CHAPTER 2

Legal Language as Distinctive Discourse

Antiquity was acquainted only with theories of oratory and poetry which facilitated production.... that formed real orators and poets, while at the present day we shall soon have theories upon which it would be as impossible to build up a speech or a poem as it would be to form a thunderstorm from a brontological treatise.

F. Nietzsche

This chapter revolves around the lawyers’ language, taken to mean the distinctive discourse used in stating and practising the law. The language involved in the enunciation and application of rules constitutes a special segment of human discourse with distinctive features which lead to confusion if neglected.

Legal profession had long its own distinctive language. The type of English used by lawyers is different from ordinary plain English.¹ Lawyers

¹ What I mean by ‘ordinary plain’ English is the language used by common people in day-to-day affairs. In legal terminology, ‘plain English’ is somewhat a woolly term. What may be plain to one may be quite difficult for another. Martin Cutts (1995: 3-4) writes, “What is really meant by plain English? Is it anything more than a slogan used by campaigners to publicise themselves and their favourite cause, and by businesses selling editing and document design service?...Plain English is not an absolute: what is plain to an audience of scientists or philosophers may be obscure to everyone else. And because of variations in usage across the English-speaking world, what is plain in Manchester may be obscure in Madras or Maine. Similarly, what is plain today may be obscure
have managed to preserve an exclusive language of their own. It has
developed as the language of the law, another variety of English. Although
some have suggested that legal English is a separate language; it seems best
to regard it as a variety of English. For the most part, legal language follows
the rules that govern English in general. At the same time, it diverges in
many ways from everyday speech, far more than the technical languages of
most other professions. It is peculiar and distinctive as its linguistic
structure is puzzling and not amenable to common modes of definition.

Legal language identifies the writer as a lawyer. Indeed, for some
people legal language is the mark of a proper lawyer. Faced with a lump of
legalese, laymen think, “We can’t understand a word. This must be the
work of an expert”. In other words, legal language is a different language; it
is the badge of lawyers’ profession. The distinctive features can best be

a hundred years from now because patterns of usage, readers’ prior knowledge, and readers’
expectations will all alter over time.” In its annual report for 1991-1992, the Plain Language
Institute of British Columbia (now defunct) mentions, “...even well organised sentences that use
commonly understood words can be presented on the page in a way that makes the message hard
to understand. ...Despite all that we have learned defining what is ‘plain’ remains elusive. What is
completely understandable to one reader may be beyond another’s comprehension. ...Plain
language is not, as some suggest, ‘sending Dick and Jane to court.’ Nor is it a false art of rendering
English down to a small monosyllabic vocabulary. It is the appropriate and correct use of the full
vocabulary in well-structured sentences, following established rules of grammar. It is the language
that is free of jargon and chosen with sensitivity to the needs and prior knowledge of the intended
reader.” (http://www.plainlanguage.com)
described as matters of style or "talking like a lawyer". Hence, the concept of Barthes that legal language should be without style: "Perhaps it is its style, characterized by the absence of style, whose distinctive colour is colourlessness". In other words, when we say that a person or group has a particular style, we generally mean that they tend to prefer one mode of expression over other possibilities.

Indeed, some styles communicate more clearly than others. Lawyers often adopt a style that does not communicate all that well, at least to the general public. Sometimes, there may be legislative reasons for such a choice. In other cases, the stylistic choice is how lawyers traditionally speak or write. Although all languages bear the traces of their past, but languages are continuously modified in everyday situations in the outside world. With legal language the balance between these two forces is quite different. It has always developed with a greater regard for its past than has ordinary language. The result is that the legal language we now have—a language full of relics from past—obsolete English words and grammatical constructions, as well as outdated French and Latin terms. It is very evident

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2 Lord Denning (1993: 5-8) makes an important point: "To succeed in the profession of law, you must seek to cultivate command of language. Words are lawyer's tools of trade. When you are called upon to address a judge, it is your words which count most. It is by them that you will hope to persuade the judge of the rightness of your cause...The reason why words are so important is because words are the vehicle of thought."

that these outdated words and constructions do absolutely nothing to enhance communication; in many cases they impede it by introducing ambiguity and thus lowering comprehension. Thus, Jefferson, with his indictment of the language of post-Independence American Acts and pre-Independence British Statutes attacks in these words:

...from their lawyers verbosity, their endless tautologies, their convolutions of case within case and parenthesis within parenthesis and their multiplied efforts at certainty by saids and aforesaid by ors and by ands, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers but to the lawyers themselves.

The Statute Law Society in a submission to the Renton Committee described statutory language as:

...legalistic, often obscure and circumlocutious, requiring a certain type of expertise in order to gauge its meaning. Sentences are long and involved, the grammar is obscure and archaism, legally meaningless words and phrases torturous language... abound.

A vintage example is in Tony Wright’s polemic against the language use headlined as “Bad language”:

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5 Alfred Philips. The Lawyer and Society. Ottawa: Carleton Press, 1991. For more information see, Renton Committee’s journal entitled Legal Drafting Styles: Fuzzy or Fussy? Faculty of Law: Australian National University.
This is the world of verbless vacuities ... of robotic repetition of words and phrases that have long lost any connection with meaning.  

The distinctive and separate legal language is the product of a society in which only a very limited class of legally competent people can comprehend the texts of that language. The relexicalisation of the law and its archaic terminological obscurity are all geared to the reproduction of elite and the discriminatory values that such an elite serves. It is a privilege to read the law, but the very idea of legal language excludes participation in the legal process. This problem affects the foundational principles of law as their comprehension and view, respectively, are obstructed by an alien and alienating language. The alienating traits of lawyers’ language have also been identified in the book, *The Lawyer and Society*, which has collected a portmanteau indictment from sources which went back to Edward VI of England, from west to America and from east to Hong Kong:

The basic deficiency of legal language is believed to be its obscurity otherwise described as opacity, impenetrability, unintelligibility.

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7 To learn the law is in large measure to learn a highly technical vocabulary, a professional argot which makes frequent lexical use of specialized use of legal meanings (relexicalisation), medieval English (aforesaid, witnesseth, out with etc) and French (Chose in action, demurrer, estoppel, street, fee simple etc), as well as persuasive use of Latin terms and phrases (exturpi cause a non oritur actio etc).  
8 Edward VI (1537-1553) became King of England and Ireland in 1547 at just nine years of age. Edward’s reign was marked by increasingly harsh protestant reforms.
This is thought to be caused, or contributed to, or aggravated, by the use of long and involved sentences of indeterminate structure, struggling over many subordinate clauses, careless or defiant of the laws of grammar, inside these malformed sentences are some words and phrases which are superfluous and some which are semantically senile, and especially terms a lot of which are meaningless.  

**Spoken versus written legal language**

We expect writing to be very similar or even identical to spoken language, but it is not. Certain aspects of speech, like intonation, cannot be conveyed through writing. Even if writing could be made to reflect all the nuances of speech, oral and written communication would still differ in some very interesting ways:

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9 Philips. *The Lawyer and Society*. Glasgow: Ardmoray Publishing, 1987, p. 118. Somewhat similar point is made in this statement: “When we first tell people that we promote the use of plain language in legal documents, most of them breathe a sigh of relief. They think they will never again have to wade through Latin, archaic English, for incomprehensible legal terms. But when you work with the language of law or government, you quickly realise that the challenge of plain language goes far beyond vocabulary. You also have to think about how words are used, sentences constructed, documents designed, and how people infer meaning from words” (http://www/plainlanguage.com).

10 The sound system enables us to express meaning in speech in both verbal and non-verbal ways. Verbal meaning (what we say) relies on vowels and consonants to construct words, phrases and sentences. Non-Verbal meaning (the way that we say it) makes use of such factors as intonation, rhythm and tone of voice to provide speech with much of its structure and expressiveness. So often, it is the non-verbal meaning which is the critical element in a communication. The most important prosodic effects are those conveyed by the linguistic use of pitch movement, or melody—the intonation system. Different pitch levels (tones) are used in particular sequences (contours) to express a wide range of meanings, such as the opposition between statement (They’re ready) and question (They’re ready?). Since intonation and the way it is used in English is beyond the scope of this study, readers who wish to look at this issue in more detail can see, among others, Peter Roach (1992) and J. D. O’Connor (1980).
...written legal discourse is clearly high on informational production...high on nonnarrative concerns...and extremely high on explicit reference... These features of legal register arise from the attempt to be clear, precise, all-inclusive, and unambiguous. Bhatia identified five syntactic features of legislative sentences: sentence length, nominal character, complex prepositional phrases, binomial and multinomial expressions.11

Speech, on the other hand, will use features which help them win the appreciation from the judge and/or fellow lawyers. For example, the technique of persuasion in examining and cross-examining witnesses is a linguistic feature attributable to oral language only. Features like these keep on changing depending on the situation and context. That is why, in legal discourse emphasis is more laid on written documents than oral communication. Oral communication generally leaves no permanent record and is more spontaneous, so it tends to be less formal than written language. This applies to legal language also. Archaic, formal and ritualistic language is primarily found in lawyers’ documents, it is far less common in their speech.

