CHAPTER 4

Legal English: Implications for Professional Development

In this chapter we will focus on implications of legal English by examining what we have called ‘internal legal language’. This is the language used for communication within the profession, and thus addresses an audience, mainly of lawyers. We will then move on to the language of consumer documents like trust deed, will or contract etc.,

Internal legal language

Lawyers write many documents for other lawyers like legal opinions, pleadings etc,. One might argue that here, the use of convoluted legalese should not matter, as long as the targeted readers can decipher it. But, of course, lawyers almost invariably work for clients. Surely, it is not unreasonable to suggest that even internal legal documents should be written in the most intelligible possible way so that the client who has paid to have the document prepared and whose rights and duties are affected by it, knows what is being proposed on his behalf.
The same applies to statutes which the standing committee of lawyers for drafting statutes, views as a type of "in-group" communication. Statutes confer rights and obligations on the public, or greatly affect the public interest. The public should therefore be able to consult statutes directly, rather than engage the services of a professional interpreter. There is already an area in American law where courts desire that ordinary people should be able to understand statutes. The United States Supreme Court has held that a criminal statute must put a person of "average intelligence" on notice that something is illegal before that person can be punished for violating it.\(^2\) In the words of Justice Holmes, this constitutional requirement of due process mandates that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed".\(^3\) Understanding criminal statutes by an average person frequently seems quite dubious, because they are simply not written in a language that the common world is likely to understand very well.

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1 Lawyers generally use long, complex, and redundant sentences, conjoined phrases, impersonal constructions and archaic words or phrases. When lawyers use these linguistic features, they subtly communicate to each other that they are members of the same group or fraternity.

2 United States v. Mazurie, 419 U.S. 1975 pp.544, 553; also Kolender v. Lawson, 461 U.S. 1983, pp. 352, 357 (requiring that a penal statute define a criminal offense in a language so that "ordinary people" can understand what conduct is prohibited).

The hope that every man can be his own lawyer, which has existed for centuries\(^4\), is probably no more realistic than having people to be their own doctor. If we receive clearly written instructions and take some time to study them, or receive good oral training, many of us can do some basic medical diagnosis and treatment. But, even if we have the required intelligence and aptitude, most of us do not have the time to learn other trades and professions well enough to engage in more complicated procedures. The same is true for the law. With a good, non-technical explanation, or a well written and relatively straightforward statute, many people can determine what the law is on a particular subject or even draft a simple will. But, someone with a more complicated estate plan and lurking tax problems has to seek professional assistance. Plain legal language will never make lawyers superfluous. In fact, as our society and laws become ever more complex, lawyers will be more essential than ever. This hardly means that internal legal language should not be reformed. There is every reason to make statutes and other legal documents clearer than they have been in the past. This benefits not just the public but also the legal profession itself. Currently many legislative drafting manuals

recommend plain language principles.\(^5\) The Renton Commission in the United Kingdom has stated that "ideally statutes should be written in ordinary, straightforward English that can be understood by lawyers and laymen..."\(^6\) Similarly, the Law Reform Commission of Canada has expressed its "dedication to the use of plain language in the drafting of statutes, to the extent possible." The office of the Legislative Council in Ontario, like other Canadian provinces, has a drafting manual which provides that acts should be primarily written in ordinary language, avoiding redundant or archaic words and phrases.\(^7\) Several Australian States have endorsed plain language drafting and have taken a radical step of banning the modal verb 'shall' as an indicator of obligation, replacing it with 'must'.\(^8\) In the words of Frederick Bowers, "The golden age of statutory flatulence is long gone; when modern critics of legal language trot out their favourite pleonasms, they are more, often than not, exemplifying

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bureaucratic language and the language of conveyances, wills, and agreements rather than statutory language.”

Pleadings and petitions present a more uneven picture. They still recycle formulaic phrases that are decades and even centuries old. Perhaps, lawyers fear that—as in the Middle Ages—even a minor slip in pleading can be fatal. Even though, many lawyers espouse plain language in theory\(^9\); they seem reluctant to change their style in practice. A significant reason for this reluctance is that it is often far easier, and takes much less time, to use old forms as a model. Perhaps, this will change as models for plain language pleadings and other court documents become more widely available.\(^1\) Lawyers writing briefs or memorandums are well aware that they need to get to the point as quickly and clearly as possible. Busy judges have no patience for convoluted, redundant, or poorly organized arguments. Even though the judges are thoroughly familiar with legalese, surveys show that a great majority prefer plain English, and that when presented with samples of writing in plain English versus traditional legalese, they rate the

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former as more persuasive.\textsuperscript{12} Some judges have become renowned for their straightforward style. Here is an excerpt from one of the cases presided over by Judge Cardozo in the New York Court of Appeals:

The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. When the plaintiff was in the car it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments.\textsuperscript{13}

Across the Atlantic, in Britain, Lord Denning in one of his judgments wrote in a simple language:

Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy was a farmer there. His farm was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank...\textsuperscript{14}

Unfortunately, this simple almost austere style is much harder to find, but it is surely worth striving for, as many judicial opinions affect not just the parties before the court, but have tremendous implications for the population at large. Justice Earl Warren had once written a memo to other members of the United States Supreme Court and had urged them to write


opinions that were "short and readable by the lay public". As a matter of policy that should be the courts ideal, those most affected by a judicial opinion should be able to read and understand it.

**Consumer documents**

While statutes and court opinions have notorious attributes of legalese, private documents written on behalf of lay clients have not lagged behind. This is highly ironic. When a client signs will of contract, it is the client—not the lawyer—who is legally speaking through that document. Thus, it is the client's intent that is deemed to govern the meaning, even though the client may scarcely understand it. Some of the most significant documents that an average person signs in his/her lifetime concern his or her house. This is the average person's most valuable asset. An extremely important document in this regard is the deed of trust (similar to a mortgage). Here is a part of a text of a typical deed of trust:

_Borrower covenants that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except of the encumbrances of record. Borrower warrants and will defend_

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generally the title to the Property against all claims and demands, subject to any encumbrances of record.\textsuperscript{16}

This is a momentous legal obligation that could cost a large amount of money, or loss of the property, if something goes awry. Still, it is doubtful that most people who sign this form have more than a foggy notion of what it involves.

The available research supports this conclusion. A study of ordinary consumers who have been interviewed, demonstrated that most of them understood very little of a standard installment purchase agreement and warranty; on the other hand, a plain English version of the same documents was understood much better, especially by low income subjects\textsuperscript{17}. Even highly educated judges may have trouble with consumer documents. During an oral argument regarding an insurance policy in 1969, Chief Justice Wein Traub of the New Jersey Supreme Court admitted, “I don’t know what it means. I am stumped”. Justice Haneman remarked, “I can’t understand half of my insurance policies”, and Justice Francis suggested that such policies are kept “deliberately obscure”.\textsuperscript{18}

Legal education also has been responsive to these trends. Law students refer to legal language as ‘talking like a lawyer’. They have to work hard to acquire this lingo. The difficulties of reading statutes are acknowledged by many of the books intended for law students. Even native speakers of English find reading a statute a very complex process. By the time students enter higher education they become expert readers. Faced with a Statute which is a distinctive kind of text from those with which they are familiar, they become novice readers again. In the United States, almost all law institutions teach legal writing to their students and require passing such a course for graduation. They stress the importance of avoiding traditional legalese. The texts used to teach legal writing in American law schools almost routinely recommend the use of plain English and illustrate how to do so.¹⁹ One book, Richard Wydick’s *Plain English for Lawyers* has been especially influential for teaching the students.²⁰ Unfortunately, after students graduate, they often go to work and are forced to imitate the antiquated style of their senior lawyers. Still, there is a reason to hope that


when these recent graduates become their own bosses, they will remember the lessons they learned as students.

