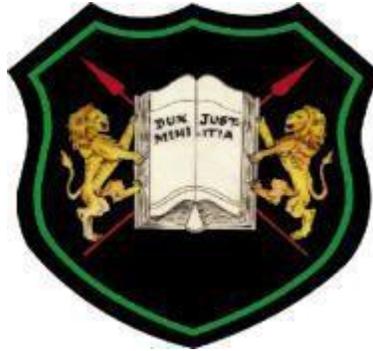


COUNCIL OF LEGAL EDUCATION



ATP 103: LEGAL WRITING & DRAFTING

ASSIGNMENT 1

CLASS E

FIRM 03

Feizer Awuor	20220962
Joy Awinja Mvatie	20221627
Faith Sitawa Nyongesa	20221053
Cherono Faith	20220316
Asha Shukri Guled	20221308
Pauline Hamisi Hamisi	20221434
Musau Esther Mwikali	20220373

QUESTION: DESCRIBE THE LANGUAGE OF THE LAW

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1.0 BACKGROUND AND DEFINITION

The language of the law refers to specialized terminology and phrasing used by those in the legal field and within legal documents. Such terms as *the language of the law*, *legal language*, *law and language*, or even the term *legalese* (or such accompanying terms as *legal jargon*, *legal argot*, etc.), which is considered more derogatory have been the subject of expansive discourse in the field of legal linguistics. It is notoriously difficult for the public to understand.¹

Language of the law in most cases is used in such a way that it is essentially the synonym of “legal language” and considering this, whatever label one decides to apply to legal language, it is not a full-blown language. Peter Tiersmas pointed out “if we isolate what is distinctive in legal English, leaving out the features of ordinary speech, what remains is far too incomplete to function as a language.”² John Mc Ginnis and Michael Rappaport in their work titled *The Constitution and Language of the Law* point out that the language of the law can be thought of as a language that builds on ordinary language but then substantially supplements and modifies it.³

1.1 HISTORY OF LEGALESE

The development of legal English is closely connected with the history of Great Britain. For several centuries, English remained the spoken language of the majority of the population, while almost all writing was done in French or Latin. Latin was important for English law mainly as the language of court records. For example, the use of *versus* in case names originated from Latin usage.

From 1066, Latin was the language of formal records and statutes. But it was not the language of legal pleading or debate. The Statute of Pleading, which was enacted in France in 1356, stated that all legal proceedings should be in English, but recorded in Latin. The influence of Latin can be

¹ The dictionary meaning of ‘legalese’ underscores this perceptive difficulty. < <https://dictionary.cambridge.org/dictionary/english/legalese> > accessed 4 May 2022.

² Peter M. Tiersma, *Legal Language* (University of Chicago Press 1999), 142.

³ John O. Mc Ginnis and Michael B. Rappaport, ‘The Constitution and the Language of the Law’ (2018) 59 *William & Mary Law Review* 1321 < <https://scholarship.law.wm.edu/wmlr/vol59/iss4/4> > accessed 4 May 2022.

seen in the number of words and phrases such as *ad hoc*, *de facto*, *bonafide* etc. which remain in current use in writing.

Following the Norman invasion of England in 1066, Anglo Norman became the official language of England. For the period of nearly 300 years, it was the language of legal proceedings. As a result, many words used in modern legal English are derived from Anglo Norman, such words are *property*, *chattel*, *estate*, *lease* etc.

English was adopted for different kinds of legal documents at different times. Wills began to be written in English in about 1400. Statutes were written in Latin until about 1300, in French until 1485, in English and French for a few years and in English alone from 1489. According to the Proceedings in the Court of Justice Act, 1730 Latin was replaced by English. As a result, new branches of law such as commercial law began to be developed entirely in English.⁴

Kenya ‘received’ Legal English along with the reception of English Laws. A burgeoning profession of African lawyers were instructed by common law practitioners along with materials that featured Legal English. Thus, the language carried on to present day.

1.2 CHARACTERISTICS OF LEGALESE

Over the centuries of its usage, legalese has acquired a fair share of characteristics. Whilst some of these features are neutral as to any other language form, others carry negative connotations. These characteristics/features are the focus of this section.

a) TECHNICALITY

Legal language employs a myriad of technical terms that can be described as esoteric. While technicality is not unique to the legal profession -computer programmers, for instance, use computer languages with specialised syntax- it achieves a status of infamy among the lay public through interaction with public legal documents/legislation.

Terms such as *habeas corpus*, *de jure*, *obiter dicta* are evident to a first-year law student, but the same terms evoke question marks to a by-passer along the street. Legal documents often

⁴ David Mellinkoff, *The Language of the Law* (Boston: Little Brown 1963).

use phrases such as *hereinafter*, *hereto*, *hereof*, *aforesaid* among others to add to the degree of formality of the legal document.⁵ These words, however, originate from the Old English and may have been introduced as ambiguity resolving elements. Contemporary terms that are just as technical are *tort*, *fee simple*, and *novation*.

Whenever ordinary words are used, they may mean something different than ordinary parlance.⁶ It is only in law, for instance, that ‘consideration’ denotes an inducement to enter a contract.

b) *SPECIALISED SYNTAX*

Syntax refers to the arrangement of words to form clauses, phrases or sentences. Legalese often uses particular forms of written syntax depending on the legal document.

In drafting wills and contracts, there is heavy use of binomials and trinomials. This is an example of a typical opening clause in a will:

“I APPOINT my wife, AOKO JUMA, of Naivasha Town, Nakuru, Kenya, to be the *Executor and Trustee* of this my Will, provided that there should be at all times one (1) *Executor and Trustee of this my Will* so that in the event that my *above-named Executor and Trustee* shall have pre-deceased me or shall survive me but die before the trusts hereof shall have terminated or shall be unable or unwilling to act or to continue to act, I appoint, in the following order of priority, such one of the persons hereinafter named *as shall not already be acting and as shall be able and willing to act to fill the vacancy* so created, namely...”