The shift from speaking to writing has had significant consequences for legal discourse. Written legal documents tend to resist change and exert a conservatizing influence on the language of the law. Since written legal discourses have been regarded as authoritative, so lawyers fixate more on the text and less on the speaker's intended meaning. Writing, especially in authoritative form, can have significant consequences for how it is interpreted. Moreover, written legal discourse tends to be more syntactically\(^\text{12}\) complex and lexically\(^\text{13}\) dense than speech. Again, the reasons are fairly obvious: writing can occur over an extended period of time, which allows an opportunity for reflection and editing. The permanence of the written records motivates people to choose their words carefully. And, because the reader can go over dense written material several times, writing becomes far more complex than speech. Thus, the complexity, density and formality of legal language are closely related to the fact that legal discourse is predominantly written.

\(^{12}\) Syntax is the study of sentence structure including word structure. The vocabulary of legal discourse is closely tied to the syntax of generalisation; of non-agentive passives, nominalizations, thematisations and automatic figurative registers, whose overall tendency is that of establishing distance and impersonality. For more information see, Chapter 3.

\(^{13}\) Lexicon is the vocabulary of a language especially in dictionary form, also called lexis. The generic character of legal vocabulary is a distinctive and important feature of the language of the law; it is for this reason that it facilitates a number of syntactic and semantic operations. It is predominantly of connotative kind: a vocabulary of possibilities purportedly comprising a comprehensive system of meanings that are internal or latent within the lexicon itself in the sense first defined by Hjelmslev. See Hjelmslev. Prolegomena to a Theory of Language. 1953.
**Law as text**

Law is a text, as Derrida also says “there is nothing beyond the text”.¹⁴ Like language, which materialises as words, phrases and sentences, the legal discourse materialises in the form of the laws, case decisions and text books. The words used in the composition of statutory provisions and case decisions constitute the legal discourse. The essential point relating to case decisions as well as to the enactment of law is that language is intimately involved in the process. The instrument (language) employed for the analysis is identical with the object of analysis itself (language). Morality or custom may be embedded in human behaviour but legal discourse by definition comes into being through language. Thus, the legal profession focuses intensely on the words that constitute the discourse whether in the form of statutes, regulations or judicial opinions.

Words are lawyers' most essential tools. They use language to discuss what the law means, to advice clients, to argue before a court and to question witnesses. The legal rights and obligations of their clients are created, modified and terminated by the language contained in contracts,

deeds and wills. The average lawyers' daily routine consists almost entirely reading, speaking and writing.

The short-comings of legal language come either from its structure or from intent in its broad sense. The legal critics focus on the effects of forces, such as tradition, culture, ideology at the collective level, and motivations at the individual level, on the shaping of language enunciated in legal discourse. The result is that language tends to be deceptive and mystifying with its figures of speech, tropes, tricks and hidden meanings. It possesses a complex grammar. It is fraught with intricate constructions of double and triple negatives, different types of 'if' clauses, hypothesis—piling, exceptions, reservations, declarations etc. What these do is to impart exact illocutionary force\textsuperscript{15} to legal norms. It is principally this grammar which creates the mind boggling effect of many passages in legal discourse.

To summarise, if law is a text, then in order to achieve its principal aims—social control, the avoidance and resolution of disputes—the writing and reading of the discourse becomes crucial.

\textsuperscript{15}An illocutionary act is any speech act that amounts to stating, questioning, commanding, promising and so on. Illocutionary force is roughly speaker's intention behind the production of illocutionary act, including its communicative point, attitudes involved, and presuppositions. For more details see, John Austin (1962) and John Searle (1969).
Law as social discourse

Law is one of the species of discourse, because the specific object of a concept of legal discourse is precisely the discursive dimension of law and the definite bodies of discourse through which legal institutions work. The magical form of legal discourse is that of a series of social texts as the canons of social order. The social and rhetorical character of legal language becomes the basis and recipient of wider discursive, social and ideological processes. Hart has also emphasised the character of law as social fact. He is concerned to argue that legal systems are more complex social entities. Borrowing from Peter Winch’s work on the methodology of the social sciences, Hart has perceived the legal rule to be a variant form of social rule\(^\text{16}\). In terms of methodological principle Winch has argued that legal rules are to be defined by reference to internal criteria—they must not be merely observed but also understood “for their being intellectual or social, as opposed to physical in character depends entirely on their belonging in a certain way to a system of ideas or mode of living”.\(^\text{17}\) Hirst has argued that

\(^16\) In terms of methodological principle, Peter Winch argues that the legal rules are to be defined “for their being intellectual or social, as opposed to physical, in character depends entirely on their belonging in a certain way to a system of ideas or mode of living. For more details see P. Winch. *The Idea of Social Science*. 1958, p, 108.

laws have no necessary unity of context, form or function. Laws can be divergent and inconsistent in form and function. Law is a social practice. Any intrinsic definition of law as a process or set of processes, and consequently also, as a discourse, is inevitably answerable or responsible for its rule within ethical, political and social commitments of its times.  

Law and legal texts are to be treated as accessible and as committed, precisely because they are in themselves contingent rather than universal and because of the social and cultural value attributed to legal discourse. For Edelman legal discourse is "a discourse of the privative appropriation of nature in its historico-social combinative."  

Jacobson has provided a comprehensive analysis of linguistic patterning of certain aesthetic discourses in the domains of art, poetry and film but no such defence is available for the study of legal discourse. Burten and Carlen have given a brief account on the specificity of legal discourse in their book *Official Discourse*. According to these two techniques more constructively. His main aim as lecturer and writer was to tell the truth and be clear. He was the most widely read legal philosopher.  

21 *Official Discourse* has a brief chapter on the specificity of legal discourse. The study proceeds from a very creditable sociological elaboration of the institutional site of legal discourse to an elaboration of certain interdiscursive properties. Towards the end of the study, the linguistic terminology or generalised labels of paradigm and syntagm, metaphor and metonymy are briefly
thinkers, the role of law is to perform: the functions of incorporation (the production of information utilizable for purposes of social control), legitimacy (the refutation of subversive interpretations of breakdowns of law and order) and, finally, confidence (the reaffirmation of images of the state's administrative rationality and democratic legality). Moreover, they say that legal and official discourses are conceived as ideological state apparatuses whose function is solely and simply that of appropriating and integrating material-social and institutional conflicts (breaking down of law and order), into the dominant paradigm of liberal democratic consensus. Legal discourse is thus to be viewed as a dialogic and rhetorical act of semantic appropriation.

The language of legal discourse is argumentative rather than scientific. In any given instance, legal argument particularizes or translates a series of sociological relations and conflicts into relevant facts or issues. As a number of studies have argued, this particularization or decontextualisation of legal discourse is its most significant hallmark.\textsuperscript{22} Concrete social relationships and real people are transmogrified into the

abstractly free and equal legal subjects of the legal code. Burton and Carlens’ contribution to this analysis is that of displaying, though not explaining, the extent to which the ideology of legal subjectivity and inter-individual relationships penetrates the interdiscourse of the law.23 The meaning of legal text is to be understood in terms of its imposition of an idealised order, or series of semantic pre-constructions onto a set of material issues and social conflicts which have in turn to be rewritten as the interrelationships of a series of individuals as legal subjects.

To summarise, legal discourse has certain semantic effects in sociological sense, but simultaneously the language of such discourse must necessarily comply with the task or functions it sets. It is indisputably necessary to examine how it works as a discourse, as a linguistic practice. If we don’t analyse the specific features, especially the lexical and syntactic features of legal discourse, a great deal of credibility of present study is lost. The point to be made is that legal discourse is considerably more complex and multifaceted. It has its own history, its own interpretive

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23 F. Burten and P. Carlen. *Official Discourse.* London: Routledge, 1979, p. 95. Interdiscourse is to be defined as the social order, or legitimate hierarchy of discursive formations. It refers, for Pecheux, to the sense in which “every discursive formation...” is dependent on the complex whole in dominance of discursive formations
techniques and own meta-language\textsuperscript{24} of methodology. Legal language in its entirety is embedded in the history of its institutionalisation and in the complex interrelations of various languages, multiple audiences and frequently divergent communicative and practical effects. In this way it can be argued that legal language is not purely and simply the malleable or transparent instrument of ideological purposes.

