Language and Law

A resource book for students

Allan Durant
and Janny H.C. Leung

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Chapter C2

Reforming Legal Language

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> never to use one word where ten will do; never to use a small word where a big one will suffice; never to use a simple statement where it appears that one of substantially greater complexity will achieve comparable goals; never to use English where Latin, mutatis mutandis, will do; and always to qualify virtually everything . . .
>
> (White 1989: 246)

Extrapolating from features of style to overall effect, White concludes, 'If a layperson can read a document from beginning to end without falling asleep, it needs work'. What point do you think White is making in this concluding comment, given the seriousness of legal language in its social effects?

Finally, compare the two parodies of legal language we have presented. Keep in mind that you are engaged in a thought-priming activity here, rather than searching for correct answers. Fuller description of legal language varieties is presented elsewhere in Thread 1 and in Threads 2 and 3.

Activity

- ❏ How far do the two passages point towards similar idiosyncrasies or excesses? Do any major differences between the targeted characteristics stand out?
- ❏ The two passages were published over 100 years apart. Is the degree of similarity or difference you see between the two passages surprising?

REFORMING LEGAL LANGUAGE C2

In this unit, we discuss claims and counterclaims that surround proposed reforms of legal language. We show why making changes to legal language is difficult by presenting a practical task based on an early English statute, and conclude with observations about current 'plain language reform' proposals.

Legal language and its critics

Units A2 and B2 trace the formation of legal English through complicated contact between French, Latin and English, and links processes of language change not only to political developments, but also to the formation of a community of practice – lawyers – who subscribe to a number of principles about their professional language use:

- ❏ standardisation and consistency of documents in the face of contextual variability;
- ❏ resilience of legal documents in the face of challenge by other lawyers involved in adversarial proceedings; and
- ❏ decontextualisation in document drafting, so that legal documents can be interpreted in different situations arising in later periods (see Butt 2013 for discussion of drafting principles based on these linguistic norms).

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Despite presumed good intentions behind these professional principles, criticisms of legal English have been expressed almost throughout the historical period in which legal English has been recognised as a variety. In recognition of difficulties surrounding legal language and response to such criticism, many efforts have been made within the legal profession towards reform, including in the UK by the 1975 *Renton Committee Report on Legislation* which was established to achieve 'greater simplicity and clarity in statute law', as well as by frequent updating of the Civil Procedure Rules (CPR), most recently based on Lord Woolf's recommendations for user-friendly language in his *Access to Justice* report (1996), which replaced expressions such as the historical term *plaintiff* with *complainant*, *inter partes* with *between parties*, *Anton Pillar order* with *search order*, and *pleading* with *statement of case*. From 1979 onwards, despite such reforms, the Campaign for Plain English (www.plainenglish.co.uk), with parallel organisations in other countries, has tried to bring about more radical rewriting of legislation and related documents, not to change what is said but so that whatever is said is expressed in an accessible, contemporary style.

Tensions between 'change' and 'no change'

Engaging with issues surrounding reform of legal language, either theoretically or practically, calls for more precise formulation of what the problems are. In his brief overview of legal English, Crystal (2010: 374) likens critiques of established legal usage to criticism of the language of science for its impenetrability and the language of religion for its mystique. His view of reform remains a cautious one:

> The goal of a simplified, universally intelligible legal English has an undeniable appeal, but it has to be pursued wisely if the results are not to raise more problems than they solve. A blanket condemnation of legal language is naive, in that it fails to appreciate what such language has to do if it is to function efficiently in the service of the community. Equally, there are no grounds for blanket acceptance.

How justified is this view? There is a tension, Crystal insists, between achieving relative accessibility of documents by accommodating to current usage conventions (which will then continue to change following any particular reform), and maintaining the authority of documents on the questionable basis that they were fixed definitively when first produced. That tension lies at the heart of the practical issues we now consider.

Reading a chapter of thirteenth-century English law

Reform of legal language is felt to be most urgent in how it affects us now. But fundamental challenges in rewriting law can be exposed more clearly if we look at a historical example. Below, we reproduce Chapter 1 from CHARTA FORESTAE, or the 'Charter of the Forest' (a charter consisting of 16 such chapters). The charter was enacted at Westminster in 'Anno 9 Henry III *and* A.D. 1225', shortly after the foundational English legal document Magna Carta (1215, now 800 years old).

In primis omnes forefte quas HENRICUS EX Avus nofter afforeftavit videantur per bonos & legales homines & fi bofcum aliquem alium quam fuum dominicum afforeftaverit ad dampnum illius cujus bofcus ille fuerit deafforeftetur & si bofcum fuum proprium afforeftaverit remaneat forefta falva communa de herbagio & aliis in eadem forefta illis qui prius eam habere confueverunt.	'FIRST, We will that all Forefts, which King HENRY our Grandfather afforefted, fhall be viewed by good and lawful men; (2) and if he have made Foreft of any other Wood more than of his own demefne, whereby the Owner of the Wood have hurt, forthwith it fhall be difafforefted; (3) and if he have made Foreft of his own Wood, then it fhall remain Foreft; (4) faving the Common of Herbage, and of other things in the fame Forests, to them which before were accuftomed to have the fame.

Your initial reaction to this piece of text will probably be that this source of law is antiquated, and possibly impenetrable, and that it cries out for rewriting into contemporary English.