The Plain English Movement

The notion that people have a right to understand legal documents that affect their rights and obligations has ultimately led to the Plain English Movement. This movement has mainly concentrated on consumer documents. Ralph Nader, an American Consumer guru, wrote an article entitled “Gobbledygook” for the Ladies’ Home Journal in 1977 in which he pointed out that even legal experts often could not understand the “mumbo-jumbo” in insurance policies, leases and loan contracts. He urged consumers to continue exercising “vigilance and pressure” on banks and insurance companies to simplify the language of their forms.

In the United States, some of the earliest efforts to improve legal language, directed at consumers, were initiated by the Federal Government, beginning rather modestly in the 1940s. Federal law now requires clear,

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21 Plain English Movement is a modern phenomenon. It started in the U.K, in 1979 by a ritual shredding of government forms in Parliament Square. In the USA, President Carter issued an order in 1978 requiring that regulations be written in Plain English. Chrissie Mehar, founder of the Plain English Campaign launched the International Plain English Campaign in New York in 1993. The campaigners point to enormous savings in time and money, which can result from the use clearer language.


conspicuous, accurate, or understandable language in many types of consumer transactions. In 1978, President Carter signed Executive Order 12044, which aimed to improve federal regulations and required that they should be “as simple and clear as possible”. New York State has enacted America’s first general plain language law in 1978. Now there are plain English laws governing certain categories of consumer transactions in most of the American States. The Drafting Handbook of the Office of the Federal Register contains much of the standard advice on making proposed rules and regulations more intelligible. More significant for the average consumer is a rule by the Securities and Exchange Commission in USA on disclosure documents relating to securities. The SEC was concerned that “the technical and dense legalese of current disclosure documents hides the information that is necessary for investors to make informed investment

27 For an overview, see the appendix in Kimble, “Plain English: A Charter for Clear Writing”.
decisions.” The rule requires the use of plain English on the cover page, summary and risk factors sections of prospectuses.

Outside the United States, Australia has been a leader in the movement. The Australian Life Insurance Company has conducted a survey of its consumers and produced a plain language insurance policy. Soon thereafter, the National Road Motorists Association of New South Wales issued its first plain language automobile insurance policy. The impetus in Australia comes mainly from public pressure and voluntary efforts, rather than being required by legislation. 30

The United Kingdom has its own movement promoting plain English. An important agitator for reform is the Plain English Campaign, started by a woman in Liverpool who was fed up with unintelligible government forms. She took hundreds of offending documents, proceeded to Parliament Square, and publicly shredded the lot. 31 The Campaign gives out well-publicized awards for plain English and booby prizes for

31 See Kimble. “Plain English”, pp.51-54.
The National Consumer Council has likewise been active in plain language issues. It recently began revising large numbers of its forms. It has systematically reviewed thousands of forms, eliminated many as unnecessary, and simplified many others. At the private level, a growing group of English Solicitors use plain language drafting in their practices. Many of them are part of a growing international organisation called ‘Clarity’, which publishes a journal by the same name.

Plain English likewise has made headway in Canada. More recently, there have been efforts at the federal level, as well as in the provinces, to promote more comprehensible legal language, encouraged by a Plain Language Centre in Toronto. However, for the most part Canada follows Australia and the United Kingdom in promoting plain English mainly by persuasion and example.

The plain language movement is attracting attention around the world. Such diverse countries as India, New Zealand, Singapore, South

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32 See Plain English Campaign. “Born to Crusade One Woman’s Battle to Wipe Gobbledygook and Legalese”. 1993. When the subject matter is one where we feel implicated and think we have a right to know, and the writer uses words which act as a barrier to our understanding, then we start to complain; and if we suspect that the obfuscation is deliberate policy, we unreservedly condemn, labelling it ‘gobbledygook’ and calling down public derision upon it.

33 Presentation of Mark Adler at the annual meeting of the Law and Society Association, Glasgow, Scotland, July 11, 1996.

Africa etc have shown an interest in promoting plain English in legal documents. It makes a great deal of sense particularly in countries where English is not a native language, but which use English for legal purposes.

**Plain English Legislation**

The above overview shows that the United States seems more willing to enact legislation requiring private parties to use plain language, while other countries tend to depend more on education and encourage voluntary measures. This brings to the forefront the question of how effective a legislation would be in achieving reform.

The earliest, and perhaps most general, approach is exemplified by the New York Plain Language Statute. This law applies to leases and consumer agreements for personal, family, or household purposes. In other words, it covers most consumer legal documents. In terms of language, the law requires that:

1. the writing should be clear and coherent and the words used have a common and everyday meaning; and

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2. the writing should be appropriately divided and captioned by its various sections.

It is reported that many consumer contracts and other documents are simpler than before. And, the law has accomplished this with little litigation.\textsuperscript{37} On the other hand, it may not be as consumer-friendly as it could be because of its very general standard of what constitutes plain language and its limited remedy.

A recent Pennsylvania law begins with a broad and general standard: consumer contracts “shall be written, organised and designed so that they are easy to read and understand.”\textsuperscript{38} The statute lists guidelines to determine whether this general standard has been met:

1. The contract should use short words, sentences and paragraphs.

2. The contract should use active verbs.

3. The contract should not use technical legal terms, other than commonly understood legal terms such as ‘mortgage’, ‘warranty’ and ‘security interest’.


\textsuperscript{38} Pennsylvania Statutes Annotation title, 73, §2205(a) (1997).
4. The contract should not use Latin and foreign words or any other word whenever its use requires reliance upon an obsolete meaning.

5. If the contract defines words, the words should be defined by using commonly understood meanings.

6. When the contract refers to the parties to the contract, the reference should use personal pronouns, the actual or shortened names of the parties, the terms ‘seller’ and ‘buyer’ or the terms ‘lender’ and ‘borrower’.

7. The contract should not use sentences that contain more than one condition.

8. The contract should not use cross references, except cross references that briefly and clearly describe the substances of the item to which reference is made.

9. The contract should not use sentences with double negatives or exceptions to exceptions.\footnote{Pa. Stat. Ann. tit, 73, §2205(b)}

The statute also contains ‘visual guidelines’, which state that the type size, line length, column width, margins, and spacing between

\footnote{Pa. Stat. Ann. tit, 73, §2205(b).}
lines and paragraphs should make a document easy to read. Moreover, a document should have captions in boldface type, and it should use ink that contrasts sharply with the paper.\(^{40}\)

We might call this method the guidelines approach. As opposed to the general approach, it gives drafters some concrete guidance. At the same time, the guidelines are only as good as the people who apply them. If drafters of legal documents do not have some training in applying the guidelines, they will have limited impact. The same is true of judges who have to decide whether a particular form meets the guidelines. Besides, linguists and other academics could be used as consultants.

The desire to quickly and cheaply evaluate the language of legal documents has produced an alternative: what can be called the objective approach. Connecticut’s Plain Language Law uses guidelines very similar to those in the Pennsylvania law. However, it also allows an alternative objective test under which a document is held to be plain if it meets the following criteria:

1. The average number of words per sentence is less than twenty-two; and

2. No sentence in the contract exceeds fifty words; and

3. The average number of words per paragraph is less than seventy-five; and

4. No paragraph in the contract exceeds one hundred fifty words; and

5. The average number of syllables per word is less than 1.55; and

6. It uses personal pronouns, the actual or shortened names of the parties to the contract, or both, when referring to those parties; and

7. It uses no type face of less than eight points in size; and

8. It allows at least three-sixteenths of an inch of blank space between each paragraph and section; and

9. It allows at least one half of an inch of blank space at all borders of each page; and

10. If the contract is printed, each section is captioned in boldface type at least ten points in size. If the contract is type written, each section is captioned and the captions are underlined; and
11. It uses an average length of line of no more than sixty-five characters.\textsuperscript{41}

The great advantage of this objective approach is that it is very easy to apply. In fact, a computer programme could make the necessary calculations in no time at all.