Formal and ritualistic language

Formal and ritualistic language is another distinctive trait of legal discourse. Such language tends to be archaic. In the court room, verbal formulas and ritualistic words put the audience on notice that this is a proceeding with important consequences. And, as Robin Lakoff has noted, "the formality of court room reminds participants that this is an adversarial setting."\textsuperscript{25} Furthermore, ritualistic language helps in framing the proceeding, marking its beginning and end. Signalling the start of the session is the talismanic cry of the bailiff. The ritualistic administration of the oath to witnesses and their placement in boxes that separate them from the outside world, only

\textsuperscript{24} See M. Pecheux., 1982, P.113

\textsuperscript{25} Robin Tolmach Lackoff. \textit{Talking Power: The Politics of Language}. Oxford: Blackwell Publisher, 1990. Lakoff is feminist and a professor of linguistics at the University of California, Berkely. Her most famous work is \textit{Language and Woman's Place}. (1975), which introduced many ideas about woman's language into the field of Sociolinguistics. Her article "Women's Language" combined with her book have served as the basis for much research on the subject of women's language.
heightens the other worldly impression. Lakoff concludes that we should not be too quick to abolish ceremony and formality, "since we want the court room to be hallowed to be set aside."26

The use of ritual and archaic language indicates that this is a special occasion quite different from ordinary discourse. The formal and unusual clothing of the main participants reinforce the impression that this is a solemn occasion and add an aura of authority to the proceedings. The separation from everyday life is also stressed by the behaviour of observers who are expected to show the proper respect by remaining silent under most circumstances. This respect is further reinforced by the judge's contempt power.

Many written legal documents have an extremely formal quality, an impression often intensified by the use of archaic words and grammar. Pleadings typically begin with the phrase 'Comes now plaintiff...'. Likewise, such documents often end with equally ritualistic words, as 'prays for relief as follows...'. When responding, the defendant may conclude with the words: 'Wherefore, defendant prays that plaintiff take nothing by reason of his complaint'. An 'affidavit', even today, often ends

26 Lackoff, 1990.
with the formulaic phrase: ‘Further affiant sayeth not’. The ‘will’ typically ends on an equally formal note, with a signature and formal attestation by a witness. The conspiracy theory suggests that lawyers employ highly stilted, formal and redundant legal prose to create an impression that drafting legal documents is far more complex than what it appears. The apparent fear among lawyers is that clients would no longer purchase their services if they were aware that a perfectly valid will could start out with the simple sentence. To quote Bentham, the conspiracy theory would suggest that lawyers employ highly stilted formal and redundant legal prose to create the impression that drafting legal documents is far more complex than it really is, if you strip away the jargon, “every simpleton is ready to say—What is there in all that? This is just what I should have done myself.”

In the court-room formal and ritualistic language in wills and similar other documents signal to the parties that this is a legal act with significant consequences. Gulliver and Tilson have called this the ritual function of the formalities surrounding the execution of certain legal documents. They put it:

The formalities of transfer therefore generally require the performance of some ceremonial for the purpose of impressing the transferor with the significance of his statements and thus justifying the court in reaching the conclusion, if the ceremonial is performed, that they were deliberately intended to be operative.\textsuperscript{28}

Overall pompous tone of the legal language is derived from the overuse of relatively unusual words, often of Latin origin, where a more common word would suffice: ‘approximately’ for ‘around’, ‘commence’ or ‘employ’ for ‘use’, ‘expedite’ for ‘hasten’, ‘prior’ for ‘earlier’, ‘terminate’ for ‘end’, to list just a small sampling.

**Lengthy and complex sentences**

One prominent feature of the legal style is the use of very long sentences. Bentham has noted that lawyers have favoured “long windedness” and suggested that “the shorter the sentence the better”.\textsuperscript{29} Sentences for example, in J&K *Explosive and Explosive Substances* Act 1961 have a mean length of 48 words. This contrasts to scientific prose, which according to one study, has a mean sentence length of 27.6 words and dramatic texts which, in one corpus, contain an average of 7 words per

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\textsuperscript{29}Jeremy Bentham, 1843, P.264. “Long-windedness” means that legal writing tends to consist of very long sentences, sometimes hundred of words in length and thus become boring. See Felker etal, *Guidelines for Document Designers.* P.43.
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sentence. Even lengthier sentences have been found by Hiltunen in his analysis. He has calculated a mean sentence length of 79.25 words; the shortest sentence has 7 words and the longest has 740.31

Presumably, a motivation for lengthy sentences is the desire to place all information on a particular topic into one self-contained unit. The result is not just very long sentences but complex ones also with many conjoined and embedded clauses. Gustafsson has found that sentences in Acts have an average of 2.86 clauses per sentence and there are few simple sentences. One sentence has nine dependent clauses.32 This indicates that legal discourse has more embedding and this embedding is significantly deeper than what occurs in most journalistic, literary or scientific discourses. The grammar instanced in this typical clause of legal document provides illocutionary force, but at the cost of complexity:

The tenant shall not without the prior consent of the landlord, which consent shall not be unreasonably delayed or withheld in the case of an assignee or subtenant who is respectable and responsible and of sound financial means and demonstrably capable of performing the tenant's obligations under this lease, assign or sublet the premises in whole or in part.33

Whatever historical reasons there may be for drafting legal rules in a single sentence, there is little justification for it today. A long sentence in legal discourse is normally much harder to follow than a shorter and simpler one. The complexity of sentences is far more of a problem than length. Plain legal language thus strives to avoid unusual, complex or antiquated syntactic constructions, while promoting clarity through strategies like keeping subject and verb close to each other, reducing the number of clauses in each sentence, and minimizing the depth of embedding.

**Unusual sentence structure**

A further distinctive characteristic of legal language is the use of sentence structures that tend to be quite unusual. An illustration, by linguists like Crystal and Davy, comes from an insurance contract: “a proposal to effect with the society an assurance”.

When a verb (V) is followed by both a prepositional phrase (PP) and noun phrase (NP); the common word order in modern English is for the noun phrase to come first: NP-V-NP-PP as in “a

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34 A growing concern about plain English in several countries has drawn attention to the unnecessary complexity of the legal language. The Plain English movements are a modern phenomenon. In the UK the Plain English campaign was launched in 1979 by a ritual shredding of government forms in parliament square. In the USA, President Carter issued an order in 1978 requesting that regulations be written in plain English. The annual Plain English awards in the UK continue to attract public interest and have helped to form a climate of opinions which has led many organisations to change their practice. The campaigners point to enormous savings in time and money from the use of clearer language. Cf. Note 1 above.

proposal to effect an assurance with the society". Yet as the above example shows, legal language often uses the order V-PP-NP. Crystal and Davy further mention that in legal texts, adverbials often precede a participle as in "herein contained or hereinbefore reserved." The normal word order for the adverbials is to follow the participle, 'contained herein' and 'reserved hereinbefore'. Besides, 'herein' or 'hereinbefore' can hardly be considered 'ordinary' adverbials.

Legal discourse also reflects a fondness for non-finite clauses that follow the nouns that they modify: "rent hereinbefore reserved and agreed to be paid." Of course, it would be awkward and ungrammatical to write: "the hereinbefore reserved and agreed to be paid rent", but it is not difficult to make the sentence sound more natural without loss in meaning. For example, one could speak of "the reserved and agreed upon rent", or "the reserved rent that the tenant has agreed to pay". Very likely, simply writing 'the rent' would be sufficiently clear from the context.

Another feature of legal style is to place dependent clauses next to the words they modify. For example:

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36 Crystal and Davy, p. 204.
37 Crystal and Davy, p. 205.
The defendant or the prosecutor, if ‘dissatisfied with the place of trial as fixed by the magistrates’ court, may apply.\textsuperscript{38}

Ordinarily, we try to avoid separating the subject and verb with too much material. We also try not to insert too much material inside the verb clause. Critics have argued that the legal word order allows adverbials and other modifiers to appear “with logical exactitude next to the words they determine.”\textsuperscript{39} Perhaps this does indeed decrease the possibility of ambiguity, but it simultaneously reduces comprehension.

