Language and Law

A resource book for students

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Chapter A5

Persuasion in Court

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PERSUASION IN COURT

A5

In this unit, we introduce the topic of how advocates talk. We show how courtroom persuasion by lawyers is 'rhetorical' in the historical meaning of 'rhetoric', which combines eloquence with strategic patterns of reasoning and expected standards of proof. We conclude with an outline of moves and structures that together make up the advocacy involved in legal proceedings. This description serves as an introduction to closer analysis of linguistic techniques in the language of advocates in Unit B5.

Legal advocacy

Silver-tongued, probing eloquence by lawyers addressing the court is the familiar representation of a distinctive style of lawyer talk. This image of **advocacy**, however, is highly selective. It is also in some respects anachronistic. In English law, to take one example, jury trial has declined in frequency since the mid-nineteenth century fairly dramatically, despite its continuing popular endorsement as a democratising feature of the legal system (Zander 2015). Currently, less than 1 per cent of all criminal cases are tried before a jury; and access to **jury trial** in civil proceedings is restricted to a very small (and diminishing) number of causes of action. The reality of courtroom advocacy, where it occurs, is more one of strategic preparation, case management and variation in style adapted to hearings at different levels in the court hierarchy, rather than grand courtroom **oratory**.

In those cases where criminal courts are addressed by advocates in the presence of a jury, the common-law approach is adversarial rather than inquisitorial. The style of address adopted is ultimately combative, in that the advocate's aim must be to win on behalf of his or her client. Any obvious impression of gladiatorial engagement is offset, however, by professional politeness and etiquette. The merits of such an adversarial system have been widely debated in law, as well as in analyses of modern societies' overall discourse ecology (see Tannen's 1999 account of 'argument' cultures). The **adversarial system** is also defended by analogy with debating, where it is also put forward as the optimal way to discover truth through powerful statements made on each side of a question.

This is the context in which the modern language of advocacy must be understood: as simultaneously a vehicle for legal exposition and reasoning; a management task of eliciting anticipated evidence from witnesses and cross-examining them; and as strategic persuasion of a jury (if there is one), or encouragement of a judge or judges towards a favourable adjudication. Many practical manuals exist on how successful courtroom advocacy is achieved (e.g. Morley 2009); there are also accounts examining the historically changing role and styles of advocates (e.g. Du Cann 1993). This unit links such insights to descriptive linguistic analyses that we explore further in Units B5 and C5.

Development of forensic rhetoric

Because modern courtroom speeches by lawyers are often still perceived as grand oratory or rhetoric, it is helpful to set the development of legal rhetoric in historical

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context. This is all the more important because the history points to close connections between formats of legal speaking and dialogue, on one hand, and systems of reasoning and democratic structures of political participation, on the other hand (Goodrich 1986: 168–208). The word **forensic** itself, for example, with its modern meaning of 'legal', derives from Roman 'forum', which simultaneously meant a political and legal assembly.

Among the earliest accounts of Western legal courts are those from classical Greece (though the wider, international context of other kinds of court should not be overlooked). Such accounts typically begin with Solon, in the eighth century BC, and with episodes in the Homeric epic poems. Recognisably legal hearings are known to have been held in Athens from about 400 BC. What amounted to an 'appeal court' in that period is striking by comparison with modern conventions: it involved an unregulated and often politically partisan equivalent of a modern jury consisting of up to about 500 people. Proceedings in such a setting encouraged recognition by defendants of the value of skill in verbal argument; and the gradually emerging field of **rhetoric** (the classical discipline concerned with techniques of public argument, evaluation and refutation) became a widespread feature of education among the political class in anticipation of a need to argue a legal case in that setting.

By the time of Aristotle's *The Art of Rhetoric* (about 350 BC), cultivation of public speaking had settled into three strands: deliberative (concerned with the future, and suited to political persuasion); forensic (concerned with things that had already happened, and suited to legal argument); and epideictic (concerned with praise, and suitable for ceremonial occasions). Each was characterised not only by verbal devices, but by specific forms of reasoning and proof deemed to be persuasive in the given setting. Aristotle's *Rhetoric* contains a whole section on litigation strategies, followed up in later sections outlining proofs, refutations and an analysis of what is usually translated as 'altercation', or techniques used in the face of contestation of rhetorical proofs by an opponent.

