History of Legal English

Up until the Norman Conquest, the language of the law and administration was Old English, but with the arrival of the Normans, this was almost completely supplanted by Anglo-Norman French, with only a few technical terms from Anglo-Saxon law remaining. This language gradually became more technical, leading to the creation of what we know as Law French, which continued to be the official language of legal proceedings for another 300 years.

The Norman conquest obviously led to the adoption of French as the language of official use, and thus of the courts, where its influence on the spoken legal language of the time was extensive. Nevertheless, Latin was the preferred language for written law, and continued to be so for two centuries after the Conquest.

By the 14th century, however, French dominated also this field. It was not until the end of the 15th century, following the introduction of printing and its standardising influence on written language, that statutes began to be printed in English. The problem with a French-dominated legal system was that the uneducated Englishman who had a case before the court could not understand what was being said.

This came to end in 1362, with the Pleading in English Act, usually referred to as the Statute of Pleadings, which stated that:

> Le roi, desirant le bon governement et tranqillite de son people [...] ordeigne et establi [...] qe toutes plees qe serront a pleder en ses courtz queconqes [...] soient pledez, defenuz, debatuz, et juggez en la lange Engleise. Et qils soient entreez et enroullez en Latin.

«The king, desiring the good government and peace of his people, [...] orders and establishes [...] that all pleas which may be pleaded in any of his Courts [...] shall be pleaded, defended,

debated, and judged in English, and shall be entered and registered in Latin» (my translation).

This was somewhat ironic, of course: the first attempt to introduce linguistic simplification in English and to guarantee access to the law for the English-speaking population was actually written in French. This irony is compounded by the fact that this move towards simplification actually brought with it a whole range of new linguistic difficulties. The main issue was that of legal certainty, a fundamental legal concept in which language plays a core role. In an uncodified system based on the law of precedent, as the English Common Law system was, the achievement of a desired legal effect was closely related to the exact words used to achieve it. In such a situation, lawyers were understandably loath to abandon terms whose referents had been established by precedent. Translating the original formulas was not always a straightforward task.

The result was that even though many terms were replaced by English equivalents, certain Law French terms remained in use. Indeed, many legal terms derived from French are still in use today, such as property, lease, tenant, damage, estate, lien, chattel, estoppel and bail. In other cases, attempts to avoid confusion involved the adoption of doublets such as "free and clear", in which a term of English origin was used alongside its Law French equivalent. The importance of precedent had a cumulative effect, whereby not only legal concepts were embodied in landmark cases possibly from decades or even centuries previously, but whereby the language used in these cases continued to be quoted and used. This was not only a question of terminology, but also of register and syntax, and many of the complex structures found in legal drafting date back to this time. Rather than merely changing and evolving, the language of English law expanded and built upon previous versions, instead of replacing them, so although the use of English was established by statute, Law French continued to survive in terms of terminology and syntax.

Latin was however used for formal records and, in the medieval period, as an alternative to French, for statutes. Cases also, although dealt with in French in the courts, were registered in Latin, a

practice that would continue until the Proceedings in Courts of Justice Act 1730, which laid down the use of English:

> Whereas many and great mischiefs do frequently happen to the subjects of this kingdom, from the proceedings in courts of justice being in an unknown language [...]: to remedy these great mischiefs, and to protect the lives and fortunes of the subjects [...] from the peril of being ensnared or brought in danger by forms and proceedings in courts of justice, in an unknown language, be it enacted [...] that [...] all writs, process and returns thereof, [...] records, judgments, statutes, [...] and all proceedings whatsoever, in any courts of justice [...] and which concern the law and administration of justice, shall be in the English tongue and language only, and not in Latin or French, or any other tongue or language whatsoever (4 Geo II. c. 26).

In the meantime, in around 1350, the Court of Chancery was established, initially to deal with appeals from those who were unable to obtain justice through the common law courts.

From the outset, the language of this court was Middle English. Since its very aim was that of correcting the shortcomings of the previous system, and considering the historical period in which it was established, this significant move towards increasingly accessible justice also in linguistic terms is hardly surprising.

In fact in this period we see that various changes had taken place or were taking place. With the English aristocracy now the result of extensive intermarrying between Normans and the English, the onset of the Hundred Years' War, and the end of feudalism, there was an increased sentiment of nationalism, a fact also reflected in the promotion of the national language, as epitomised in Chaucer's *Canterbury Tales*, also from this period.

The result of these various administrative and linguistic influences on English law is a legal language composed of Medieval Law French, Middle English translations of Law French, Classical Latin, Middle English as a legal language in its own right, and Modern English. Of course, to make matters worse, we are dealing

with technical language usually expressed in texts with complex syntax.

At the time that the shift in common law courts was being made from French to English, there was some concern as to whether different words with the same referent actually had the same meaning. Just to be safe, legal drafters began to include both terms, and the resulting constructions, composed of synonyms or near synonyms, have continued in use up to the present day. Examples include: *last will and testament*; *terms and conditions*; *null and void*; *breaking and entering*; *free and clear*; and *right, title and interest*.