\textbf{Wordiness and redundancy}

Wordiness is the legal profession’s most distinctive characteristic and redundancy its strongest point. The motto of lawyers seems to be: “Never use one word where you can use two; and the more you use, the better”. An American judge has said that “the legal mind finds magnetic attraction in redundancy and overkill.”\textsuperscript{40}

Lawyers continue to reach for familiar words or phrases out of habit without pondering whether the words contribute anything to the meaning that they hope to convey. Much of this is what those in the legal profession call ‘boilerplate’: a standard provision that is routinely added to a particular

\textsuperscript{38} J & K Code of Criminal Procedure.
\textsuperscript{39} Gustafsson, 1975, p. 22.
\textsuperscript{40} Coca Cola Bottling Co.Vs Reeves 486 So 2\textsuperscript{nd} 374, Miss.1986 Bobertson J, pp. 383-4.
type of document. Part of the problem is that lawyers never delete a clause from their standard will or contract forms, even if it serves no evident function. Generally, they add material to cover additional possible contingencies. The result is as ever more words.

Excessive wordiness is also commonly found in grants of rights. The grantee is given “the full right to pass and repass on foot or with or without vehicles along and over the foot paths and roads respectively of the said estate”.41 These characteristics of wordiness and redundancy give legal discourse its distinctiveness. They are almost always unnecessary, both linguistically and legally. The drafter hopes, by piling word on word, to cover every conceivable circumstance, as if to ensure exactitude by sheer weight of verbiage.

Another contribution to wordiness is the inclination to use prepositional and other phrases in place of simple adverbs like ‘slowly’. The same is true of prepositions and conjunction. Some lawyers seem incapable of using short and simple words such as ‘if’, ‘before’, and ‘after’, preferring instead to say or write ‘in the event that’, ‘prior to’, or ‘subsequent to’. Other common examples of such complex phrases include

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‘during the time that’ instead of simply ‘during’, ‘until such time as’ in place of until ‘and’ ‘in order to’ for ‘to’.

Legal discourse is not inherently verbose or compact; the incentives under which lawyers operate make all the difference. Lawyers who draft private documents, like contracts, deeds, and wills, are normally paid by the hour and may feel a need to impress their clients or justify their fees with the length and complexity of their prose. They are thus naturally inclined towards liberal use of redundancy and a verbose style. Sir Mathew Hale, Chief justice of the King’s Bench, has given reasons for the development of lengthy pleadings:

These pleadings being mostly drawn by clerks, who are paid for Entries and Copies thereof, the larger the pleadings are, the more profits come to them, and the dearer the clerks.42

Recently, pleadings exceeding 2600 pages were lodged in a South Australian case; they were later reduced to about 360 pages. The judge expressed his distaste in epithets such as, “contradictory, embarrassing, and so convoluted that the pleadings are well-nigh impossible... to

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Richard Wydick, an American expert on clear legal language writes:

Lawyers are busy, cautious people, and they cannot afford to make mistakes. The old, redundant phrases worked in the past, a new one may somehow raise a question. To check it in the law library will take time and time is the lawyer’s most precious commodity. But remember once you stay one of these old monsters, it will stay dead for the rest of your legal career. Such trophies distinguish a lawyer from scrivener.

Some common legally redundant expressions are:

advise and consent
alter or amend
cease and desist
consess and acknowledge
or and during the period
force and effect
free and clear
full and complete
good and sufficient
null and void
order and direct
save and except
to have and to hold
transfer and assign
ture and correct
undertake and agree
unless and until

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The use of two words joined by an ‘and’ is a red flag that should make drafters pause and examine carefully whether both words are necessary or whether one is redundant and should be eliminated.

**Conservatism**

The common law traditionally looks backwards, seeking authority from the past. This reliance on past judicial decisions—*precedents* as lawyers call them—can curb innovation. The pattern of the present is fixed by reference to the past, and there is a reluctance to alter the law, in general and, to deal with a problem, in particular. This reluctance is reflected in the well known saying, “Hard cases make bad law”. When confronted by manifest injustice, it is easy to lose sight of principle; there is a fear of setting a precedent for the future. Of course, some lawyers do not allow themselves to be fettered by the precedent. For them a rigid adherence to a principle can inhibit justice. Among judges, perhaps in the modern times is Lord Denning. His book, *The Discipline of Law*, contains a chapter called “The doctrine of precedent”, which he concludes in his clear and right style:

Let it not be thought from this discourse that I am against doctrine of precedent. I am not. It is the foundation of our system of case law that has evolved by broadening down from precedent to precedent. By standing by previous decisions, we have kept the common law on a good course. All that I am against is its rigid application—a rigidity which insists that a bad precedent must necessarily be
followed. It would treat it as you would a path through the woods. You must follow it certainly so as to reach your end. But you must not let the path become too overgrown. You must cut out the deadwood and trim off the side branches, else you will find yourself lost in thickets and brambles. My plea is simply to keep the path to justice clear of obstructions which would impede it.45

Lord Denning has earlier dealt with a similar theme, but with particular emphasis on lawyers’ language. In his lecture at Oxford in 1959, entitled “From precedent to precedent”, he said:

You will have noticed how progressive the House of Lords has been when the lay peers have had their say, or at any rate, their vote on the decisions. They have insisted on the true principles and have not allowed the conservatism of lawyers to be carried too far. Even more so when we come to the meaning of words, lawyers are here the most offending souls alive. They will so often stick to the letter and miss the substance. The reason is plain enough. Most of them spend their working lines drafting some kind of document or another—trying to see whether it covers his contingency or that. They dwell upon words until they become mere precisions in the use of them. They would rather be accurate than be clear. They would sooner be long than short. They seek to avoid two meanings, and end—on occasions—by having no meaning. And the worst of it all is that they claim to be the masters of the subject. The meaning of words, they say, is a matter of law for them and not a matter for the ordinary man.46

45 Lord Denning. The Discipline of Law. London: Butterworth’s, 1979, P.314. Lord Denning (1899-1999) was a legal genius, and judicial laureate. His style of writing was his own. He communicated effectively: in short sentences, sometimes two words, sometimes only one, but most appropriate. His writings are not merely stuffed with legal details. They speak of his love for literature. Shakespeare seems to be his part of daily vocabulary. His judgments are pieces of literature. His writings reflect what Samuel Wesley has recommended “Style is the dress of thought, a modest dress, neat, but not gaudy, will true critics please.”
46Lord Denning, 1979, p.293.
These criticisms are hardly new. Centuries ago Jonathan Swift had expressed similar views. In *Gulliver's Travels* (1726), his hero describes a society of men in England bred from youth to prove by words multiplied for the purpose that black is white and white is black.

> It is a maxim among these lawyers, that whatever hath been done before: may legally be done again. And therefore they take special care to record all the Decisions formerly made against common justice and the general Reason of Mankind. These, under the name of precedents, they produce as Authorities to justify the most iniquitous opinions; and the judges never fail of decreeing accordingly... It is likewise to be observed, that this society hath a peculiar Cant and Jargon of their own, that no other Mortal can understand and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very Essence of Truth and Falsehood of Right and Wrong, so that it will take Thirty years to decide whether the Field, left me by my Ancestors for six Generations, belong to me, or to a Stranger three Hundred Miles off.47

Gulliver’s attack on distinctive legal language is the strongest call for a clear legal language.

The tyranny of the precedent books exists still with us. To many practitioners, the contents of the precedent books are gospels. Some lawyers cling to the belief that adopting precedents from books will save them from claims in negligence. But, legal documents should be drafted for the needs of the particular client, in the light of the circumstances of the particular

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transaction. Just as the needs of clients differ, so do the needs of their documents. Robinson has written:

The majority of members of the branches of profession are addicted to the use of precedent books, office forms and printed forms. The thinking seems to be that the needs of a client must be satisfied by some cure prescribed years ago.  

Blind adherence to precedents is one of the causes of the complexity of modern legal documents. Sometimes, slavishly-copied precedents are not merely inappropriate to the particular transaction; they are dangerous or even wrong. The two aspects of precedents—reliance on past decisions and dependence on published forms—are compounded by a third: the customary methods of learning in practice. Richard Preston, writing in the early 19th century, explained how lawyers taught themselves to draft documents:

The misfortune of person, who either as clerk to a solicitor or as a student in a conveyancer’s chambers, begins to study the practice of conveyancing, is that he is taught by form, or precedent, rather than by principle. He is made to copy precedents, without knowing either their application or those rules on which they are grounded. When he begins to prepare drafts he is led to express all his information from these forms, and his knowledge is, in the limited as the means by which he has been instructed.