One important feature of the subsequent history of rhetoric was a series of philosophical controversies surrounding the role of verbal skill. One tradition, associated initially with a group of philosophers called the **sophists**, emphasised how far rhetoric allows a speaker to argue successfully on behalf of virtually any proposition. In a non-philosophical context, that view is sometimes echoed in modern questioning of legal advocacy (e.g. whether counsel genuinely believed clients they have vindicated or had acquitted in court). Philosophically, this view was attacked by Plato in his *Gorgias*. Plato considered it a fundamental problem of justice and democracy, hence the very different direction developed in his *Republic*. Another, contrasting tradition (associated in earliest forms with Isocrates) emphasised how far speech provides a basis for human civilisation, with implications as regards the structure both of politics and law. Each of these currents has persisted. So has a further divergence: how far the style and substance of verbal expression are necessarily interwoven; or, alternatively, whether verbal devices can be detached as simply ornament, independent of situated forms of reasoning of the kind propagated in political debate or law.

The divergence is hardly insignificant. Historians often note, for example, that rhetoric in both law and politics declined following the conquest of (largely) democratic

classical Greece by Macedonia, and then how, after being revived in legal structures of the Roman Republic (e.g. by Cicero), rhetoric declined again during the Roman Empire. It underwent a further period of mixed neglect and renunciation in the Middle Ages, before being rehabilitated as part of a revival of classical learning during the Renaissance. Rhetoric then suffered another period of decline in the face of newer, 'scientific' views of the relation between language, persuasion and truth in the course of the seventeenth century. But by that time, rhetorical reasoning and eloquence had already been absorbed into specialised legal training and, partly fortified by legal conservatism, the combination of the two has continued in modified forms through to the modern period.

The absorption of aspects of the rhetorical tradition into legal advocacy is significant in relation to language and law for two reasons:

1 Legal advocacy emphasises the high value placed in legal formats on verbal submissions and the weighing of evidence as the appropriate means for achieving just outcomes. This sense of the value of skilled speech brings together different levels of legal thinking: from day-to-day courtroom pleading, through the structuring of legal hearings around formats involving verbal disputation (opening speeches, evidence, summing-up, etc.), to the fundamental formulation and operation of law in democratic societies.
2 Understanding legal reasoning as a kind of rhetoric involves acknowledging that styles of persuasion and argument necessarily adapt to different purposes and settings. Classical rhetoric identified and described specific lines of argument. But it also showed how stylistic register must be modulated for different purposes and audiences, and drew a distinction between high, middle and low styles of language suited to different kinds of speech event.

Changing styles of legal advocacy – from the now often parodied grand oratory of trials in some periods to the low-key interaction of other periods and other kinds of tribunal – reflect a practical connection in advocacy between purpose, style and outcome.

Changing styles of advocate speech

The contrast between legal rhetoric conceived as high oratory, and understood as strategic argument adapted to the needs of particular settings including courtrooms, can be seen more clearly by looking at a short, historical example. Below, we present an extract from Edmund Burke's opening speech in 1788 in a famous impeachment hearing against the Governor General of India, Warren Hastings. Burke's style of legal oratory was hardly representative even of his own period, and would be virtually impossible in ours. But it was widely admired, and offers a striking contrast with modern styles of courtroom speaking and questioning we consider in our related Units B5 and C5.

> The crimes which we charge in these articles are not lapses, defects, errors of common human frailty, which, as we know and feel, we can allow for. We charge this offender with

> no crimes, that have not arisen from passions, which it is criminal to harbour; with no offences, that have not their routine avarice, rapacity, pride, insolence, treachery, cruelty, malignity of temper; in short in nothing that does not argue a total extinction of all moral principle; that does not manifest an inveterate blackness of heart, died in grain with malice, vitiated, corrupted, gangrened to the very core . . . [. . .] As to the criminal, we have chosen him on the same principle, on which we selected the crimes. We have not chosen to bring before you a poor, puny, trembling delinquent, misled, perhaps, by those, who ought to have taught him better, but who have afterwards oppressed him by their power, as they had first corrupted him by their example. Instances there have been many, wherein the punishment of minor offences, in inferior persons, has been made the means of screening crimes of a high order, and in men of high description. Our course is different.
>
> (Burke 2002 [1788]: 274–5)

