

Plain English Movement and Its Influence on Today's Legal English

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Abstract: When one addresses a specific audience, his or her style changes accordingly as it is strongly influenced by the type of the audience. It is clear that the style used within the legal field would greatly differ from the style used under most other circumstances. Legal English has developed into its current form over the course of many centuries and has been shaped under the influence of various aspects. We have come to accept the fact that legal English has many particular characteristics that make it specific, irreplaceable, and admittedly, sometimes rather confusing and incomprehensible. Legal professionals use legal language; this is a part of their profession, a part of their training. Formal and traditional legal English has become equivalent to professional legal English. Its specific style is something that the general public has learned to accept and expect from legal professionals.

Keywords: Plain English Movement, passive voice, legal English, Legalese.

1. INTRODUCTION

In recent years, the archaic and formal nature of legal English has come to be questioned by many experts in the field of linguistics and law. Friedman's (1993) view of this issue is a clear one. "The fact is that legal writing, as it pours out of thousands of word-processors, is overblown yet timid, homogeneous, and swaddled in obscurity. The legal academy is positively inimical to spare, decent writing." He is certainly not the only critic of the current form of legal language. Mellinkoff (1963: 526) describes legal language as "wordy, unclear, pompous, and dull".

The criticism of the current style of legal English has led to what is known as Plain English Movement. This movement began in England and the United States in the seventies, when, as Cutts (1995: 14) states, "consumer groups used the mass media to publicize and ridicule examples of obscurity in legal documents and government forms, calling for plain language or plain English." The movement has been supported by many authorities and it is built on research. The proponents of simplification of legal English propose many arguments in its favor. According to Kimble (1992: 20), "plain language has to do with clear and effective communication— nothing more or less. It does, though, signify a new attitude and a fundamental change from past practices. If anything is anti-literary, drab, and ugly, it is traditional legal writing – four centuries of inflation and obscurity".

2. PROPONENTS AND OPPONENTS OF PLAIN ENGLISH MOVEMENT

Haigh (2004: 37) supports plain English as well by saying "all legal writing should aim at achieving three goals: clarity, consistency and effectiveness". He claims that "writing of all kinds should be as easy to understand as possible". One of the prominent proponents of simplification of legal language, Wydick (1978), claims:

We lawyers cannot write plain English. We use eight words to say what could be said in two. We use old, arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers.

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Another strong argument for simplification of legal English is expressed by the Law Reform Commission of Victoria 34 (About the ALRC: 2010), which states that many legal documents are unnecessarily “lengthy, overwritten, self-conscious and repetitious”. They also supposedly consist of lengthy sentences and involved sentence construction. They are poorly structured and poorly designed. They suffer from elaborate and often unnecessary cross-referencing. The Law Reform Commission of Victoria 34 (About the ALRC: 2010) further states that the legal documents

...use confusing tautologies, such as let, allow, and permit. They retain archaic phrases such as ‘know all men by these presents’ and ‘this indenture witnesseth’. They use supposedly technical terms and foreign words and phrases, such as ‘inter alia’ and ‘res ipsa loquitur’, even when English equivalents are readily available. They are unintelligible to the ordinary reader, and barely intelligible to many lawyers.

Particular aspects of legal English are considered the issues of interest when it comes to the simplification of legal English. Williams (2004:114) summarized them as follows:

- Eliminating archaic and Latin expressions;
- Removing all unnecessary words;
- Ensuring the text can be understood by someone ‘of average intelligence’;
- Including a ‘purposive’ clause at the start of the text;
- Reducing the use of the passive;
- Reducing nominalization;
- Replacing shall with must or the semi-modal is/are to construction (as in: There is to be a body corporate) or the present simple;
- Ensuring the text is gender-neutral.