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One of the principal difficulties to be surmounted by a person so educated is to gain sufficient strength of mind, and resolution, to free himself from the shackles of precedent.49

Training in law firms, universities and colleges of law reinforces the budding lawyers’ natural desire to seek comfort in the precedents of yester years. As a result, lawyers are reluctant to set aside what has been used for years and presumed to work.

**Jargon, argot, and technical terms**

Legal discourse contains a large number of words that are not used at all in ordinary speech, or are used in a different sense. Critics characterise most of this vocabulary as argot or jargon. To some critics most legal terms are worthless jargon whose main purpose is to befuddle the public. Its vocabulary is full of hoary words and phrases, many survivors from Anglo-Saxon, Latin, and French. Several writers have claimed that the legal lexicon consists of a great deal of argot. One such writer is Mellinkoff, who uses the term to refer to a specialized language or means of communication with a group50. These days, linguists tend to use the term in a more restricted sense, referring to a secret language through which a

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group intends to obscure communication. This usage harks back to the origins of the word, which was first used in French sources to refer to the clandestine language of street merchants.\textsuperscript{51}

Much of what Mellinkoff\textsuperscript{52} characterizes as argot is really what we would today call jargon: the vocabulary of a trade, occupation or profession.\textsuperscript{53} The phrase, a technical term and jargon are closely related and linguists often use them interchangeably. Examples of legal jargon include ‘black-letter law’, ‘boilerplate’, ‘case at bar’, ‘case on point’, ‘case on all fours’, ‘chilling effect’, ‘conclusory’, ‘decedent’, ‘grandfather clause’, ‘a hypothetical’ (used as a noun, as in a good hypothetical is hard to find), ‘instant case’, ‘judge shopping’, ‘predecease’, ‘sidebar’ and numerous others.

One of the most striking features of legal discourse is its technical terminology. Such terms indeed have an important function for any profession. For instance, a phrase like ‘cy pres’ (in case the purposes for which properties are dedicated by way of Trust or Will cannot be accomplished, it is permissible under the doctrine of cy pres to utilize the

properties for similar purposes.) facilitates more efficient communication by encapsulating in two short words what might otherwise take an entire paragraph to explain. And, technical terms are useful because they often have a fairly precise definition. Even Mellinkoff, a stern critic of legal jargon, has admitted that there is “a small area of relative precision in the language of the law—mostly terms of art”.

As in many other fields, legal terms of art come into existence by means of usage or convention. Of course, usage can change over time and from place to place. In fact, even at the same time and in the same place, lawyers may use legal terminology in slightly different ways. The result is that technical legal terms are not immune from the vagueness and ambiguity inherent in ordinary English.

It is unrealistic to expect the legal vocabulary to achieve the exactitude of the scientific lexicon. Scientific language is often quite precise because the concepts or categories themselves are well defined. The scientific community seems to agree on the definition of terms like ‘centimetre’, ‘photosynthesis’ etc. Unfortunately, legal vocabulary tends to refer to legal and social institutions that change frequently, which results in

54David Mellinkoff, 1963, pp. 293 and also 388
the meaning of associated terminology changing as well. The content of a term like 'negligence' will change depending on the era and society. Furthermore, most exact sciences are international in scope, sharing common assumptions and vocabulary that transcend political borders. 'Oxygen' can be directly translated into any language with minimal loss in meaning. Legal systems, by comparison, are highly parochial.

It might seem that judicial decisions and statutory definitions would make the meaning of legal terminology more precise, especially compared to terms whose meaning depends on usage. But, judicial interpretations can also muddy the waters by deviating from accepted legal usage, or even from ordinary usage. Judges have been known to interpret 'and' as 'or' and 'or' as 'and', even though their distinction is fairly clear.55 Surely such interpretations undermine precision and the established meaning of the term.

Another illustration is the term 'issue', widely used in wills. When a testator leaves her estate to her issue, the ordinary meaning of the term is her descendants, or any one to whom she has contributed genetic material. Now suppose that one of her children was adopted. Clearly, that child is not

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‘issue’ in the ordinary meaning of the word. Yet many judges have ruled that the term includes adopted children, often relying on indications that is what the testator would have wanted, or policy reasons. While this seems like the right thing to do, it has completely undermined any precision that the term ‘issue’ might once have had.

In fact, the peculiarities of legal language have become a symbol of the inaccessibility of the law to ordinary people and of the extraordinary expense of legal services. According to Solan, “to many, I imagine, lawyer is some sort of bizarre translating device: The lawyer is presented with a problem in the actual world, such as an automobile accident. He translates this easily understood problem into some sort of incomprehensible jargon. The judge then rules, and the incomprehensible jargon is translated into dollars owed, or prison terms, or something else that can once again be understood. For all of this translation back and forth, the lawyer charges a healthy fee”.

**Shortening of words or phrases**

Another distinctive trait of legal discourse is to shorten words or phrases, or to create novel terms for which there is not formal equivalent, which

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promotes group solidarity and makes it harder for outsiders to comprehend the legal context. One of the best ways to shorten terms is through clipping and of course, many shortened forms have become accepted in the standard language, such as ‘bike’, ‘exam’, ‘memo’, etc. But, lawyers use a fair amount of clipped terms which do not fall in the standard language, such as, ‘depo’ (deposition), ‘hypo’ (hypothetical example), ‘punies’ (punitive damages), ‘rags’ (interrogatories).

Acronyms are another way to shorten legal phrases. An Acronym consists of the initial letters of several words. Acronyms are common in many trades and professions, and the law is no exception. A few examples are ‘TRO’ (Temporary Restraining Order) ‘TSC’ (Trial Setting conference), ‘JNOV’ (Judgement Non Obstinate Veredic to), ‘P’S’ and ‘A’S’ (Memorandum of Points and Authorities) ‘UCC’ (Uniform Commercial Code).

A different way to shorten a phrase is to replace an adjective and noun combination with an adjective that functions by itself as a noun: examples are the terms ‘incidentals’, ‘consequential’, ‘punitive’ for ‘incidental damages’, ‘consequential damages’ and ‘punitive damages’.
Flexible and general language

Legal language is described as full of words and expressions with general or flexible meanings. Lawyers sometimes deliberately employ terminology because of its pliability. As Reed Dickerson has noted, flexibility in legal language is often a "positive benefit". The best known illustration of flexibility is the word 'reasonable' in expressions like 'reasonable care', 'beyond a reasonable doubt' and 'reasonable man.' Obviously, such flexible terms may be useful. But, what is reasonable in any particular situation may not capable of precise articulation in advance. The standards of 'reasonableness' change over time, For example: in the past it was deemed prudent to apply tourniquet to the wound. Nowadays, this is no longer recommended: experts advice us to transport the victim to medical facilities as soon as possible. Therefore someone in the past, who applied tourniquet, would have been acting reasonably. That same person today might be responsible for any damage because it is no longer reasonable to apply the tourniquet in the first place. William Prosser, a leading American commentator on law, has noted:

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The conduct of the reasonable man will vary with the situation with which he is confronted; under the latitude of this phrase, the courts have made allowance and have applied, in many respects, a more less subjective standard.\textsuperscript{58}

Thus, the word 'reasonable' only causes reasonable doubt about 'reasonable doubt'.

We are, thus, left with a body of writing that calls itself precise, but reserves the right to be as imprecise as it wishes, when the situation calls for imprecision. This state of affairs is widely criticized by lawyers and non-lawyers alike, who recognise much of legal language as arrogant and empty hocus-pocus.

The other flexible words are, for example, 'obscene' or 'indecent'. Many governments around the world claim the power to ban 'obscene' or 'indecent' materials. But what exactly is 'obscene'? Justice Stewart has admitted that he could not define it intelligibly, but claimed that "I know it when I see it."\textsuperscript{59} At best, people might agree on flexible definition of these terms, something along the lines of offensive to one's standards of decency, yet people differ dramatically on what those standards of decency are and


how to apply them to any particular situation. The problem is that if a term is too flexible, it gives a judge or government official tremendous latitude in deciding what should be banned as 'obscene'. Despite its limitations, flexible language has several useful functions. It allows a legislature to use a general term without having to articulate in advance exactly what is included within it, something the legislators might not be able to agree even if they had the time to try. It permits the law to adapt to differing circumstances and communities within a jurisdiction. And it enables the law to deal with novel situations that are certain to arise in future, as well as changing norms and standards.