There are a number of different tests, including the Dale-Chall formula and the Fog Index.\textsuperscript{42} Perhaps the most common is the Flesch Reading Ease Test, developed by Rudolf Flesch. It has been incorporated into many state Statutes that require insurance contracts to be in plain English. To apply the Flesch test, one has to begin by calculating the average number of words for every sentence in the text, then multiply this number by 1.015. Next, count the average number of syllables per word and multiply this by 84.6. The sum of these two numbers is subtracted from 206.835, producing the Flesch reading ease score.\textsuperscript{43}

\textsuperscript{41} Conn. Gen. Stat. §42-152 (c) (1997).
Linguists and experts on plain language have subjected the Flesch test to a barrage of criticism. Their basic point is that the test is simplistic. Legal discourse is hard to understand because of linguistic features such as those described in chapter 3. It cannot be improved by mechanically shortening sentences and using words with fewer syllables. A problem with the Flesch test is that sentence length is only indirectly tied to comprehensibility. What really matters is complexity: levels of embedding, sentence structure, and so forth. Some very long sentences are perfectly understandable, while quite short ones (the lis pendens shall be expunged, which means, pending litigation shall be terminated.) may be impossible for the lay public to understand. Nor is there a direct relationship between the number of syllables in word and comprehensibility. Some words have three or four syllables like 'ambulance', 'automobile', 'helicopter', 'hospital', 'radio' or 'television', but these words would be understood by any adult speaker of English. Other words or phrases are very short, but cause significant comprehension problems, such as 'en banc', 'estop', 'fee simple', 'per stripes', or 'seisin'. What really matters is the likelihood in the use of words so that the average person will know what a word means.

Archaic, formal, and technical words are bound to be problematic, regardless of how few syllables they have and commonly used words will present few comprehension difficulties, even if they have many syllables.

**Some Remaining Challenges**

The movement advocating plain English has made substantial progress in improving the language of consumer contracts. There are many areas in which lack of comprehensibility still creates problems for the public. For instance, a medical consent form is a vital document where a patient acknowledges the risks of some medical treatment and authorizes a doctor to proceed. They are often drafted by lawyers. Research indicates that patients do not understand these forms very well and that use of plain language principles improves readability. The same issue arises when someone signs a form consenting to allow police to search a building or vehicle. Also drafted by lawyers, these forms likewise tend to use legalese, rather than plain English.

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Similarly, immigration forms—both the instructions and the questions—seem to be designed to impede practically any reader’s comprehension. Readers can and do become confused by the embeddings and the exceptions. The following comments made by the 9th Circuit Court of Appeals in the USA in 1990 about the comprehensibility of immigration documents could be equally applied to immigration forms everywhere:

Moreover, we conclude that the documents are so bureaucratic and in some respects so uninformative and in others so misleading that even those aliens with a reasonable command of the English language would not receive adequate notice from them.

**Rhetoric as the politics of legal language**

The conjunction of rhetoric and legal discourse creates a number of analytic possibilities. The profane basis of sacrosanct legality is partly bureaucratic and partly linguistic. According to Sumner, “Legal discourse in modern societies is ... bureaucratised magic expressed in legalese. It is therefore not only a discrete phenomena but downright impenetrable”.46 The magical form of law is rhetorical in a variety of related senses. In a linguistic sense, the impenetrability of legal language can be viewed as a function of its non-referential characters. In other words, it is a context independent discipline.

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In this perspective, Genette says that the obscure terminology as well as the figurative and metaphorical devices of legal expression are operative upon a symbolic or connotative axis of language which is effectively removing it from the real linguistic realm of denotation or reference.\textsuperscript{47} In another terminology, legal rhetoric functions as an elaborated and elitist linguistic code or speech variant.\textsuperscript{48}

**Interpretation and indeterminacy**

Law is an interpretive practice. By weaving in and out of different open paths of argumentation, an interpreter may skirt his or her ethical obligation and subvert the interpretive process to personal advantage and, this way, indeterminacy inevitably accompanies the interpretive process and makes room for potential abuses.

Thomas Heller, while discussing the indeterminacy of legal discourse, points out that it “does not arise because the standpoint of the human individual is in someway privileged or central. Rather indeterminacy is an element of the grammar of complex systems”.\textsuperscript{49} Indeterminacy arises from the vagueness of language, contestable concepts, family resemblances,

\textsuperscript{49} *Accounting for Law*, Bristol: Routledge. 1988.
open texture, etc. All these expressions lack precision and so they are uninformative or incomplete. For instance, we can make a vague allegation by suppressing the agent of an action with passive voice, ‘money has been withdrawn from the pension fund’, or a nominalization, ‘there has been a withdrawal from the pension fund’ or an indefinite subject, ‘someone has withdrawn money from the pension fund’. There are a number of ways of achieving this sort of vagueness: expression of vagueness ‘roughly’, expression of doubt ‘may be’, parenthetical verbs ‘I suppose’, ‘I guess’.

Indeterminacy is a snare for legal theorists. If the law is formulated in an indeterminate language, how can a court apply the law? It almost seems as if there is no law for the case, and, yet there is a legal provision that claims to tell people their rights and duties. H.P. Grice opines, “one just does not know whether to apply the expression or withhold it”. The indeterminacy claim is traditionally expressed by saying that an indeterminate statement is ‘neither true nor false’. The plaintiff cannot win a case in which the application of the law is indeterminate because if a governing rule is not linguistically determinate enough to decide a case, it presumably cannot support a cause of action. Many legal systems have such

rules. Suppose that a statute implies a term in sales contract that the goods shall be ‘of satisfactory quality’ and suppose goods delivered under a particular contract are a borderline case for ‘satisfactory quality’. If the matter is litigated, the court will have to decide whether the term was breached and it cannot do so because the plaintiff’s case cannot be made out. In this way, vagueness causes indeterminacies and poses difficulties to the courts in deciding the case. Hilary Putnam also says that a vague statement in a borderline case “may have not determinate truth value”.\(^5\)

Indeterminacy can best be characterised as ‘boundarylessness’, in the sense as there can be no sharp boundaries to the application of indeterminate words. Boundaryless expressions and concepts are quite common in legal system, especially in criminal law. Since law is constituted by rules, when language is indeterminate, law is indeterminate and yields no right answer. The rule of law becomes necessarily unattainable and unraveling them will help to unravel the puzzle about linguistic indeterminacy. According to Aristotle, it was better for the law to rule than for any one of the citizens to rule.\(^5\) And community is ruled by law if there is not too much linguistic indeterminacy.

Indeterminacy of language gives rise to a sceptical problem. It does not make sense to say that one has understood a rule yet one does not know which actions would be in accord with it. If language is to be a means of communication, there must be an agreement between rule and action. Marmor suggests that we do not understand a rule if we do not know what accords with it. He expresses the grammatical nature of the relationship between rule and application as follows: “understanding a rule consists in the ability to specify which actions are in accord with the rule”\footnote{Andrei Marmor. *Interpretation and Legal Theory*. Oxford: Clarendon Press, 1992.}. This notion of understanding is crucially indefinite, when the rule is linguistically indeterminate.