Meanwhile, in the courts of equity, which had never been bogged down by rigid common law procedure, having moreover been set up to remedy it, English flourished. Here, the Middle English period saw the introduction of many words that lawyers continue to use today, despite their having fallen from general use, such as *notwithstanding*, *aforesaid*, *witnesseth*, and the many compound words based on *where*, *here*, and *there* (*herein*, *hereinafter*, *thereto*, *wherein* etc.).

During the 16th and 17th centuries many technical terms were introduced, such as *affidavit*, *alimony* and *subpoena*, all borrowed from Latin and all still used today. The introduction of such words was mainly due to a desire prevalent in this period to improve English by means of importing classical terminology and imitating the rhetorical effects of the classical writers.

As we have seen, legal English is thus the result of rigid procedural forms and terminology translated from French into English, the maintenance of original French terms, the introduction of Middle English terms and the importation of terms from Latin. Accusations that the language of the law contains antiquated vocabulary and syntax are thus clearly founded, but many lawyers defend this linguistic fossilisation as a guarantee of stability.

It then comes as no surprise that by the time Dickens came to write Bleak House, in 1852, the common view of the legal profession and of legal language was one of mistrust and misunderstanding. Dickens talks of "fog":

> Fog everywhere. Fog up the river, where it flows among green aits and meadows; fog down the river, where it rolls defiled among the tiers of shipping and the waterside pollutions of a great (and dirty) city. [...] and the dense fog is densest, and the muddy streets are muddiest near [...] Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

Another century would pass before there were attempts to finally deal with this issue seriously, when, in 1979, the Plain English Campaign was established in London to combat «gobbledygook, jargon and misleading public information». Another ten years would pass before this was joined by the European Commission's 1998 campaign, Fight the Fog (perhaps named with *Bleak House* in mind), and yet another dozen years until there was concrete legal action, this time on the other side of the Atlantic, with the US Plain Writing Act of 2010. The aim of all of these moves was to make official, and especially legal texts more accessible to the general public by the use of "plainer" language, in terms not only of terminology, but also syntax. The features of Plain English can be summarised as follows: priority given to clarity, avoiding technical language as far as possible; a preference for words of a Germanic origin rather than those derived from Latin and Greek; importance given to the implied reader, namely a lay person rather than a lawyer or legal specialist; a prevalence of verbs rather than nouns; the use of the active rather than the passive voice; and simple, concise language, as summed up in the acronym KISS (Keep It Short and Simple). By applying this rule, excessive verbiage can be avoided, with, for example: "in view of the fact that" becoming "as", "within the framework of" becoming "under"; and "a certain number of" becoming "some".

To have an idea of how this affects the readability of a text, we can see the simplification achieved in the following example, whereby «The committee *came to an agreement* to the effect that *a study*

should be carried out by the consultants into the feasibility of *the provision of* national funding» becomes, in Plain English, «The committee *agreed* that the consultants *should study* the feasibility of *providing* national funding» (*How to Write Clearly*, Directorate-General for Translation, European Commission (my italics).

The language of English law

We will be looking at legal language in closer detail today. The lesson is divided into two sections:

- Section 1: the features of legal English (vocabulary, style, syntax and morphology)
- Section 2: problems interpreting legal English

We need to examine legal texts from two different perspectives:

Individual terminology

Larger text organisational units and genres – structure typical of contracts etc.

Section 1: the features of legal English

1) The general features of legal English

Like legal language in other cultures, legal English is a complex type of discourse.

The general features of legal English are as follows

a) **Latinisms**. English law grew out of a system that evolved in the Middle Ages when Latin, supported by the power and prestige of the Roman Church, was the *lingua franca* throughout Europe for written texts and intellectual debate. Secondly, Roman law was a coherent written system that for centuries had been developing over a wide area of Europe. It was therefore inevitable that some of its language would become used in the texts and professional speech of English legislators, who shared a common culture with their colleagues elsewhere. There are hundreds of Latin phrases in common legal use, such as *prima facie*, *bona fide* and *res judicata*.

b) **Terms of French or Norman origin**. Terms dating back to the period following the Norman Conquest in 1066. After the Norman invasion, justice was administered in Norman French. Even the royal seal carries a French motto (*Dieu et mon droit*). Examples include *lien*, *on parole*, *damage* (as well as a long series of other words ending in –age).

c) **Formal register and archaic diction**. Like legal language in other cultures, legal English is often marked by old-fashioned syntax and antiquated vocabulary. This is partly due to the preservation of terms that were introduced many centuries ago. Despite such terms no longer being used in everyday language, lawyers are unwilling to introduce new terms, because these traditional terms have an established meaning which avoids the risk of ambiguity. We should also remember that in English trials references are constantly made to very old texts.

d) **Archaic adverbs and prepositional phrases**. A special case of fossilised language is the persistence in legal English of compound words based on the simple words 'here', 'there' and 'where'. These are often used to refer to different sections of the text under discussion. Common examples include *hereinafter*, *thereunder*, *hereby*, *thereby*, *whereby*.