1 List your grounds for this impression (be as precise as you can).
2 Now rewrite the chapter as well as you can into modern English.
3 When you have done this, consider the following points:

3.1 Among features you are likely to have noticed in rewriting are:

- ❏ the existence of parallel texts (Should you have rewritten the Latin or the English version? Which one states the law? Or are both versions statements of law, which you needed somehow to synthesise if there are differences between them?);
- ❏ use of 'f' (our simplified font representation) in place of modern 's'; and
- ❏ capitalisation in the English text of most, but not all, nouns and selective use of upper case both for the first word of the chapter and for the name of the monarch, King Henry.

3.2 You might also have wondered about other features, including:

- ❏ words whose meaning may no longer be clear, such as unusual 'demefne' and unusual-in-this-context 'hurt' (you can find detailed discussion of such terms, and the legal concepts they signify, in histories of English law such as Pollock and Maitland 1895 or Baker 2002); and
- ❏ coreferring use of 'the fame'.

3.3 Now step back from this venerable/antiquated source of English law that you have been working on. Ask yourself: what version of the source text are you reading, exactly?

In order to work on a facsimile of *Charta Foreftae*, you have to look elsewhere. The version reproduced above comes from:

> Statutes at Large: from MAGNA Charta to the END of the REIGN of KING *HENRY* the SIXTH, To which is prefixed, a TABLE of the TITLES of all the Publick and Private Statutes during that Time. VOLUME the FIRST, LONDON MDCCLXIX.

3.4 The edition of the thirteenth-century source of law we are looking at dates, then, from 1769 (= MDCCLXIX). It comes from an edition with a brief Preface by the editor, Owen Ruffhead, in which he feels obliged to 'fay fomething with regard to the Tranflation'. Reference to 'translation' reminds us that a thirteenth-century English law would not have been enacted in English, but in Latin (see Unit B2). The English version you have just rewritten – presuming you didn't work from the Latin – is not the original, but an eighteenth-century modernisation (i.e. you have just rewritten a rewriting).

3.5 You may conclude that this fact would make an updated, twenty-first-century translation all the more urgent, if this piece of legislation on forests and forestation continued to be in force. But notice something else in the eighteenth-century modernisation: Ruffhead comments in his Preface (using the verb form 'hath' alongside 'has', despite the former having been virtually obsolete in general English for nearly a century by the time he was writing) that:

> it has been observed by Mr Serjeant *Hawkins*, that the old Tranflation hath obtained a kind of prefcriptive Authority.

Ruffhead anticipated criticism of his 1769 update even by comparison with earlier renderings (let alone with the original) if he introduced changes into the language. His defence of such changes, however, is that although 'it might juftly be deemed Prefumption to alter the old Tranflation', his purpose is exactly to extend access to law by means of the modernisation: 'the Tranflation is intended for the Benefit of thofe who are not qualified to refort to the Original'.

3.6 Ruffhead's strategy raises an editorial dilemma:

> In the early Statutes, the Errors of the Verfion are exceedingly numerous . . . The Reader will perceive frequent, and very material Miftakes.

And his response to those mistakes is that since the old translation:

> by long Ufe, hath acquired a kind of prefcriptive Authority, it hath been judged proper to leave the Text, as it ftands in former Editions, and to infert the propofed Amendment in the Margin'.

3.7 Consider these points together. Even *mistakes* in a translation that serves as a proxy for a legal original have taken on legal authority that needs to be preserved. If Ruffhead is to avoid simply reproducing errors that have now become 'authoritative', he must proliferate legal variants that risk undermining

the text's authority and may create inconsistency of interpretation and application. He will also have to add notes that can themselves be challenged, and which in any case will add to, rather than decrease, the barrier of legal style – and the specialised education necessary to deal with such style – that stands between citizen and law.

Activity

- ❏ Consider Ruffhead's editorial dilemma as a hypothetical case study that has similarities with, as well as differences from, contemporary challenges in rewriting law *without changing it*. Work through his challenges, as you see them, identifying benefits and problems associated with different strategies that a modern legal editor (or legislator involved in 'codifying', or consolidating, previous law) might adopt.
- ❏ Does this activity suggest anything about what consequences might follow from adopting a strategy of leaving existing laws as currently written but introducing new laws in a more accessible, plainer English style?

A case for reforming legal language?

As we saw in a quotation above, Crystal urges caution in advocating wholesale reform of legal language. The practical question arises, for instance, whether reforms should be applied only to new legislation and related documents, or whether one implication of opting for such reforms is a need to review all earlier legal sources (especially as these are likely to present the most acute problems of understanding). Given the daunting scale of redrafting all earlier legislation, another issue arises: whether, if modified legal style is only introduced gradually, inconsistency between legal documents dealing with the same matters but written in different periods will be increased. Such issues have been extensively discussed, and appear to call for pragmatic responses that may vary between different legal settings and purposes.

READING A STATUTE

C3

In Unit B3, we have explored how understanding the concept of genre can illuminate both the historical development and current functioning of legal text types. In this unit, we look at an extract from perhaps the most recognisable legal genre: the statute. Statutes state what the law is. But the present division of labour between legal professionals and the general public is reflected in the fact that statutes are rarely read outside the legal profession. Reading a statute, we show, calls for familiarity with basic genre features even in order to find information let alone understand legal import and

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