Indeterminate language of rules forces us to rethink on approaches to language. We cannot say that interpretation eliminates indeterminacy in the application of legal rules or even that it tends to reduce indeterminacy. Backer and Hacker write:

Nothing can be inserted between a rule and its application as mortar is inserted between two bricks. It is a grammatical platitude that a rule determines what acts are in accord with it, just as a desire determines what satisfies it and a description determines what must be the case for it to be true...It is in language that a rule and act in accord with it.\footnote{Baker and Hacker. *Wittgenstein: Rules, Grammar, and Necessity*. Oxford: Blackwell, 1985 p.20.}
Algorithmic justice and correct semantic theory

What legal discourse solicits of the reader is not simply reception, but the active, independent, autonomous construction of meaning. Legal cases arise in new configurations, full of surprise, both argument and judgement require more than a mechanical comparison of case with case, as according to Alan Wolfe, that would lead to "Algorithmic justice".\textsuperscript{55}

Alan Wolfe says that "Algorithms are rules designed to be followed with as little interpretive variation as possible".\textsuperscript{56} They may help in explaining how computers function and how species other than our own regulate their affairs, yet if humans are following instructions algorithmically, then they will have no interpretive capacities and will not be able to supply meaning to texts. As a result, they will be subject to a fate of following rules without any input into how those rules are formulated and applied. Thus according to Wolf "what characterizes Algorithmic justice is a lack of appreciation for the rule-making, rule-applying, rule-interpreting capacities of human beings and instead an emphasis on the rule following character".\textsuperscript{57}

\textsuperscript{56} Drusilla Cornell, p. 363.
\textsuperscript{57} Drusilla Cornell, p. 366.
The correct semantic theory can reduce algorithmic codings. The judges and lawyers ought to guide their interpretations and judgments through ordinary meanings of the words and not by conventions and belief system. Moore says, “Judges should use the realistic theory of meaning rather than a ‘conventionalist’ theory wherever the ordinary meaning of a legal text is relevant”. The ordinary meanings of the words depict the real nature of the things to which the words refer and can produce better results in the long run. As an alternative semantic theory, Brink has also preferred one which asserts that “the way world is”. He has argued that the level of legal indeterminacy and passive reception of rules would be much smaller if one followed a legal theory based on a correct semantic theory, as it would show that meaning does not depend on users’ beliefs about the term, but only on the properties of the object or class to which the term corresponds. Moore has also emphasized that the “interpretation of legal texts should not differ from that of ordinary text, because surely we understand normal words and sentences well enough and if sometimes we

need assistance it would be from dictionary, not a philosophical treatise". The notion that a philosophical theory about meaning could settle the matter does not seem tenable. Law must through a correct semantic theory, constantly carve out a sufficiently determinate and differentiated meaning for itself as a practice by processing and reworking the actual social and historical materials with which it happens to be confronted and only then law can embrace corrective justice.

Language of legal discourse and language of literary discourse

Our life is a life of language. We are in part the products of our language. Whenever we speak or write, we define ourselves and others and a relation between us, and we do so in words. As we grow up in the world, our experience is formed by the language in which it is presented and this language becomes a part of our nature.

The kind of reading and writing that lies at the heart of legal discourse is both like or unlike literary discourses. A writer of a literary piece—prose, poetry, drama, novel and so on—as well as the writer of legal discourse—statute, deed, judgement or other legal writings—have to

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deal with the language. Both are word-men. Even though there may be some dissimilarity between the writer and a lawyer, yet there is some similarity between the two. Catherine Drinker Bowen in her paper on, “The lawyers and the King’s English” pointed out that though “you and I—the lawyer and the writer do not, actually belong to the same species, at least we can be classified under one genus...articulate men....Lawyers and writers are interested in the techniques of utterance”.61

It is one thing to use a language; it is quite another to understand how it works. The constant confrontation with the actual life makes the men of law practical. Thus, lawyers have what writers want. To quote John Mason Brown, “the great judges are concerned with interpretation, the great writers with revelation. Judges are devoted to protection—the protection of human rights, of property, of men against men, the structure of the state and other beckoning and majestic concept known as justice. Creative writers...apply their gifts to human emotions, problems, frailties or possibilities seen in terms of persons rather than abstractions. Wisdom is what we want from a judge not wit, clarity of phrase before beauty,

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Engagement with a literary discourse is a dialectical process and structurally tentative. The reading of legal discourse, by contrast, cannot be tentative, in its own terms the legal discourse is authoritative. Whether we like it or not, as the reader of a statute, contract, trust, or judicial opinion we are in the first instance its servant, seeking to make real what it directs.

There are other apparent differences between reading legal and literary discourses. For example, a legal discourse speaks directly to its reader, as other discourses do, but the textual community it establishes with the individual reader is always a way of making lawyers community as well. In this sense, law is structurally ulterior in character. It is literally and deliberately constitutive: it creates roles and relations, places and occasions on which one may speak or write; it gives to the parties a set of things that they may say or write, and it prohibits them from saying or writing other things. It makes a real social world in a way that a work of literature does not. It is also true that individual works in the literature of the law seldom achieve greatness on any scale, in the same way as the greatness established by the *Iliad* or the plays of Shakespeare.

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62 John Mason Brown.
Legal discourse also differs from literary discourse in that the former deals with rights and latter with thoughts. Of course, the basis of literary discourse and legal discourse is the same grammar and logic. According to Mackay, "though they have a common basis, they may be contrasted rather than compared. The style of a good legal composition is free from all colour, from all emotions, from all rhetoric. It is impersonal, as if the voice not of any man, but of the law, dealing with the necessary facts". But, it is not so with literary composition. The beauty and worth of legal discourse is based on revelation. On the other hand, beauty of the literary language lies in half revealing and half concealing. Mackay also points out, "legal composition moreover differs from literary composition not only in suggesting nothing except what it states, it should also imply nothing which it does not express".

A legal discourse uses such language as to satisfy the aspirations of all persons concerned. Mackay makes it clear that "legal composition should convey at once one and the same meaning from the mind of the writer to the mind of the reader, and should convey it completely. Literary composition, on the other hand, conveys frequently different meanings to

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64 J. G. Mackay, p.334.
different minds. Let a text of scripture serve as an example. How often has it been interpreted differently?\textsuperscript{65} The other difference is that the works of great literary writers like Homer, Plato, Virgil, Dante, Shakespeare, Goethe, etc, are often said to be untranslatable i.e., incapable of being interpreted in another language so as to express their full meaning. A legal composition, on the contrary, is always translatable into any language which has the requisite words.\textsuperscript{66} But Mackay also says that we should not forget that legal discourse, like literary discourse, is concerned with words which are compoundable into propositions or sentences, which are collected into paragraphs, called sections, clauses or articles.

John Mason Brown says, “The great judges have never lacked something to say and, at their best, have said it with light and heat”.\textsuperscript{67} The great justices have been termed as ‘poet lawyers’; they have hated verbosity and used clearly communicative English like music. To quote John Mason Brown, “English to them has been a music which they have heard and which, in their writing, they have made us hear”.\textsuperscript{68}

\begin{footnotes}
\footnotetext[65]{J. G Mackay, p.336.}
\footnotetext[66]{J. G. Mackay, p.326.}
\footnotetext[67]{John Mason Brown. “Language: Legal and Literary.”}
\footnotetext[68]{John Mason Brown., p.33.}
\end{footnotes}
Finally, it cannot be doubted that some works of literature contain certain semantic reflections about law or dramatizations of legal topics that add something irreplaceable to our understanding. An example is Shakespeare’s *The Merchant of Venice*, when Portia drew difference between flesh and blood:

This bond doth give thee here no jot of blood,  
The words expressly are a pound of flesh:  
Then take thy bond, take thou thy pound of flesh,  
But, in the cutting it, if thou dost shed  
One drop of Christian blood, thy lands and goods  
Are by the laws of Venice confiscate  
Unto the State of Venice.