Another excerpt from a typical contract of sale:

“The property is sold *subject to and with the benefit of the entries* in the Registers of the Vendor's Title *and the Purchaser* having been supplied with copies of the entries *is deemed to purchase with full knowledge of the entries and shall raise* no further enquiry or requisition.”

⁵ David Mellinkoff, *The Language of the Law* (Boston: Little Brown 1963) 13.

⁶ This characteristic is referred to as ‘legal homonyms’: Peter M. Tiersma, *Legal Language* (University of Chicago Press 1999).

From the above excerpts there are also syntactic disruptions which aim to add additional information within commas. Legal English consists of only complete sentences containing both coordinate and subordinate clauses. These sentences can stretch over several lines, constitute one whole paragraph.

Legal language also tends to be impersonal. Legal documents are typically written in third person as it adds to the degree of formality. Parties concerned may be referred to as *the contractor, the borrower, the lender* etc. throughout the document instead of making use of simpler pronouns.

The result hurts the clarity of the sentence but may serve as a means of evading ambiguity.

c) *AN EMPHASIS ON SEMANTICS*

In many ways, the task of judges/magistrates is the interpretation of statutory terms. There are competing philosophies on the best form of interpreting legal instruments: literal rule, originalism,⁷ and purposive being but some of them.⁸ Words in legislation or legal instruments can be intentionally restrictive to a set circumstance. Sometimes this results in pedantic judgments as was the case in *Garner v Burr*⁹ where the term ‘vehicle’ was restrictively interpreted to exclude a chicken coop driven on wheels. This was because the coop used iron wheels, not the pneumatic tyres expressed in the underlying legislation. Although the magistrate acquitted the accused on the basis of this construction, the Appeal Court reversed it, saying:

“The regulations are designed for a variety of reasons, among them the protection of road surfaces; and, as this vehicle had ordinary iron tyres, not pneumatic tyres, it was liable to damage the roads. [The magistrates] have put what is in my opinion too narrow an interpretation on the word ‘vehicle’ for the purposes of this Act. It is true that, according to the dictionary definition, a ‘vehicle’ is primarily to be regarded as a means of conveyance

⁷ Boyce Brett, ‘Originalism and the Fourteenth Amendment’ (2009) 33 Wake Forest Law Review 909.

⁸ Richard Posner, ‘Pragmatism versus Purposivism in First Amendment Analysis’ (2002) 54 Stanford Law Review 737.

⁹ [1951] 1 KB 31.

provided with wheels or runners and used for the carriage of persons or goods. It is true that the [magistrates] do not find that anything was carried in the vehicle at the time; but I think that the Act is clearly aimed at anything which will run on wheels which is being drawn by a tractor or another motor vehicle. Accordingly, an offence was committed here. It follows that [the magistrates] ought to have found that this poultry shed was a vehicle within the meaning of s. 1 of the Road Traffic Act of 1930.”¹⁰

d) *VERBOSITY*

Verbosity is taken to mean using or containing more words than are necessary.¹¹ This runs counter to practices of precision and conciseness recommended in communicative writing. Verbose language is due to the grammatical features of legal language such as long sentences and use of prepositional phrases (*in the event that, until such time as, during the time that*). As Richard Wydick writes in advocating for clarity in writing:

“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.”¹²

1.3 JUSTIFICATIONS FOR THE USE OF LEGALESE IN LEGAL DOCUMENTS.

Legal language is common and far reaching across common law jurisdictions. This section delves into the possible justifications for its use in the contemporary era.

a) *NECESSITY*

Lawyers write for a potentially hostile audience, in an adversarial atmosphere where documents are prone to scrutiny by loophole seeking opponents. Change from legalese to plain English can lead to uncertainty and simplicity to ambiguity.

¹⁰ *ibid* 33.

¹¹ < <https://dictionary.cambridge.org/dictionary/english/verbose> > accessed 5 May 2022.

¹² Richard C. Wydick, *Plain English for Lawyers* (5th edn, Carolina Academic Press 2005) 20-21.

b) *COMPLEXITY*

Some legal concepts are inherently complex. First, let's take a look at its history. As expounded above, the use of legalese dates back to the time of Anglo-Saxons. When the Anglo-Saxon laws became increasingly complex, they found it necessary to use an equally complex legal language to reflect complicated status of society.

c) *AUDIENCE*

The kind of audience you are communicating to are mostly fellow advocates and magistrates or judges who understand legal terminologies. Within this 'bubble' of likeminded colleagues, the likelihood of a persisting style of language is higher.

d) *TO AVOID FUTURE MISINTERPRETATIONS*

Legalese guards the future of misinterpretation which could lead to huge unintended consequences given the public nature of legal instruments. This consideration is all the more pertinent in drafting legislation and judgments as the drafter must be conscious to constructions and/or the interpretative value that such documents may come to be known for.

e) *ADOPTION OF LEGAL JARGON TO EVERYDAY CONVERSATIONS*

A number of words that are traditionally legal jargon are adopted into the English language such that even persons who are not conversant with the legal jargon use and understand the meaning of such words. For example, *bona fide*, *prima facie*, *habeus corpus*, *amicus curiae*, *caveat emptor*, *mandamus*.

1.4 CONCLUSION

This paper has sought to describe the nature of the language of the law. In so doing, attention has been paid to the definition of the language of the law, the history of the legal language, its pertinent characteristics and the various justifications for using legal language. The aim is to supplement existing instructional material on the topic discussed and enhance the comprehension of the same.