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An Analysis of Linguistic Choices in Legal Drafting

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Abstract

This research analyses the register choices and the language of Law. The language of law has been found to be too difficult for a layperson to comprehend. This is so because the wordings are unique and peculiar to the profession. This specialised use of language through the register choices makes interpretation and understanding of laws, legal processes, documents and proceedings a herculean task. This is the crux of this study. It is based on the foregoing that this study seeks to unravel the unique register choices used in legal documents in order to ascertain the extent to which it makes or mars the understanding of these documents and also to find out to what extent the intended purpose is achieved. The paper also examines and analyses the abstruse words used by lawyers in the course of speaking and writing legal documents. The present study adopted a qualitative research design. For the method of data collection, there is direct lifting of sentences and words from the selected documents and texts which are textually analysed. This present study found that the language of law is highly technical. This variety of language use does not enhance the layman's understanding of legal documents, because the language lacks clarity and brevity. The paper concludes that this unique and professional way of language use bestows on the

language of law a peculiarity and distinctiveness that is different from other varieties.

Keywords: Register, Legal Language, Analysis, Legal Drafting

Introduction

Language is a communication tool used by human beings in their daily lives as a means of conveying information. Human beings interact with one another with ease, because they share a common code that makes up the language. With the use of language, human beings establish and maintain social relationships. Expression of thoughts, feelings and emotions are equally done through the use of language. It is mostly through language that our non-material cultural heritage is preserved. It is also through the instrumentality of language that knowledge is imparted and disputes settled. This implies that the language to be used to achieve these objectives must be clearly understood by the recipients because as soon as the bridge that holds communication collapses, the objective is defeated. Language affects every sphere of life: scientific, technological, religious, social, personal and interpersonal spheres. Each of these different spheres selects the language it uses. By implication, every profession has its own type of language for effective communication. The concept *register*, therefore, refers to this variation of language according to use. One of the main characteristics of register, as Yule puts it, is that it is the use of special jargons. To him, jargon is the 'technical vocabulary associated with a special activity or group' (245). He is of the opinion that jargon helps to connect those who see themselves as 'insiders' in some way while excluding 'outsiders'. Following this argument, sports commentary, medical reports, and advertisement are linguistically different.

Law, just like every other discipline, has its own peculiar language, which may seem arcane to many but not to lawyers and/or law scholars alike. The uniqueness of the language of legal proceedings is not a recent phenomenon. In fact, it has become

more like a tradition, perhaps an observer can infer and safely, too, conclude that a legal document is not meant for an ordinary audience but for the "initiated," who are, by their professional training, saddled with the responsibility of interpreting the legal document. However, being first and foremost a language, though legal; it is pertinent that members of the public understand it especially to the extent that it affects their rights, duties and obligations. Such documents that need to be understood include deeds, wills, medical consent forms and consents to search, release of liability, legal notices, petitions and orders. For instance, it is necessary for one to comprehend the ideas written on the legal documents one signs so as to fully understand the consequences of what is being signed. No matter how technical and intricate legal language appears, the fact that the terms used are made up of grammatical terms still remains. In other words, the language of law, though technical, can be linguistically investigated for better understanding especially to laypersons.

Statement of the Problem

The language of law has been too difficult for a layperson to comprehend. This is so because the wordings are unique and peculiar to the profession. This specialised use of language through the register choices makes interpretation and understanding of laws, legal processes, documents and proceedings a herculean task. This is the crux of this study. It is based on the foregoing that this study seeks to unravel the unique register choices used in legal documents in order to ascertain the extent to which it makes or mars the understanding of these documents and also to find out to what extent the intended purpose is achieved.

Objectives

The objective of this study is to examine critically the language of law in legal documents and cases as a special variety of language use. The research is specifically devoted to the study of this variety of language in order to discover what makes the

variety unique and peculiar to only the profession of Law. The study is also aimed at identifying, analysing and understanding the linguistic and register choices used in legal documents and proceedings and the impact it creates on the adjudication process.

Research Questions

1. What register choices are prevalent in legal documents and proceedings that make the variety unique and peculiar to only the legal profession?
2. What are the common words/register used by lawyers in legal drafting and what do they mean?
3. To what extent are legal documents comprehensible to laypersons who have little or no knowledge of law?

The Language of Law

The law is a profession of words. Legal processes, national constitutions come into existence, laws and statutes are enacted and contractual agreements between private individuals take effect by means of written and spoken language. Language of the law functions as a spoken and written medium for exchanging information between/amongpeople participating in various legal situations happening in different legal settings. For centuries it has succeeded in keeping its special status. Legal language is a distinctive genre of English. Maley considers it "a medium, process and product in the various fields of the law where legal texts, spoken or written, are generated in the service of regulating social behaviour" (1994: 11). From historical records it is apparent that language of law has always differed from common-use-language. It has been too difficult for a layman's mind to comprehend. 'The mention of legal language tends to conjure up in the mind of the layperson 'legalese'- that often incomprehensibly verbiage found in legal documents, as well as an arcane jargon used among attorneys. To elucidate how this special dialect came about and how it differs from ordinary English, researchers have

turned to the language of the law as a linguistic phenomenon in its own right, tracing its evolution and noting the peculiarities of vocabulary and sentence structure'. Schane (2006:2)

The term legal language, as Bhatia (1994:101) indicates, "encompasses several usefully distinguishable genres depending upon the communicative purposes they tend to fulfil, the settings or contexts in which they are used, the communicative events or activities they are associated with, the social or professional relationship between the participants taking part in such activities or events, the background knowledge that such participants bring to the situation in which that particular event is embedded and a number of other factors". Legislative and legal language is a distinctive genre of English.