Similarly, in Homer’s *Iliad* Achilles struggles with limits of his inherited language—the only language he has—and tries to find a way to speak and act that does justice to his situation, we ask not only whether he will succeed in making meaning as he wishes but also what kind of character he will give himself in doing so and what kind of relations he will establish with others. According to Have Lock, “In sum, the ‘justice’ of the *Iliad* is a procedure, not a principle or any set of principles. It is arrived at
by a process of negotiation between contending parties carried out rhetorically". 69

To sum up the language of legal discourse differs from literary discourse in the way of presentation and communicativeness.

**Suggestions for professional development**

The purpose of the analysis is to suggest that there are obvious and pressing reasons for a thorough reassessment of the role of linguistics in legal theory and in legal practice. The application of linguistic system can eliminate or substantially reduce most of the problems. If legal writer is concerned with substance, postponing attention to linguistic system, the result will be a document, legislation, or rule that is neither well thought nor well expressed. Arthur Littleton has stated that, "language is something more than a tool of thought. It is a part of the process of thinking". 70

**Identify the actor**

Many documents, legislations and rules offer many examples of an action to be taken without clearly specifying who has the duty to take the action. The actor can often be inferred from the text, it is preferable specifically

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name the actor. For example, the proposed legislation may seek to prevent
an intoxicated person from receiving a marriage license. Instead of writing
a provision that states: ‘A marriage license may not be issued to a person
who is intoxicated’, the legal writer should determine who issues marriage
licenses and name that person in the legislation in order to identify the
actor.

The need for consistency is particularly important in references to
the actor. For example, a person seeking a writ of habeas corpus is referred
to as a ‘prisoner’, a ‘person in custody’, a ‘person detained’, a ‘petitioner’
and an ‘applicant’ in Model Pleadings of High Court. Presumably, all
references are to the same person, but only confusion can be created by the
use of five different terms to refer to the person seeking the writ.

**Limit the use of pronouns**

The drafter must be careful in the use of pronouns because of the possibility
of ambiguity in the noun to which the pronoun refers. Another reason to
avoid the use of pronouns is to avoid the use of sexist language, because the
use of masculine to include the feminine is no longer acceptable. In this
context Wydick gives several rules. One rule is to use gender neutral terms.
The ‘draftsman’ of a statute or rule has now become the ‘drafter’. In most
places, ‘workmen’s compensation laws’ have become ‘worker’s compensation laws’. One chronic problem for legal drafters has been an acceptable alternative for ‘chairman’. Wydick recommends ‘chairmember’ or something completely different such as ‘presider’ or ‘presiding member’.

Another technique is to use ‘it’ when the noun antecedent can refer to an artificial legal entity such as a corporation or partnership. Thus, if the antecedent is ‘party’, ‘trustee’, ‘employer’, ‘taxpayer’, ‘appellant’, ‘owner’, ‘tenant’, or the like, ‘it’ is just as appropriate as ‘he’ or ‘she’ and avoids the sexist language. However, if the antecedent can only be a human being such as ‘driver’, ‘drafter’, ‘parent’, or ‘student’, then ‘it’ cannot be used.

**Use active voice**

The most important principle of legal discourse and the one upon which most of the others depend is the command to use the active voice. Grammatically, active voice refers to the use of a transitive verb in a sentence. A transitive verb is one that requires an object to complete its meaning. To say that a verb is used in the active voice means that the subject of the sentence is the one who engages in the action described by

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the verb while the object of the verb is the result of the action. Thus, if the verb is ‘to write’ in the sentence, ‘a party writes a brief or parties write a brief’ the subject of the sentence is the person who writes while the object of the sentence is that which is written. The form of the verb is ‘write’ or ‘writes’, depending upon whether the subject is in the first, second or third person and singular or plural. The opposite of the active voice is the passive voice, in which the actor is relegated to being the object of a preposition ‘a brief is written by a party’ or not even mentioned ‘a brief is written’.

The principle is use the active voice unless it is inappropriate. The first and foremost reason why it is so important to use the active voice because it requires the drafter to identify the actor. This is crucial in all legal writing but even more important in drafting widely applicable documents, legislation and rules because of their very nature. Reed Dickerson has also stated that “legal drafting is the crystallization and expression in definitive form of a legal right, privilege, function, duty, status, or disposition”.72

The active voice has several other benefits. First, it usually requires fewer words, ‘A tax payer shall file a return’ has seven words, but ‘a return

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must be filed by a tax payer' has nine words. Second, it is easier to understand, because it identifies the actor first. In a document, legislation, or rule, the action is never more important than the actor. By its very nature a document, legislation or rule works only when it imposes a burden or benefit on a particular actor.

**Use base verbs**

The use of nominalization in place of a verb is a technique common to lawyers and bureaucrats. A nominalization is the creation of a noun out of a verb. The nominalization of the verb ‘consider’ is ‘consideration’, ‘decide’ is ‘decision’, ‘determine’ is ‘determination’ ‘file’ is ‘filing’ and ‘accept’ is ‘acceptance’. Nominalizations are not intrinsically wrong, but their use should be avoided in a document, legislation or rule. The nominalization is always a longer word than the base verb and the nominalization always requires supporting words, usually an article and a verb. Thus, a provision that with a base verb reads ‘the administrator shall consider the application’ becomes with a nominalization ‘the administrator shall give consideration to the application’ or ‘the court shall determine’ becomes ‘the court shall make a determination’.
Use the present tense and the indicative mood

Two closely related problems in legal discourse are tense and mood. They are treated together because they both involve the improper use of the word 'shall'. The legal writer is seldom tempted to use the past tense, but there is a strong temptation to use the future tense. The writer quite naturally thinks in terms of the future because whatever is written today will almost always affect only events in the future. The Example is from Section 68 CRPC:

Every summon issued by a court under this code 'shall' be in writing, in duplicate, signed and sealed by the presiding officer of such court, or by such other officer as the high court may, from time to time, by rule, direct.

It seems that the use of future tense in a document, legislation, or rule is not correct because it ignores the principle that the document, legislation, or rule always speaks at the time it is applied to specific facts. For a document, legislation or rule, the time is always now for any operative provision. They should be read as though they had been adopted that very day and as though the adopting body were speaking directly to the reader at the very moment the document, legislation or rule is being read.

The use of the present tense has several advantages. It makes the document or statute easier for the reader to understand, because there is no
need to make the transfer from the future to the present tense. Seldom in
legal writing is the past or future tense appropriate. When the document
describes a condition or event that precedes the operative provision, the past
tense may but need not be used. If the condition or event comes after, use
the future tense. The following example uses the present perfect tense in the
first clause and the future in the second, ‘If a person has been convicted of a
felony, the person will (shall) be ineligible to apply for a grant’. Both the
present perfect and future tenses can be eliminated by having the example
read, ‘if a person is convicted of a felony, the person is ineligible to apply
for a grant’. In most instances, the use of the past or future tense can be
avoided by a careful drafting. In the example just given, the provision
would be better if it read ‘a person convicted of a felony is ineligible to
apply for a grant’.

Use ‘may’ to grant discretion or authority to act

The use of ‘may’ is limited to the grant of discretion or authority ‘an
aggrieved party may appeal a final judgement or the governor may fill a
vacancy’. If a limitation is imposed on the exercise of the discretion or
authority, introduce the limitation by the term ‘only’: ‘an aggrieved party
may appeal a final judgement only: by filing a notice of appeal within 30
days of the entry of judgement or the governor may fill a vacancy only from a list of three persons nominated by the commission'.