For these reasons, flexible and often quite abstract language is typical of constitutions, which are ideally written to endure through time. As Justice John Marshal has written that the "constitution was not a 'legal code' that contained 'immutable rules' for every possible contingency." Consequently, the constitution—especially the Bill of Rights—has many quite general or flexible terms, including 'due process', 'freedom of speech', 'liberty', 'probable cause', 'property', 'unreasonable search', 'cruel

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and unusual punishment’, etc. These terms are so malleable; their meaning will naturally evolve with our changing society.

Elsewhere, flexibility may be less appropriate. The greatest problem arises under the criminal law: those who have to obey a law should know precisely what is prohibited, something that flexible language does not convey well. If the law flexibly bans any ‘indecent’ language, it may be very problematic to decide which words are permissible and which are not. Likewise, when drafting private documents, such as contracts and wills, lawyers are often leery of flexible language, fearful that in the future it may be interpreted in a way that they do not intend. Consequently, although in some legal contexts flexible language is useful or even necessary, in other circumstances it may be less appropriate.

Professor David Mellinkoff has concluded that the claimed precision of legal language is largely a “myth”\textsuperscript{61}. He has been joined 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 cases become controversial over the meaning of some word or phrase in statutes and other legal documents. This 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, an equally important impediment to precision in legal language is the fact that often legal drafter is forced to choose between the flexible and the precise, knowing that each direction has it own attractions and dangers. In certain cases he may deliberately opt to be imprecise for strategic reason. Similarly, a word is classified as general when it is not limited to a unique person or thing and thus can denote more than one, when it refers to a class, eg. Grand-parent (paternal, maternal), child (natural, adopted, legitimate, illegitimate), property (real, personal, intangible, residential, commercial) etc. A general term can be over inclusive or under inclusive and thus requires great care on the part of the drafter to be neither.

**Legislative definitions as conventional glosses**

Legislative definitions, like conventional definitions, are merely conventional glosses on the meaning of words and it may be necessary for judges sometimes to ignore the legislative definition when it runs counter to the true nature of the case. In this context, I would like to quote Moore’s realist theory of meaning, which is based on the idea that a word “refers to a natural kind of event that occurs in the world that it is not arbitrary that we
posses some symbol to name this thing"62. Under this approach, our use of
a word, and the definition we offer for it, will not necessarily be static, but
will change as our understanding of the object, event, or idea to which the
term refers changes. Moore has offered 'conventionalism' as the
disfavoured alternative to a metaphysically realist theory of meaning.
Conventionalist theory regards the relationship between symbols and things
to be essentially arbitrary.63 Moore's point is that we will reach absurd or
sub-optimal or unjust results if we treat the statutes' stipulative definition
on its own. Instead, we must understand that the ordinary meaning and
usage of a term and our belief about the world provide a background, a
context within which we ought to interpret statutory definitions.

Conventionalism in the legal context is inflexible and immobile.
Moore has argued that as our understanding of objects and processes in the
world changes and improves, 'conventionalism' offers neither processes
nor justifications for modifying our definitions of words to keep up. Thus
meaning will "run out" in our attempt to describe the world.64 He has also
argued that under "conventionalism any attempt to apply an old term to new

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64 Moore, 1985, p. 293.
circumstances must be characterized as a change of that terms meaning."\(^{65}\) His favourite example to explain and justify his realist theory of meaning is the word ‘death’—people once equated death with cessation of heart and lung function. Such definitions were incorporated into statutes for determining when a person’s organs could be removed for use in transplant surgery. After this doctors gained the ability to revive the person whose heart and lungs had stopped functioning for a short period of time. Moore has pointed out that doctors and legislators now tend to equate death with non-revivability.\(^{66}\) Further he has argued that a conventionalist must believe that the meaning of the word ‘death’ has not changed. Whether a person is really dead or not will be ascertained by applying the best scientific theory we have about what death really is. A realist believes that “there is more to what death is (and thus what “death” means) than is captured by our current conventions.”\(^{67}\) Moore says:

If the statute authorizes, transplants explicitly used the old definition of ‘death’, we would still think it ghastly for a judge to rely on that definition to allow the removal of an organ from a person who could still be revived.\(^{68}\)

\(^{65}\) Moore, 1985. p. 293
\(^{66}\) Moore, 1985, p. 293-4, 297-300, 308-9, 322-8, 382.
\(^{67}\) Moore, 1985, p. 294.
\(^{68}\) Moore 1985, p. 322-25.
For Moore, statutory definitions in such cases are not stipulations, the legislature “should be held to have the same linguistic intentions as other language users, namely [metaphysically] realist ones.”\textsuperscript{69} Therefore, when we consider Moore’s thought experiment, I would conclude that the term ‘death’ is becoming interestingly inadequate, overburdened and overstretched that at the least it has come to describe family-resemblance group of phenomena rather than unitary natural kind of event.

Moore approaches law through language. His discussions about language are in two related assertions: (1) We intent our words to be understood in a realist way, and (2) definitions offered in statutes are merely conventional glosses on the meaning of words, as the words have uncertain usage patterns. The meaning of terms exists out in the world somehow, and we are able to grasp the meaning in some way. Understanding a term’s meaning is thus equivalent to grasping the platonic, which in turn some how guides our application of the term in a potentially infinite number of circumstances.

\textsuperscript{69} Moore, 1985, p. 323.
Moore is clear that adherence to realism about meanings would entail a change of practice and would lead to changes in the outcome of cases:

Judges should guide their judgments about the ordinary meanings of words by the real nature of the things to which the words refer and not by the conventions governing the ordinary usage of those words. Judges should use the realist theory of meaning rather than a conventionalists theory.\(^70\)

Legislation is often applied long after it is enacted. The rule maker's intention can be more abstract. When we are speaking to a person we know we keep in consideration how we think that particular person would respond to what we say. Therefore the extra clarity in language may come from knowing how the listener will understand a comment. But all these points are largely absent while enacting statues.

To summarise, linguistic practice of law is a problem and discourse analysis is a methodology of clarifying the use of legal language and the meaning of specific legal terms. Since legal theory is concerned with the specific characteristics of the legal normative order and particularly with the specific and distinctive features of legal language, a sharpened awareness of words will refine and clarify our appreciation of that for

\(^70\)Moore. p.323
which they stand. The great anomaly of legal language is our inability to define its crucial words in terms of ordinary factual counterparts.

**Rhetoric as argument**

The most prominent feature of the judicial opinion is that it is not an isolated exercise of power but part of continuing and collective process of argument and judgement. The argument is not like political conversation of the usual sort—a kind of jostling and compromise, focusing mainly on the problem of immediate present—but a highly formal one, in which authoritative conclusions are reached after explicit argument. These decisions in their turn become the material of future arguments leading to future decisions and so on in a continuing process of opening and closure. In this way no one can claim to foresee the end of argument and judgement.

The same principles and techniques of argument appear to hold true in legal discourse although legal discourse is differentiated as a genre of discourse by virtue of its predominantly textual character and also by virtue of the highly restricted institutionalisation of its authorship. The restriction is mirrored in the specialised character of its audience. The theory of rhetoric has recognised that the law has more than one audience, three, to be precise—the legal profession, the litigants and the public. Rhetorical
analysis of law may be summarised in the dual terms of the need to provide an account of the role of judicial author as orator, on the one hand, and of the argumentative techniques, on the other hand, which serve the credibility or acceptability of the exercise of judicial will in the best way. Thus, every legal speech is made from a defined position, to a defined audience, in a defined language.

Legal argument is born out of rhetorical conceptions of eloquence and persuasion. The concept of legal rhetoric as the study of the manifold means of persuasion is necessarily predicated upon the concept of argumentative techniques as communication, because persuasion is dependent upon both the presentation and the reception of messages. Aristotle and Cicero have agreed that it is the notion of suitability or of appropriateness of the argument to its context which forms the object of rhetorical analysis. This indeed is the form of wisdom that the orator must especially employ—to adapt himself to occasions and persons. According to Cicero, in rhetorical perspectives one does not speak in the same style at all times, nor before all people, nor all against opponents, nor in defense of
all clients, nor in partnership with all advocates. He can therefore be eloquent who can adapt his speech to all conceivable circumstances.71

Perelman has observed that “law, having a social function to fulfill, cannot be conceived realistically, without reference to the society it regulates.”72 And the legal system performs social functions in the form of an inexorable indeterminacy, which actually serves the purpose of reinforcing the description of legal argument. Thus its object is external to it, its method or technique is functional and its outcome is the analysis of discursive practice reviewed precisely as practice rather than truth.