e) **Redundancy (doublets and triplets)**. By this we mean the form of reduplication, in which two and sometimes three near synonyms are combined. Examples include *have and hold, final and conclusive, null and void, aid and abet.*

f) **Frequency of performative verbs**. Performative verbs are verbs which in themselves embody an action. Examples often found in legal contexts include *agree, admit, pronounce, uphold, promise, undertake, swear and certify.*

2) The Classification of legal vocabulary

We can classify legal vocabulary into three categories:

a) **Purely technical terms**. Technical terms are those that are found exclusively in the legal sphere and have no application outside. Examples include *barrister*, *solicitor*, *bring an action* etc. Because these terms are identified so closely with the system that produced them, some believe they are impossible to translate, but can only be adapted for use by lawyers in a different legal system, such as that in Italy. This is known by translators as the problem of equivalence, and we will have a brief look at this concept later.

b) **Semi-technical or mixed terms**. This group consists of words and phrases from everyday language which have acquired additional meanings when used in the specialist context of legal activity. Often, terms have a variety of meanings. A case in point is the word issue:

- without <u>issue</u> (without children)
- the parties could not agree on the <u>issue</u>
- the passport was <u>issued</u> by the Liverpool office
- parties must wait for process to <u>issue</u> from the court (be served).

c) **Everyday vocabulary**. This group, which is naturally the largest, consists of terms in general use that are regularly found in legal texts. The fact that a term is commonly used in everyday English does not however mean that it corresponds to a similar everyday term in Italian. The English *paragraph*, for example, corresponds to the Italian *comma.*

3) Features of the morphology and syntax of legal English

a) **Unusually long sentences**. Sections of English acts (laws) may be extremely long, of up to 200-300 words, with multiple subordination and postponement of the main verb until very late in the sentence. However, this should not cause a difficulty to Italian readers, who are used to such complexity in their own legislation.

b) **The complexity of English legal syntax**. The syntax of English legislation and contracts is extremely complex also

due to the abundance of restrictive connectors, such as: *notwithstanding, under, subject to, having regard to, relating to, pursuant to, in order to, in accordance with, whereas* and many more.

c) **Abundant use of the passive voice**. The passive is often used to establish rules which apply universally, for example "no late submissions will be accepted"; "payment must be made within seven days". The implied subject is too obvious to require stating.

d) **Conditionals and hypothetical formulations**. In texts like statutes, contracts and handbooks containing procedural rules, many possible situations and exceptions must be provided for. The result is that the language in which they are written, and legal language generally, is full of syntactic indicators of condition and hypothesis, which may be either positive (*if, when, where, whenever, wherever, provided that, in the event of*, and many others) or negative (*unless, failing, should... not..., except where* and so on).

e) **Active and passive parties in legal relationships: the suffixes –er/-or and –ee**. Most legal activity is concerned with the creation, exercise and extinction of rights and with disputes concerning those rights. In criminal cases the two parties are the State (or the Crown in England) and the accused, or the prosecution and the defence. In civil proceedings they are the plaintiff (or claimant) and the defendant. In proceedings the courts adjudicate between the rival claims of two sides or adversaries. This explains the generic name of "adversarial procedure" for the English system, rather than the "inquisitorial procedure" characteristic of the investigating judge found in Italian criminal law.

On the other hand, a feature of legal relationships created at the desire of the parties is the use of the suffixes *–er/-or* and *–ee* to form the names of the active and passive parties. For example, the party who grants a right is a grantor and the person who receives it is a grantee. In contracts, a party which makes a promise is a promisor, and the party receiving is a promisee. There are many other

Problems interpreting legal texts in English

1) Interpretation

One result of the complex nature of legal language is that the interpretation of terms and words creates not only a problem for foreign students wishing to understand them, but also at times for the judges and courts in England itself. There are however a number of rules adopted to deal with problems of how to interpret disputed or unclear terms. The main rules are as follows:

a) the literal rule: words that are reasonably taken to have a single meaning are to be given that meaning, however strange the result.

b) Documents and statutes are to be construed as a whole, the idea being that internal inconsistencies will thus be avoided.

c) The golden rule: ordinary words are to be given their ordinary meanings and technical terms their technical meanings, unless the outcome is absurd.

d) The mischief rule: when the aim of the statute is to cure defects in the law, any ambiguous terms are to be construed in such a way as to favour that outcome.

e) The '*ejusdem generis*' rule: when a document contains a list of specific items belonging to the same class followed by general words, the general words are to be interpreted as referring to other items of the same class (*ejusdem generis*). For example, if law refers to "cows, pigs, goats and other animals", the phrase "other animals" means other farm animals and does not include, for instance, fish, foxes or crocodiles.

f) The rule '*expressio unius est exclusio alterius*', i.e. 'the inclusion of the one signifies the exclusion of the other'. This is the other side of the previous rule, and means that if specific words in a list are not followed by other general ones, the list is to be regarded as exhaustive, e.g. "weekends and public holidays" excludes working weekdays.

examples of this kind such as *lessor/lessee, licensor/licensee, assignor/assignee.*