Another common use of ‘may’ is to express eligibility or entitlement. ‘A classified employee with 30 years of service may retire at age 58 or a committee member may be reimbursed for actual and necessary expenses while on committee business’. The use of ‘may’ in these circumstances is unclear in that the provision could be read to establish the discretion in someone else such as an employer or administrator. To avoid this lack of clarity, the lawyers can state the eligibility or entitlement expressly in those terms: ‘a classified employee with 30 years of service is eligible to retire at age 58 or a committee member is entitled to be reimbursed for actual and necessary expenses while on committee business’.

Use ‘may not’ to prohibit an action

When a legal drafter wishes to prohibit an action, the most common method is to combine the mandatory ‘shall’ with the negative ‘not’ and say the actor ‘shall not...’ ‘a person shall not discharge a toxic substance into the air’. The proper way to express a prohibition to act is to say ‘may not’ in connection with the action prohibited ‘a person may not discharge a toxic substance into the air’. The effect of the words ‘may not’ is to deny the
actor the power or the authority to engage in the action. The denial of the power or authority accomplishes all that is necessary to establish the legal prohibition against a person performing an act. It also provides the legal basis for imposing a sanction for a violation of the prohibition. Nothing else is necessary.

**Use the positive rather than the negative**

When drafting a provision, it is often possible to express it in the positive: ‘a person is eligible or the administrator shall grant’ or in the negative ‘a person is not eligible or the administrator may not deny’. Dickerson refers to the use of the positive rather than the negative as ‘directness’. Wydick points out that the use of the negative when the positive can be used usually involves the use of multiple negatives (not ineligible, not deny).

**Identify working words and glue words**

Identifying working words and glue words is the most helpful technique in eliminating unnecessary word and to use the active voice. According to Wydick, we should “distinguish between two types of words in a sentence—working words that carry the meaning or substance of the

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75 The working words are the nouns, verbs, adverbs and adjectives, and the glue words are articles, prepositions and pronouns.
sentence, and glue words that join the working words to make a sentence."76

Let us consider the following statutory provision:

All challenges for cause or favour, whether to the array or panel or to individual jurors, shall be determined by the court.

This sentence has 22 words. The working words are ‘all’, ‘challenges’, ‘cause’, ‘favour’, ‘array’, ‘panel’, ‘individual’, ‘jurors’, ‘determined’, and ‘court’, a total of ten words. The remaining 12 words are glue words. Now let us convert this sentence to the active voice and put the words in the singular and the sentence will read as:

The court shall determine a challenge for cause or favour to an array, panel, or individual juror.

This sentence has 17 words. It has only 9 working words and the glue words have been reduced from 12 to 8. The drafter could also eliminate one additional working word—‘individual’. To say that a party can challenge a juror is the same as saying that a party can challenge an individual juror. The word ‘individual’ adds nothing except to make those reading the statute wonder, if there is any kind of juror other than an individual juror.

Footnote

Avoid compound constructions and expressions

Every author on good writing style has preached the virtue of using short words or expressions rather than longer and more complicated ones or eliminating the word or expression. Strunk and White put the expressions ‘the fact that’, ‘who is’, ‘which was’, ‘in some (many) cases’, among those that should not be used because they add nothing to the words that follow them.\textsuperscript{77} Dickerson and Wydick have suggested other compound constructions or expressions with their simpler alternatives include the following:\textsuperscript{78}

<table>
<thead>
<tr>
<th>Compound</th>
<th>Simple</th>
</tr>
</thead>
<tbody>
<tr>
<td>a person is prohibited from</td>
<td>a person may not</td>
</tr>
<tr>
<td>adequate number of</td>
<td>enough</td>
</tr>
<tr>
<td>all of the</td>
<td>all the</td>
</tr>
<tr>
<td>at such time as</td>
<td>when</td>
</tr>
<tr>
<td>at the time</td>
<td>when</td>
</tr>
<tr>
<td>by means of</td>
<td>by</td>
</tr>
<tr>
<td>by reason of</td>
<td>because of</td>
</tr>
</tbody>
</table>

\textsuperscript{77} W. Struck and E. White. \textit{The Elements of Style}. (4\textsuperscript{th} ed). Brighton, Harvester Press, 2000, pp. 24, 42.

cause it to be done have it done
does not operate to does not
during such time as while
during the course of during
excessive number of too many
for the purpose of to
for the reason that because
in as much as since
in a prompt manner promptly
in accordance with by, under
in connection with with, about, concerning
in the case of if
in the event that if
in the nature of like
is a person who a person
is able to can
is applicable to applies
is authorized to may
is binding upon binds
is directed to shall
is empowered (entitled) may
is not prohibited from may
is permitted to may
is required to shall
is unable to cannot
it is directed to shall
it is lawful to may
it is the duty of shall
it is unlawful to may not
in the alternative or
paragraph 8 of subsection (C) of Section 1984 Section 1984(C) 8
prior to before
provision of law provision
subsequent to after
sufficient number of enough
the manner in which how
the question as to whether whether
to the effect that to
Avoid redundant legal phrases

Another technique to eliminate unnecessary words in legal discourse is to avoid traditional legal phrases that include redundancies. Although history explains how these redundant phrases crept into legal discourse, it does not justify their continued use in the discourse. According to David Mellinkoff, their use is not required in law and they simply create problems for the reader.79

Some common legally redundant expressions are:

advice and consent
alter or amend
cease and desist
confess and acknowledge

for and during the period
force and effect
free and clear
full and complete
give, devise and bequeath
good and sufficient
last will and testament
make and enter into
order and direct
perform and discharge
save and except
to have and to hold
transfer and assign
true and correct
undertake and agree
unless and until

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.
Some compound constructions are worse than redundancies; they include inconsistent terms. The expression ‘authorize and direct’ includes a word that grants discretion, ‘authorize’ and one that is mandatory, ‘direct’. Similar expressions are ‘means and includes’, ‘desire and require’ etc. It is suggested to use the word that most accurately reflects the intent and leave out the other.

Avoid lawyerisms (legalese)

Lawyerisms are words and phrases used characteristically by lawyers or people trying to sound like lawyers. They are the jargon of the legal profession. Examples are ‘said’, ‘such’, ‘whereas’, ‘further provided that’, ‘herein above mentioned’, ‘party of first part’, ‘the same’, ‘therefore’, ‘thereafter’, ‘hereby’, ‘hereinafter’. These words are almost never necessary and add nothing to substance. A drafter who discovers one of these words in documents or statutes should make every effort to eliminate it or find a less artificial substitute. The drafter will usually discover that ‘the’ or ‘that’ will serve just as well as ‘such’ or ‘said’; or their variations. According to David Crystal:

Jargon is itself a loaded word. One dictionary defines it, neatly and neutrally, as ‘the technical vocabulary or idiom of a special activity or group’, but this sense is almost completely overshadowed by another: ‘obscure and often pretentious
language marked by a roundabout way of expression and use of long words.' For most people, it is this second sense which is at the front of their minds when they think about jargon. Jargon is said to be a bad use of language, something to be avoided at all costs. No one ever describes it in positive terms (that was a delightful piece of rousing jargon)\(^8\).

**Be consistent**

Another principle of good legal writing is to be consistent in the use of words, that is using the same word rather than a synonym. In non-legal-discourse, the use of a synonym rather than being repetitive, known as 'elegant variation' is considered desirable, but only as a matter of style. In legal discourse elegant variation may create the construction problems.

In the drafting of a document, or statute, consistency in the use of language is an absolute necessity. Courts take the position that if the document, or statute uses one word in one place and a slightly different word in another place, the document or statute means something different in the latter than in the former. In the world of construction, there is no elegant variation, only substantive variation. The courts may conclude only reluctantly that no difference in substance was intended. Wydick refers to

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elegant variation as a "language quirk". The legal drafter must be consistent in the use of words and avoid the trap of elegant variation and choose the best word the first and every time it is used.