However, as any movement would, this movement also faces strong opposition. Hiltunen (1990: 104) remarks, “[t]he reform movement has by no means been unanimously welcomed within the legal profession.” He (1990: 104) claims that “it is not really possible to write simplified legal documents that would be as precise, comprehensive and unambiguous as those written in the traditional legal language”. It is necessary to consider that simplification of legal language, which has been developing and establishing for hundreds of years, may not be as simple as one would hope. One of the potential issues in such process is complexity of the content. Complex ideas often require complex language and many times cannot be expressed in plain language. Another potential issue is the matter of judicially-defined list of the meanings that are attached to certain words and phrases. Rephrasing them may shift their meaning, which would have to be newly established. Many authorities do not accept the idea of simplifying legal English. Driedger (1976: 23) says,

[e]very word in a statute is intended to have a definite purpose and no unnecessary words are intentionally used. Anyone who wishes to understand a statute must be willing to spend a little time with it, reading it through, slowly and carefully, from beginning to end, and then re-reading it several times ...an ordinary reader must simply accept the fact that he will be not able to grasp the full implications of a bill, as it is a serious document meant to be precise, not to be read like the morning newspaper.

Neumann (2001) compares the words to surgeon’s tools saying, “[w]ords are the principal tools of lawyers and judges, whether we like it or not. They are to us what the scalpel and insulin are to the doctor.” This statement shows Neumann's belief that the form of legal language is a delicate matter and it is a balance not to be disturbed.

3. OPPONENTS OF USAGE OF PASSIVE VOICE IN LEGAL ENGLISH

As the style of legal English has faced much scrutiny, so has one of its formal syntactical aspects, passive voice. The critics and opponents of inclusion of passive voice in legal documents suggest that passive voice removes the agent from the sentence, which often makes it difficult for the reader to determine what action the reader should take and to what extent. They suggest that while legitimate reasons exist for using passive voice, a low quality document sometimes uses excessive number of passive voice as well as third-person voice structures. In contrast, an effective document addresses

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the audience in first- or second-person voice structures and uses active voice. Active voice uses strong, concrete verbs that enable the reader to immediately see who is performing the action.

According to Williams (2004: 114), "the use of passive voice and peculiar use of pronouns are characteristics of a highly impersonal style of writing". Passive voice is typical for legal English, and it is considered overused in all types of legal documents. Legal writers use it automatically, so both laws and court decisions generally contain a verb in the passive, especially when obligation or condition is presented. The critics of overuse of passive voice say that it is used to create the impression that the rules are infallible as they occur without the influence of the human agent.

Wydick (1978) states that the passive voice has two disadvantages. First of all, it takes more words to express ideas using passive voice. Wydick (1978: 747) explains it by using an example: "The union filed a complaint," in which the verb filed does the work by itself. But when one says: "A complaint was filed by the union," the verb requires a supporting verb (was) and a preposition (by). According to Wydick (1978:746), the second disadvantage of passive voice is its detached abstraction. With the active voice, the audience can usually see who is doing what to whom. But passive voice often leaves that unclear. Wydick (1978:746) uses another sentence as an example: "It is feared that adequate steps will not be taken to mitigate the damages which are being caused." Wydick (1978:746) points out that the before-mentioned statement leaves out too much information and too many questions require further answers. "Who is the agent? Who is doing the fearing? Who is supposed to take the steps? Who is causing the damages? We cannot tell because the actor in each case is hidden in the fog of the passive voice." Wydick admits that using passive voice has its merits. He claims (1978) that the most appropriate time to use passive voice is when what is done is disproportionately more important than who does it.

The plain English movement makes it a point to stress that passive voice should be replaced with active voice because, in the words of Haigh (2004: 37), the "passive permits an indirect and formal tone with which lawyers instinctively feel comfortable". For example, to avoid any kind of confusion, Haigh (2004: 37) provides an example in a statement "A meeting is to be called." He (2004: 37) suggests that such statement should be replaced with simpler and more direct "John Smith will call the meeting." Haigh also states that active voice communicates the message much easier and is clearly easier to understand by the audience.

Zwicky (1941: 437–438) sums it up in the following words:

Another kind of wordiness, the most pernicious kind of all, comes partly from laziness, partly from fear. This we may call the 'passive style' as distinguished from the 'active.' It is full of cumbrous qualifications: 'in general it may be said that,' 'under ordinary circumstances it will be found,' 'it is probably safe to say that.' It has long and unnecessary transitions: 'Now that we have seen how the machine functions, let us take a view of its advantages to social progress.' Worst of all, the writer of the passive style converts his verbs into abstract nouns and uses passive verbs and verbs of being. He thus robs his writing of its greatest strength: action. He takes good honest verbs like separate, develop, bewilder, make, and steals their life away by turning them into the abstract nouns separation, development, bewilderment, manufacture, or, much worse, the making of. With his verbal ideas thus abstracted, the writer of the passive style must cast about for other verbs to fill his sentences. First he looks for verbs of being. To say that a thing is or seems or becomes is almost never as good as to say it does something. He who robs his thoughts of action robs them of half their life, for life is action and readers like to think in terms of action. Especially is this evident in another characteristic of the passive style, the use of verbs in the passive voice. A passive verb shows action in reverse. It represents a subject not as doing something but as being done to. Hence it too makes meaning static. That is the great defect of the passive style. It pictures for a reader life in the abstract, life without action: still-life.