To summarise, legal argument by its nature contrasts one way of talking with another, one version of a narrative with another, and in this way gives its users and their community the benefits of contrast and tension. The lawyer speaks in various modes, and is always subject to the double duty of making sense both in ordinary English and in the specialized language of the law. It is in fact the linguistic inconsistencies through which a lawyer proposes the charges of his legal services and thus to resist changes in the language of his discourse. It is the argumentative style which creates rhetorical community over time. It is this discourse, working in the

social context and its distinctive language in the fullest sense of the term, which is law. Thus, legal argument defines a place that is part of larger world yet distanced from it due its distinctive linguistic practice.

**Inclusive language: the masculine shall include the feminine**

Legal language is an inclusive language in the sense that it prefers the male pronoun. The male includes the female. This is so even where the document is a standard form, such as a mortgage or lease, designed for use by males and females alike. It produces a strange language. This distinctive characteristic of legal language does little to enhance precision and could even sow confusion. This is the penchant for declaring that one morphological category will include another. For instance, statutes commonly declare that the masculine gender will include the feminine and the neuter. Thus the pronoun ‘he’ includes ‘she’ and ‘it’, and ‘man’ presumably includes ‘woman’. Oddly, although the masculine can include the feminine, the opposite is not true. Thus, a pension plan providing a benefit to ‘widows’ has been held inapplicable to widowers. Women have

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73Rules of Interpretation of Statutes. Standards of Judicial Administration Recommended by the Judicial Council California now encourages its judges to “use gender neutral language in all local rules, forms and court documents...”
argued that using the masculine to refer to people in general perpetuates sexism\textsuperscript{74}, and better practice these days is to avoid such constructions.

Along those same lines legal documents and statutes often declare that the present tense shall include the future and sometimes the past, and that the singular shall include the plural and vice versa\textsuperscript{75}. Applying all these definitions together leads to the rather absurd result that ‘one man is’ could be legally equivalent to ‘two men were’ or ‘two women will be’. These odd redefinitions seem to have arisen for quite legitimate reason: to counter the trend of needlessly repeating nouns and verbs. In the past, statutes often applied to ‘any person or persons’. Such repetition could become quite tedious, as illustrated by Relinquishment deed:

\begin{quote}
Mr John ‘have’ granted, surrendered, remised, released & for ever quite claimed, and confirmed and by these presents ‘do’ grant surrender, remise, release and for ever quite claim, and confirm.
\end{quote}

To the extent these redefinitions help lawyers overcome their Penchant for needless repetition, yet there is no good reason to fiddle with the normal meaning of verb tenses. To summarise, inclusive language can

\textsuperscript{74}Women Liberation Activists
\textsuperscript{75}The Works of Jeremy Bentham (ed) John Bowring Bentham recommended stating that the masculine singular should comprehend both genders and numbers as a remedy for long-windedness.
lead to unintended mischief and precision is hardly promoted by such a device.

**Telegraphic speech**

A less usual distinctive trait of legal language is its being telegraphic\(^{76}\). It is called ‘telegraphic’ because it resembles the language of telegrams, in which clients pay per word and have a strong incentive to leave out any excess or predictable verbiage. It is like newspaper headlines, which are typically also telegraphic: ‘Mr. A Gunity!’ In place of the full sentence ‘The Court Finds Mr. A Gunity!’ Telegraphic language occasionally occurs in written legal language. An illustration is the order (such as appeal allowed or remanded) that follows the written opinion of a court. It is more commonly used by lawyers and judges during trial especially when ruling on objections:

COUNCIL FOR DEFENDANT: Objection! Hearsay.

PROSECUTOR: Not offered for the truth of the matter.

JUDGE: Over ruled\(^{77}\).


\(^{77}\)Record of Proceedings of a Trial.
Telegraphic language is a quick and efficient way to communicate standard messages, especially when the content is so predictable that any deleted word can easily be recovered. Its use also results from the reluctance of courts to tolerate long interruptions. In any way, it vividly shows that judges and lawyers are quite capable of cutting out excess verbiage and getting directly to the point when it suits their purpose.

**Overuse of capitals**

Overuse of capital letters is another mark of legal discourse. The reason is primarily historical\(^78\). Today, initial capital letters are commonly used in legal documents to identify terms. This convention is so well established that it may be difficult to discard, but the practice may not be carried to excess.

Words are recognised as shapes\(^79\). Readers absorb words because they have learned what words look like, in the same way that they recognize trees, cars, crockery and faces. Modern readers unused to the historical practice of frequent capitals find them irritating. Further, overuse of capitals offends the principle that legal writing is simply a version of ordinary writing; it should follow the rules and conventions of literate

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\(^78\)See Examples of old Enactments.

English. Capital letters should be used only where necessary. In so many documents words such as ‘Grantor’, ‘Grantee’, ‘Guarantor’, ‘Corporation’, etc are capitalized. Most of these capitals are completely unnecessary and are in fact visually disconcerting. In writing a letter to a friend a lawyer would omit almost all capitals, except for words at the beginning of sentences, much the same procedure should be followed in drafting.

Reed Dickerson has said that legal drafters should use initial capital letters only where required by good usage, as for proper nouns. Other writers have advocated the sparing use of capitals. Piesse, for example, suggests that although the undue use of capital initial letters is ‘inelegant’, the device may actually help the careful reader. Thus, if a party to a document is a company, it can be referred to throughout as ‘the Company’, and can leave company without capital for use if a company in general is meant. According to such writers, the device of using a capital letter is particularly helpful when the descriptive word is likely to be used also in a different sense. The capital letter warns the reader that for the purpose of the document the word bears a particular meaning. But a better practice

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80David Mellinkoff Legal Writing. P.44. See also Robert Dick Legal Drafting in Plain Language (3rd edn.) p.112.
would be to avoid misunderstanding by calling the party something altogether different, such as ‘the supplier’.

In traditionally drafted documents, capitals are sometimes used in complete words, to break up chunks of language, common examples are: WHEREAS, TOGETHER, WITH, PROVIDED, THAT, ALL THAT, and the like. However, overuse of capitals in whole words or passages hinders fluent readers.\textsuperscript{83} According to Martin Cutts and Chrissie, there is no justification for continuing the practice in modern documents, particularly as other devices exist for breaking blocks of text into a manageable chunks.\textsuperscript{84} Now let us consider this clause:

This Mortgage incorporates the National and provincial Building Society Mortgage Conditions 1983 Edition and the Rules and the Borrower and the Guarantor (if any) have received copies of the said Mortgage Conditions and the Rules.\textsuperscript{85}

The indiscriminate capitalisation produces a clause which at best is hard to read, and at worst may prove difficult to interpret. To summarise, excessive capitalization creates a wholly artificial atmosphere in a document without appreciably increasing the reader’s understanding.

\textsuperscript{84}Martin Cutts and Chrissie Marther. \textit{Writing plain English}. Stockport: Plain English Campaign, 1980, p. 21.
\textsuperscript{85}J&K Cooperative Societies Act, 1960.
Peculiar linguistic conventions

Legal discourse exhibits linguistic quirks that set it apart from other kinds of writing. These quirks are easily recognizable and are almost always unnecessary. To take a simple illustration, lawyers habitually use words that have long since disappeared from ordinary speech. Examples are ‘hereby’, ‘herein’, ‘hereinafter’, ‘heretofore’, ‘herewith’, ‘wherein’, ‘whereas’, etc. These words, like other examples, give legal writing a distinctive voice, but are quite unnecessary for legal efficacy. They are no longer part of ordinary speech and thus reduce understanding. They can be discarded entirely.

In addition, lawyers often adopt linguistic conventions that have no basis in law, logic or modern usage. Examples are: ‘of even date herewith’ instead of ‘dated the same as this document’, ‘these presents’ instead of ‘this document’, ‘the date hereof’ instead of ‘today’, ‘in my said mother’, instead of ‘my mother’, ‘for the purpose of identification only more particularly delineated’, instead of ‘for identification only’ or ‘more particularly’ delineated. ‘jointly and severally’ instead of ‘separately and together’.

Two leading linguists, David Crystal and Derek Davy in their analysis Investigating English Style were also intrigued by the rarity in
legal documents of substitute words like “he, she, they, their, this, that and it”.

Crystal and Davy have also pointed out:

❖ Adverbs and Adverbial phrases or clauses are placed next to the verbs they modify. This results in oddities such as ‘a proposal to effect with the society an assurance’ (rather than a proposal to effect an assurance with the society)

❖ Sentences are unduly long. Sequences of connected information are put into complex sentences capable of standing alone, instead of in short sentences with linking devices to show antiquity.

