research studies; his general position is

encapsulated in *Legal Language* (1999), summarised in Tiersma (2008), and available in condensed form on his website www.languageandlaw.org (which has, however, not been updated since his death in 2014). Tiersma acknowledges his debt to Mellinkoff and by way of background provides a succinct account of the origins, historical development and characteristics of legal language as a variety or cluster of varieties. Later stages of *Legal Language*, however, focus on why that variety is difficult to understand and how it can be reformed (in fact, some of the reforms he advocates have begun to be introduced since publication of the book).

Tiersma reviews arguments in favour of the distinctiveness of legal language. He emphasises need for decontextualised written communication if the law is to be applied consistently and authoritatively. Broad and impersonal statements of legal rules, he observes, help project the law as impartial, especially if expressed using **passive voice** (which creates an impression that legal acts are accomplished without the intervention of a fallible human agent). Formal, archaic and ritualistic language separates legal proceedings from ordinary life, marking them as special and important, particularly if the legitimacy of courts is enhanced by ritual language that suggests they are unchanging, ancient institutions.

In the course of his account, Tiersma significantly develops Mellinkoff's historical explanation of features of legal language: that they had their origins in a transition from an oral to a written legal culture. Noting the emergence of an English legal profession during the same historical period as the transition into a writing-led legal culture, Tiersma suggests that professional monopoly produced a 'conspiracy of gobbledygook'. 'Talking like a lawyer', in his account, allowed lawyers to mark themselves as members of a profession, and continues to function as a commercial display, attracting custom. The technicality, even incomprehensibility, of legal style he suggests helps command high fees; and use of template documents (e.g. preprinted standardised forms) whose interpretation has already been tested in adversarial proceedings in court is economically efficient. Each of these arguments is commonly invoked in current debates about further review and reform of legal use of language.

A practical challenge: legal drafting

An interesting, complementary approach to how legal language functions can be found in guidance on legal drafting. In a study of international common-law practice, Butt (2013) asks: what influences the legal drafter? His answer is that the main influences are:

- ❏ familiarity and habit, based on security achieved by adopting forms and words that have been used before;
- ❏ conservatism, both general and allied to common-law reliance on past judicial decisions;
- ❏ fear of negligence claims, because of the required standards of professional advice and duty of care to clients;
- ❏ constraints on how legal documents are physically produced;
- ❏ pressure to conform to professional norms, including deadlines and clients' demands;

- desire to avoid ambiguity;
- the mixture of languages from which law in English has drawn its vocabulary;
- payment by length of document and time, reducing incentive to minimise the task or time taken to complete; and
- a litigious environment and risk that documents will come under hostile scrutiny from other lawyers.

Emphasising the practical implications of his discussion, Butt illustrates each of these factors in detail, showing how aspects of legal documents ranging from length and layout to phraseology and exemplification are determined by technology available (including in earlier periods of legal development), by commercial pressure and professional community norms.

Legal language and culture

There is, however, another, often neglected approach to how the seeming oddity of legal discourse can be understood in terms of function: a view put forward by some legal scholars and anthropologists of the variety's symbolic and ritualistic aspects (alluded to by Crystal and Davy in their suggestion that ceremonial features of legal usage such as archaism amount to a verbal performance 'directly equatable with wigs'; Crystal and Davy 1969: 213).

Ritual aspects are central to Berman's (2013) celebration of legal language as providing 'effective symbols of community'. Berman's analysis was written in the 1960s, but only published posthumously 40 years later. As well as discussing formal features and applications of legal language, Berman argues that legal discourse styles function not only to impose obligations, communicate legal argument, persuade, or adjudicate, but also create what he calls a 'liturgy of legal procedure': a set of elaborate and in his view dignified verbal rituals suited to dealing with highly charged or impassioned situations that need to be settled by legal proceedings. To describe the combined process through which language (and symbolism) shapes society and communicates ideas, Berman coins a new term for how he believes legal language functions: 'communification', a combination of communication with the creation or development of communities and values. Berman's claims as regards the functioning of legal language can seem over-optimistic when viewed alongside extensive criticism of the very features he celebrates. But his concern with legal language as embedded in deep patterns of cultural behaviour engages with a valuably broad understanding of language's symbolic as well as narrowly communicative functions.

Functions or dysfunction?

In this unit, we have used 'function' in a descriptive way, rather than as necessarily implying effective or successful operation. The distinct but related question of how far the internationally varied and changing styles of English used in law are fit for purpose is not easily resolved. What is clear, however, is that the demands made on legal discourse are intense and sometimes contradictory. As Crystal (2010: 374) puts it, legal discourse is:

pulled in different directions. Its statements have to be so phrased that we can see their general applicability, yet be specific enough to apply to individual circumstances. They have to be stable enough to stand the test of time, so that cases will be treated consistently and fairly, yet flexible enough to adapt to new social situations. Above all they have to be expressed in such a way that people can be certain about the intention of the law respecting their rights and duties. No other variety of language has to carry such a responsibility.

B3 GENRE ANALYSIS OF LEGAL DISCOURSE

Unit A3 introduces the concept of genre partly by contrast with linguistic register. Both kinds of variation, we point out in that unit, contribute to the overall characteristics and suitability in a given situation of a text or stretch of discourse. In this unit, we look more closely at how discourse genres function in law. We distinguish between synchronic (systemic) and diachronic (historical) aspects of genre and illustrate how legal genres have developed by reference to the history of law reporting. In Unit C3, we look at features of another legal text type: the statute.

Directions in genre analysis

Genre has been studied extensively since ancient times, both as an aesthetic category (e.g. the distinction between tragedy, epic and lyric in Aristotle's *Poetics*) and in treatments of public rhetoric (e.g. the contrast between forensic and political styles of speaking in the same philosopher's *The Art of Rhetoric*). A range of classificatory systems can be found, including ones based on formal properties, conventional purpose, occasions of use, and anticipated effect. Although training manuals have always existed offering instruction in different styles of writing and speaking, it is relatively recent that questions raised by differences of discourse type have been viewed as a distinct field of research: **genre analysis**.

Modern linguistic theories of genre

In his study of genre analysis as a way of understanding English in academic and research settings, Swales (1990) summarises different approaches to genre thinking, including accounts in folklore studies, literary criticism, rhetoric and linguistics. Central to his own understanding is a concept of 'discourse community', or group of language users narrower than a sociolinguistic speech community who are all concerned with shared purposes in an organised, social or professional practice. Building from this starting point, Swales develops an approach to analysing genre based on the following propositions:

1 A genre comprises a class of **communicative events**; such events share communicative purposes that are recognised by expert members of the discourse community and provide the rationale for the genre.

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