The following are examples of synonyms that the unwary drafter may use:

<table>
<thead>
<tr>
<th>Author</th>
<th>Writer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Automobile</td>
<td>Car, Vehicle</td>
</tr>
<tr>
<td>Case</td>
<td>Action, Suit, Proceeding</td>
</tr>
<tr>
<td>Clothing</td>
<td>Apparel</td>
</tr>
<tr>
<td>Decide</td>
<td>Determine, Rule</td>
</tr>
<tr>
<td>File</td>
<td>Submit</td>
</tr>
<tr>
<td>House</td>
<td>Home</td>
</tr>
<tr>
<td>Judge</td>
<td>Judicial Officer</td>
</tr>
<tr>
<td>Personal</td>
<td>Individual</td>
</tr>
<tr>
<td>Publisher</td>
<td>Printer</td>
</tr>
<tr>
<td>Radio</td>
<td>Receiver</td>
</tr>
<tr>
<td>Refine</td>
<td>Purify</td>
</tr>
<tr>
<td>Reside</td>
<td>Live</td>
</tr>
</tbody>
</table>

Use short sentences

Of all of the complaints made about legal discourse, probably the most common and the most justified is that sentences in them are too long. A sentence in a document, or statute runs on for hundreds of words and includes five or ten separate thoughts. The entire passage and each separate thought could be far more easily understood if the sentence were broken down into a separate sentence for each separate thought. If the sentence describes a series of events, put each event in a separate sentence. An illustration of the length and complexity is the following sentence:

Every person who insures or receives any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within this state or not, or who receives any valuable consideration upon any agreement to repay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn, at any particular time or in any particular order, or who promises or agree to pay any sum of money, or to deliver any goods, things in action, or property, or to forbear to do anything for the benefit of any person, with or without consideration, upon any event or contingency dependent on the drawing of any ticket in any lottery or who publishes any notice or
proposal of any of the purposes aforesaid, is guilty of a misdemeanor.\textsuperscript{82}

There is obviously a huge amount of information that has been compressed into a single sentence, which accounts for its length and grammatical complexity. The statute would be far more comprehensible if it were broken down into parts. For example, the statute could begin by stating the overall prohibition in general terms:

1. Every person who insures a ticket in any lottery whatever is guilty of a misdemeanor.

2. Insuring a ticket includes any of the following acts:

   a) Insuring or receiving any consideration for insuring for or against the drawing of any ticket in any lottery whatever, whether drawn or to be drawn within the state or not;

   b) Receiving any valuable consideration upon any agreement to repay any sum, or deliver the same, or any other property, if any lottery ticket or number of any ticket in any lottery shall prove fortunate or unfortunate, or shall be drawn or not be drawn, at any particular time or in any particular order....and so forth.

\textsuperscript{82} J&K State Lotteries Act.
Obviously, breaking the statute down into numbered subsections makes it far easier to process.

**Punctuate properly**

An early rule of statutory construction held that punctuation is not part of a statute. Today, a legal drafter would be ill-advised to ignore punctuation. Courts now look at punctuation marks in statutes or documents in the same way as they look at its words as guides to legislative intent. Lord Shaw pointed out that punctuation is part of the composition of language, and is sometimes quite significant. He saw no reason to deprive legal documents of the significance attached to punctuation as in other writings.  

The basic rules of punctuation will not be reviewed here. They can be easily obtained in any book on basic grammar. There are, however, several uses of punctuation marks that often create problems for the drafter or reader of statute or documents. To avoid those problems, the following principles are suggested:

1. Always put a comma before the ‘and’ or ‘or’ in a series when the last two words in the series are intended to be separate e.g., ‘a brief must contain a statement of issues, statement of the case,

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83 Lord Shaw. Ac 337, 1918, p.348.
statement of facts, argument and conclusion'. In this example, the comma before the 'and' is necessary to show that the 'argument and conclusion' are each a separate part of the brief. If there were no comma, it would be possible to read the words 'argument and conclusion' to mean that the last section of the brief would include both an argument and a conclusion. The comma before the 'and' eliminates the possibility of confusion and misinterpretation.

2 Use a comma to indicate that qualifying language is applicable to all of the preceding clauses: 'The court may receive additional evidence in writing or by oral testimony, unless the court decides it is merely cumulative'. Here without the comma after the testimony it would not be clear whether the 'unless' clause applies to both written evidence and oral testimony or only to the latter. In many instances, placing the qualifying language first is preferable.

3 One of the best techniques for the drafter to eliminate unnecessary words and to enhance clarity is to tabulate with the
help of punctuation marks. An example is from Civil Procedure Code. The first sentence of the rule reads:

The summons shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the times within which these rules or any statutory provision require the defendant to appear and defend.

Tabulating everything in the rule with the help of punctuation marks, the rule would read: The clerk shall direct the summons to the defendant, sign it, and include in it:

(1) the name and address of the

(A) court,

(B) plaintiff,

(C) defendant, and

(D) plaintiff's attorney; and

(2) notice

(A) of the time specified by rule or statute in which the defendant must appear and defend
4 Use a colon only to introduce a tabulation. Do not use it to introduce a proviso. Make the proviso\(^84\) a separate sentence.

**Numbers, time, and age**

**Numbers**

There are three types of numbers that a legal drafter may use: cardinal numbers (1, 2, 3), ordinal (first, second), and fractional (one fifth, two thirds). A cardinal number is expressed as a figure as indicated (the court shall hear the case 7 days after the last brief is filed). If the number begins the sentence, it is spelled out (Seven days after the last brief is filed the court shall hear the case). Ordinal and fractional numbers are spelled out as indicated.

**Time**

In a document, legislation, or rule, time can mean the time of day or a period of time. When expressing the time of day, use cardinal numbers (the applicant shall file an application before 5.00 p.m. on the last day of the month). When expressing a period of time, the drafter must avoid

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\(^84\) A proviso is an exception or modification that begins with “provided that” or, if more than one proviso is added, “provided further”. It follows the statement of the rule and is usually preceded by a comma or semicolon.
ambiguity in when the period of time begins or ends. Do not use 'from' a date to begin a period (from January 1, 1994,) or 'to', 'until', or 'by' to end a period (to, until, by) July 1, 1994,). Instead use 'after' with the immediately preceding date to start the running of time (after December 31, 1994,) and 'before' with the immediately succeeding date to end the period (before July 1, 1994,).

Age
When expressing age, the drafter must remember that a person reaches an age on the person's birthday and thereafter is older than that age. Thus if a rule says 'a person over age 16', technically it means a person who is one day over 16, not 17 years of age or older. The expression is often used to mean the latter rather than the former. To eliminate the ambiguity say '16 or over' if it is intended to include 16 year olds, or '17 or over' if it is intended to exclude 16 year olds. Lack of clarity can be created at the end of an age period by saying 'until age 65'. This can mean until a person reaches age 65 or age 66. Eliminate the problem by saying 'under' the age that is intended to be the cut off point. Thus if it is intended to include persons who have reached their 18th birthday but not their 70th birthday say, 'a person 18 or over but under 70'. It is not necessary to use the words 'age'
or ‘years of age’ before or after the number. If it is thought desirable to refer to age—say ‘age 18’ rather than ‘18 years of age’.