❖ Postmodifying elements are inserted at those points in a group where they will most clearly give the required sense. Though the aim is precision, the practice produces oddities such as ‘the payment to the owner of the total amount’, (rather than the payment of the total amount to the owner) and ‘any installments then remaining unpaid of the rent’ (instead of any installments of the rent then remained unpaid).

Interpretation and meaning

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87 David Crystal and Derk Davy, p.201.
Some of the most important questions in law deal with meaning especially the interpretation of documents. A tremendous amount of judicial energy is devoted to interpreting the language of statutes, contracts, wills and other legal documents. 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. To conceptualise interpretation is a two-stage process of which reading is the first stage; that reading stops while interpretation goes beyond to involve the efforts to reformulate. Interpretation therefore supervenes when a difficult text is being read.

**Meaning of meaning**

The query pursued by the interpretation process is meaning. Eco proposes three possible approaches to textual meaning: authorial intention corresponds to what author intended to say, the second approach is what the text actually says and conveys to the reader, what the reader takes it to mean, is the third approach. And we assume that in the reading of a text presenting no particular difficulty, all three, author's intention, textual intent and reader's grasp or comprehension, substantially coincide. But, with a 'difficult' passage this assumption lingers so far as the writer's and textual intents are concerned. A competent writer is assumed to have meant
what he says and to have said all that what he meant to say. According to the principle of expressibility, every thing that can be meant can be said. Harris has argued that there is no source regarding intention other than the words of the rules themselves.88

The act of interpretation is initiated by the reader, where he senses a breakdown in communication. Interpretation constitutes an indispensable precondition to the generation of meaning, otherwise jurisprudence promotes blind worship of the arbitrary and the unintelligible and blocks discovery of the inter-textual connections necessary to endow legal acts with meaning. There are certain linguistic factors on which its interpreters interpret in conflict or cooperation among themselves:

**Definitions**

We normally think of definition as the stuff of dictionaries. Yet the quest for precision, along with a desire to reduce the length of documents, has led to a growing dependence on definitions in legal drafting, especially informal written texts.

A modern view of dictionaries is that they should be a repository of the knowledge that the speech community possesses about words. Such a

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dictionary is descriptive, because it describes actual usage by the speech community. This reflects the philosophy that the meaning of a term depends entirely upon how it is used, and cannot be dictated by an organization or the government. Thus consistent with modern linguistic theory, current dictionaries do not try to dictate meaning, instead they endeavour to describe how people actually use a word. And of course, this is the only sensible approach.

In contrast, a legal definition, for example, in a statute or contract, resembles the prescriptive practices of by gone eras, because it dictates how the word ought to be used in that statute or contract. The difference is that statutory definitions are authoritative. The editors of a dictionary do not have the power to tell me how to speak; they cannot mandate that I use the word, for example, ‘intrigue’, in a particular sense. But a legislature does have the authority to declare that a specific term used in a piece of legislation shall be understood in a particular way. Thus, for purposes of the consumer legal Remedies Act, law defines a ‘person’ as an ‘individual’, ‘partnership’, ‘corporation’, ‘company’, ‘association’ or other group. From a descriptive standpoint, this carries no sense. No self-respecting lexicographer would define ‘person’ in these terms. Speakers normally use
‘person’ to refer to an individual, which is the exact opposite of a corporation, association or group. Although the legislature cannot change the ordinary meaning of a ‘person’, it does have the power to define the term for purposes of its legislation. As some courts have put it: “the legislature may act as its own lexicographer.”

Such definitions can also be called ‘declaratory definitions’. How the word is actually used is dispositive and is arguably irrelevant. What matters is the meaning that is given to it by declaration, usually within a limited context. Bentham has endorsed this function of definitions and ‘abbreviated words’ as a remedy for long windedness. He has suggested that they be used in legal language like the variables X and Y in mathematics. But, it has also proved dangerous to bury too much of the substance of the text in the definition. It enables a legal document to become extremely complex, while appearing deceptively simple. And so much of the essence of statute is contained in innocuous definitions. The Canadian expert on statutory interpretation, E.A Driedger, has opposed the use of definitions. He has argued that definitions should not contain

substantive matters of law, which tended to clutter them up and make the law hard to find.91

Thus, definitions can present serious problems unless and until they are not interpreted by the actors of interpretive community to understand, to ascribe meaning to, or inscribe meaning in the text.

**Ambiguity**

Linguistic ambiguity is one of the factors which indicates that the text has distorted the intended meaning and that textual intention has diverged from authorial intention. Because certain ambiguous expressions are plurivocal, so in such expressions interpretation is required in the form of an alternative meaning.

Eco suggests that the process of interpretation begins with the conjecture as to the meaning on the reader’s part. This can be aroused or evoked also by a message which is both unambiguous and univocal. Eco gives an example, “Will be there tomorrow, 4.00 Pm”. The textual intent is to convey an innocent piece of information. But it may be received as a

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message heavy with a threat. Another might see in it the message of promise.\textsuperscript{92} This suggests that language is also inherently ambiguous.

Kelson has argued that the problems of legal language and legal meaning have most captivated and troubled the future development of legal positivism. He has acknowledged that “every law-applying act is partly determined and partly undetermined. The indefiniteness may concern either the conditioning fact or the conditioned consequences.”\textsuperscript{93} He has concluded that the ambiguity of linguistic expression is a frequent cause of uncertainty:

There is simply no method... by which one of several meanings of a norm may gain the distinction of being the only correct one... Despite all the efforts of traditional jurisprudence it has not been possible so far to solve in an objectively valid fashion the conflict between will and expression in favour of the one or the other.\textsuperscript{94}

Thus, a text especially ambiguous text is not a pure presence that immediately and transparently reveals a distinct meaning intended by its author. If the focus in interpretation is switched from writer to reader, from

\textsuperscript{92} Eco Umberto. \textit{Semiotics and the Philosophy of Language}. London: Macmillan 1984. Eco was born in 1932 in a small city east of Turin and Sixty miles South of Milan, in the North Western province of Piedmont. In 1971 he took up a position as the first professor of Semiotics at Europe's oldest University, the University of Bologna and by the late seventies, he had established a very sound reputation as a semiotician. In 1974, Eco organised the first Congress of the International Association for Semiotic Studies, and during the closing speech he summarised the field with the now famous statement that Semiotics is, “a scientific attitude, a critical way of looking at the objects of other sciences”.


\textsuperscript{94} Kelson. p.352.
generation of the text to its reception, the idea that there is a single right interpretation has to be abandoned. Arthur Jacobson has argued that even divinely prescribed law involves multiple writings, erasure and intersubjective collaboration.95

To summarise, the issue of legal interpretation involves enquiries into the nature of language. Besides, the text cannot dictate the manner in which it will be interpreted nor the situation in which it will be applicable. Nietzsche has similarly commented from a different standpoint on the inscrutability of language. He has declared that a text reveals no distinguishing marks between error, lies and illusion.96 The text with such linguistic complexities entails interpretation for unmasking, demystification and reduction of illusions.

The position of the courts is very much like a group of people who play a new board game for the first time. They follow the written instructions to the letter, until when they encounter an uncertainty in the rules. They could just stop. But mostly people like courts, want to continue playing. To do so, they must decide how the rules should be interpreted.

96 Nietzsche. The Early Greek Philosophy And Other Essays. Edinburgh: T.N. Foulis, 1908.
They could proceed on the basis of what the game inventors would have done if they had thought about it. Or they might use their own ideas about how the game ought to be played. Some how they have to resolve the ambiguity and other complex linguistic practices by formulating an additional rule of their own. They may even write down their new rule and creating a written precedent for the next time they play the game. Judges are like these game players. They cannot stop a case in midcourse and let cases linger interminably.

**Conclusion**

Legal English has traditionally been a distinct variety of English. It diverges in many ways from ordinary English in general, far more than the technical languages of most other discourse. It is larded with long and complex sentences, with unusual word order, antiquated words and structures that are not really the part of the repertoire of ordinary English. There is clearly a distinct legal style. Crystal and Davy use ‘Style’ to refer to the language habits of a person or a group of people.⁹⁷ Along the same lines the language habits of the profession cause lawyers to frequently choose one means of expression such as the passive constructions, unusual

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vocabulary, divergent morphology, syntax, modal verbs etc., over other possibilities. The identification and analysis of these features would separate the wheat from the chaff in the chapter that follows.