4. VIEWS IN FAVOR OF PASSIVE VOICE IN LEGAL ENGLISH

As in any issue, there are opposing opinions on the issue of necessity of passive voice in legal English as well. There are many proponents of passive voice construction usage within the legal text. Hewings (2005) analyses the subject matter and shares situations in which usage of passive voice would be not only appropriate, but beneficial. Firstly, passive voice is crucial when one wants to keep the agent unknown or when the agent is not important, obvious, or necessary to mention. Another circumstance under which legal English benefits from usage of passive voice is factual writing in which procedures and processes are described. According to Hewings (2005), passive voice is also an appropriate in more

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formal contexts, where we want to avoid any mention of an agent or in situations when we need to put the topic at the beginning of a sentence and a comment on that topic at the end. He (2005) states that passive construction helps us put long subjects at the end of a sentence.

David Crump is also an opponent of plain language and he claims that plain language may disrupt the conventions established by the legal discourse community and ultimately lead to confusion. Crump (2002) feels that emphasizing easy comprehension may jeopardize a document's quality and interfere with its integrity. While Crump (2002) agrees that a lawyer should prepare jury instructions so regular people can easily understand them, the possibility of later appeals negates this need. According to Crump (2002), after a jury reaches a verdict, disagreements may take place over the accuracy and completeness of instructions that use plain language. As a result of this possibility, Crump (2002) feels that accurate, complete jury instructions should override any concerns about producing easy-to-comprehend instructions in plain English.

5. CONCLUSION

While plain language advocates discourage the use of legal language, it has many proponents. Coleman (1997: 199), author of the article, "In Defense of the Passive Voice in Legal Writing," advocates the use of passive voice in legal writing. He says that writers should consider using passive voice for necessity, stylistic effectiveness, and rhetorical strategy. Sometimes passive voice is necessary to avoid creating an awkward sentence that is difficult to understand. Passive voice can also add stylistic effectiveness by helping unify paragraphs and make them more coherent. As a rhetorical strategy, passive voice gives legal rulings objectivity. By disguising the actor in a sentence, the judge helps impart a sense of impartiality and objectivity. Passive voice also helps distract attention. Perhaps an attorney needs to deliberately create ambiguity to distract attention from something unfavorable to the attorney's client.

REFERENCES

- [1] Coleman, B. *In Defense of the Passive Voice in Legal Writing*. *Technical Writing and Communication* (1997): 191-203. Web. 2015.
- [2] Crump, D. *Against Plain English: The Case for a Functional Approach to Legal Document*
- [3] Cutts, M. (1995): *The Plain English Guide*. Oxford: Oxford University Press.
- [4] Friedman, L. M. (1993): *How I Write*. 4 *Scribes J. Legal Writing* 3, 5.
- [5] Haigh, R. (2004): *Legal English*. London: Cavendish.
- [6] Hewings, M. (2005). *Advanced grammar use (2nd ed.)*. Cambridge: Cambridge University Press.
- [7] Hunt, B. (2002): *Plain Language in Legislative Drafting: An Achievable Objective or a*
- [8] *Laudable Ideal?* *Statute Law Review* 24, pp. 112-124.
- [9] Kimble, J. (1992): *Plain English: A Charter for Clear Writing*, *Cal. L. Rev.*, 19-22
- [10] Mellinkoff, D. (1963): *The Language of the Law*. Boston: Little, Brown & Co.
- [11] Williams, C. 2011. *Legal English and Plain Language: an update*. *ESP Across Cultures* 8: 139-149.
- [12] Wydick, R. C. (1978): *Plain English for Lawyers*. 66 *Cal. L. Rev.*, 727