The reconstitution of language

Whenever a person wishes to communicate, he must communicate in a language that has its existence outside himself in the world he inhabits, if he is to be understood, he must use the ordinary English. It can give him his terms of social and natural description, his words of value, and his materials for reasoning; it establishes the moves by which he can persuade, or threaten or placate or inform or please another, or establish terms of cooperation or intimacy; it defines his starting places and stopping places and the ways he may intelligibly proceed from one to the other. Sometimes, he can use words in new ways—can cast new sentences and make new moves—for the user of the language is also its maker, but for the most part his resources are determined by others.

The relationship that a speaker or writer has with his language may range from comfortable to impossible. Sometimes one’s language seems a perfect vehicle for expression and action; it can be used almost automatically to express what one wishes. But, at other times one may find that he no longer has a language adequate to his needs or purposes, to his
sense of himself and his world; his words lose their meaning. In the *Iliad*, for example, this happens to Achilles, who struggles with the language and values of his heroic culture, trying to find a way to speak in a satisfactory way about himself and his experience. It also happens to the interlocutors in Plato’s *Gorgias*, who are severely distressed when they are forced to face the contradictions among the platitudes by which they shape their lives. And it happens to Emma, whose language, while seemingly satisfactory to herself, is to the understanding observer utterly impossible. Similarly, the judges and lawyers find themselves out of tune with their language especially when they have to solve some hard cases. Of course, at that time words lose their meaning; that is what they have always done and will always do. What matters in the face of this fact, is to understand the reconstitutions of language. Reconstituting language becomes a radical assertion of independence, responsibility and an essential equality to meet the needs.

Reconstitution of language does not mean that the writer invents wholly new language, but he finds ways to give meaning and sometimes

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new form to the terms, and structures of the language he has inherited or acquired. He remakes language out of an old language, but not in the sense that a carver simply makes a figure out of wood; he works, rather, the way a musical composer makes his music, not only out of notes, tones, timbres and rhythms—the physical material of his art—but out of the music that precedes. Thus, he makes music at once out of sounds and out of music itself. Similarly, the lawyer or judge makes a case partly out of the trouble in the world and partly out of the law itself. In doing these things he has to reconstitute the language. Reconstitution entails not merely a method of interpretation, but an active engagement with the text. In this way language is in part a system of invention, and an organised way of making new meaning in new circumstances.

The legal case is always a discourse. It is a way of making a world with a life and value of its own. The discourse it creates is at once its method and its point and its object is to give to the world it creates the kind of intelligibility. This means that the case is always an invitation to the reconstitution of the language in the light of new circumstances and new intractabilities. In this context, law seems to be a branch of the humanities in that it seeks not to be a closed system but an open one. It learns from the
past and seeks new terms for the expression of motives; it is a method of learning and teaching; one construction of discourse is tested against another. This multiplicity of discourses that the law permits is not its weakness but its strength, for it is this that makes room for different voices to reconstitute language in response to the demands of circumstances and suggests conception of justice as equality.

**Background and necessity of English language in law syllabuses**

The British system of the administration of justice was introduced in India with the firm root of the British rule. The necessity of the help of trained counsels was felt for the protection of the interests of the parties to disputes. With a view to impart legal education universities were established at three Metropolitan cities in 1857 and other institutions were also given the charge of imparting the education in law. In 1887 Allahabad University began to teach Law and some other colleges like Patna Law College and Robin Shaw College started the teaching of Law in 1891; L.L.B was a two year degree course. English was the language of instruction as well as examination. But the condition of legal education and legal profession was not satisfactory. Dr. Radhakrishan Commission lamented upon the deplorable condition of the legal education and it was thought that the decline in the prestige of
legal education was due to lack of the proper and adequate knowledge of English, which was the exclusive language of law at that time. Some universities\textsuperscript{88} prescribed Law Preliminary Examination which included two papers on English: paper I included three texts representing prose, poetry and a play of Shakespeare, paper II related to English—essays, précis and composition consisting of (i) one essay type question carrying 40 marks (ii) one précis question carrying 30 marks, preferably relating to Socio-political or legal subject (iii) Composition carrying 30 marks. Common errors in grammar—vocabulary and diction, construction of sentence, paragraphs and paragraph construction, idioms, punctuation, etc.

During 1960s, the course became a three year post-graduate programme throughout the country and the curriculum got revised to reflect the contemporary needs and demands of the profession. The Advocates Act, 1961 was passed which specifically provides that it shall be the function of the Bar Council of India to promote legal education and to lay down standards of such education in consultation with the universities in India imparting legal education.\textsuperscript{89} The other consideration was that since English is the language of law and it was considered as a dire necessity for a person

\textsuperscript{89} Advocates Act, Section 7, 1961.
who joined a law college, to have acquired proficiency in English language and literature. It was thought essential with a view to help the candidates in understanding the law reports and standard text books.

The Fourteenth Report of the Law Commission of India had noted the general loss of moral prestige of legal profession. The reason was thought to be the lack of the knowledge of English of the Law graduates. Language dilemma began to be felt. First, the imperative of the time was that law should have been written in a language understood by people, in general, and litigants, in particular. Second, was that English could not be ignored for the following reasons:

1. The language of the Law is not just English as ordinarily understood but a veritable system of technical terms, situational meanings, complicated procedural arrangements etc, which communicate at least among the law men in a unique style imperceptibly interwoven with certain justice traits and justice qualities.

2. The language question has assumed emotional overtones after linguistic re-organisation of States in India and English came to

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be accepted as a convenient link language by a substantial number of States and there are inherent difficulties for them to use a language other than English for transacting judicial work.

3. English continues to enjoy associate status with Hindi as a national language and higher education is almost always imparted through English.

4. The precedent bound common law system of jurisprudence puts heavy reliance on past judicial decisions which are only available in the English language.

5. In federal polity the higher judiciary is manned by judges from all parts of the country and there were inherent difficulties for them to use a language other than English for transacting judicial work.

The first seminar of the Bar Council of India Trust held on 13-15 August 1977 at Bombay resolved that the duration of the L.L.B Course leading to enrolment as an advocate including the practical training should be four years. The four years law course was divided into eight semesters and English was taught in all the semesters\textsuperscript{91} as fifth paper.

\textsuperscript{91} Journal of the Bar Council of India, 1978.
Each paper was allotted 75 marks and thereby 600 marks were allotted to English. It showed the importance of English language in law. In 1982 the Bar Council of India made it clear that in five years law degree course two years would be devoted to pre-law study and English was to be taught in both pre-law years. The study of General English was made compulsory and another paper under the caption of ‘legal language’ was introduced as a compulsory paper in part II. In this way the Bar Council of India made sufficiently clear that “the new scheme of Legal Education under 10+2+5 also consequently adopts a curriculum which develops in every prospective lawyer proficiency in English…”

In present age of the globalization and multi-nationalisation law graduates have better prospect of service if they have sufficient knowledge of English. They can serve the country at the inter-State communication level and also national and international planes. One should not forget the warning of Vinayak K. Gokak:

The English language has linked India with the world. It has conducted sparks of inspiration from the world outside to India and from India to world. We are blessed with two-way traffic that English has afforded us. We have paid a heavy price in the past for this privilege. But in our indignation over the price that has been paid, let not us throw away the privilege that is already ours. We may then have to condemn ourselves like Othello:
Of one whose hand,
Like the base Indian, threw a pearl away Richer than all his tribe.

English is certainly not richer than our tribe. But it is a pearl all the same and it would be foolish to throw it away.  

**Conclusion**

Understanding the competing goals and interests of the profession with respect to its language can help us decide which aspects of legal language are worth preserving and which should be cast aside. If lawyers wish to be truly professional in their use of language, they need to reconsider old habits and concentrate on how well their speech and writing attain the paramount goal of language: clear, concise and comprehensible communication. Mellinkoff has also challenged lawyers to use more ordinary English and to abandon antiquated habits that had been passed down from generation to generation.  

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