Burke's style is clearly 'rhetorical' at a number of levels (look closely at the passage to find evidence for each of the points below):

1 It addresses its audience as an aggregated public rather than seeking to persuade specific addressees.
2 It adopts a 'high' style of long sentences modelled on Latin periods (far more common then than now).
3 It embellishes points with lists of cognate words and syntactic parallelism and antithesis.
4 It uses formal and unusual words and phrases ('malignity of temper', 'gangrened to the core').
5 It contains archaism ('wherein . . .') and word order inversion ('instances there have been many').
6 It is organised and punctuated to highlight prosodic patterning when delivered as bursts of eloquence.

Note, however, that despite the oratory and although the passage begins with a clear statement of its topic, 'the crimes', several hundred words later we still have no idea what crimes are being alleged.

The scale and architecture of Burke's speech (which concludes with 11 parallel structures, 'I charge him with . . .', and 5 'I impeach him in the name of . . .') are also notable. But Burke's closing techniques now sound excessive rather than forceful. His opening speech overall lasted four days (not in fact the longest opening speech in English law, which reportedly lasted over a hundred days). The impeachment hearing as a whole was also epic in proportion, lasting more than seven years. At the end of the proceedings, after rhetoric from both sides, Hastings was acquitted. But while the prosecution itself was unsuccessful, Burke's opening speech remains widely admired and is still included in anthologies of advocacy.

Burke's legal oratory seems extraordinary now, and would be impossible in any modern courtroom. That is not entirely surprising, given general changes in discourse expectation and because more active judicial time management has been introduced to control costs. The grand style of courtroom address has nevertheless not completely

disappeared from either the occasional reality or more frequent cultural perception of legal advocacy. Modern linguistic descriptions of advocacy therefore offer the prospect of showing what stylistic characteristics are actually involved; which techniques, if any, have been retained from the earlier rhetorical tradition; and how residual features have been adapted to fit the modern structures and contemporary style of legal proceedings.

Current practice: style, moves and event structure

In the course of an analysis of a corpus of modern Crown Court jury trials, the British linguist Chris Heffer describes the role of an advocate, at least in criminal trials, in a manner that contrasts markedly with the role we infer from the Burke extract above:

> The counsel is above all a strategist engaged in acts of persuasion: persuading the jury of the guilt or innocence of the defendant: convincing the judge of the legal admissibility or otherwise of an item of evidence; coercing the witness into answering in a certain fashion.
> (Heffer 2005: 95)

The contrast with Burke here is not only between high-flown public monologue and strategic effort to engage with the jury in order to persuade them. It is also to do with an organisational rather than oratorical emphasis, requiring orchestration of the voices of others as much as projection of the advocate's own voice. And as in other situations, speaking cannot be disconnected from listening. A modern trial will also involve long periods during which the advocate listens, taking material into account in anticipation of making a response later rather than speaking straight away – hence the theatrical metaphor often invoked in relation to legal trials of a play consisting of a series of acts.

Advocacy is not just a texture of eloquence. Rather, it operates at a number of levels: there is the immediate stylistic level of choosing appropriate words and sentence structures to match the needs of courtroom interaction and expectations of relevant addressees; there is a speech act level calling for choices whether, and with what strength, to assert, ask questions, request clarification, object, exhort; there is a level of more complex discourse moves including crafted monologues, taking witnesses through their evidence, and interacting with opposing counsel and the judge(s); and there is the macro-strategic level of managing the trial's overall, combined narrative and expository schema (which we explore in Unit D3, D4 and D5).

INTERPRETING LEGISLATIVE TEXTS A6

Few issues are more important in language and law than how meanings are given to written legal texts. In this unit, we show how emphasis in law on singular, correct interpretation differs from the descriptive and explanatory approach adopted in linguistics. In Unit B6, we extend this discussion by considering the reasoning processes

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