Legalese is a jargon characteristically used by lawyers for legal writing which may be difficult for laymen to understand. It is a variety of language use that is peculiar to legal practitioners. Legal writing tends to have very unusually long sentences with many carefully phrased clauses and features of legal writing that make it resistant to misinterpretation. When legalese documents are read by non-legal practitioners, they are often difficult to comprehend or even deceptive for those without legal training (Moore, 2010:14). Unlike ordinary writing, legal writing is aimed at a highly specialised group that uses a specialised vocabulary, containing both unusual and common terms imbued with technical meanings. As a result, the researcher asserts that sentences in legal documents are often very lengthy and complex. For this reason, legal writing has often been criticised as an obtuse exercise that encourages the perception that lawyers speak in rhetoric that is without substance. Since the latter half of the 20th Century, many legal scholars have encouraged writers to eliminate old fashioned terms and phrases in favour of explicit and shorter forms. For instance, an expression such as"part of the first part and part of the second part" can be replaced with" plaintiff and defendant"

respectively. Legal writing is also a variety of technical writing that has been developed to meet the needs of legislators, lawyers and judges to express their desired application of the law. Legal writing consists of a distinctive style, and large terminologies are derived from Latin, French and English (Allen, 2013:229).

Furthermore, Blackstone (2012:113) who quoted Williams (1969:65) asserts that "certain technical terms were not capable of English dress with any degree of seriousness". Writing on the history of legal language, Alabi (2013:12) quotes Crystal (1969:195) as saying: "during its development legal English has had to rub shoulders with and sometimes give way to both French and Latin. French and Latin loan words continued to be used in writing legal documents from the period when Anglo-Norman was the language of the courts. Legal language is generally either informative or persuasive. A persuasive document such as a motion or brief, attempts to persuade the fact finder of the most appropriate interpretation of such language. Sometimes, a communication gap arises from the technical language. Here, the vital role of law in our society becomes handicapped in some cases.

According to Gilman (2012*:119),* Involved here is the communication of vital information. The dull language of law – its bewildering syntax and other faults of grammar, its less than forthright expression, its substitution of can't for vocabulary is paralysing communication. The problem does not only lead to technological devices that will not work but to an ability to discuss intelligently. The language of law is obscure, because of its jargons, ambiguity and inaccuracy. The resultant problem is that those who are not in the legal profession find it difficult to comprehend such a language variety. Hence, even in a situation where the information that concerns them is vital, it is neglected due to their inability to understand the language. To speak of legal English as communicating meaning is in itself misleading. Of all

the varieties of language, it is perhaps the least communicative in that it is designed not to enlighten the users of language at large. According to Maxwell (2013:11), Legal writers pushed into oddity by their attempt to be unambiguous and as it were, in the same direction by the knowledge that since their productions are for the benefit of someone familiar with the jargons as themselves they do not need to bother much about the general public. Crystal (2013:96) avers this variety of language use when he asserts: Lawyers have been doing basically the same things – conveyance of property, drawing up wills and so on – for a long time and for each species of transaction there are developed formulae or rather collections of such formula – which are known to do the job adequately, having been subjected to long and thorough testing before the courts. There is a strong motivation for any lawyer to turn to a form of words that s/he knows s/he can rely on, rather than take a chance of concocting something entirely new which may turn out to have unsuspected deficiencies.

Therefore, much legal writing is by no means spontaneous but is copied directly from "form books" as they are called in which established formula is collected. Legal English is so unlike normal discourse that is not easily generated even by experts. It is a form of language, which is about as far removed as possible from informal spontaneous conversation. Quirk (2012:19) emphasises that the lawyers must absolutely eschew words that have colour, and content themselves with the "herein before" and "aforesaid" in order to achieve precision. The lawyer neither wants to be obscure nor make his documents too easy to be read. Gasiokwu (2010:81) asserts that it is possible to express laws in highly specific language that provides details of every aspect of the relationship that law seeks to regulate. But viewed from another perspective, one sees clearly the difficulty of expressing all statutory rules in very detailed way.

Another major characteristic of legal language is the use of abstract concepts which do not take their meanings from sensed experience but are normative in character. Concrete words convey meaning more plainly than abstract words. Lawyers are generally notorious for vague abstractions. They argue that since the law itself contains so many abstractions they must use abstract words. According to White (2011:81), legal writing requires ability to present an issue in an honest and straight forward manner. Since facts are sacred, what is to be understood must be factual to the point. The factual situation must not be confused by the use of unnecessary style. Accuracy, therefore, is a product of language and also of the exclusion and inclusion of emphasis and subordination. Proper stressing of important ideas and the subordinate of less important ones is the key to successful legal writing. Brevity is important in legal writing, as one's writing will be more likely to be understood and remembered if it is brief. Writing that is brief and accurate has a good start towards clarity (Collins 2013:21) Based on this description of the language of law we shall now proceed to analyse the use of legal register in the actual documents of selected court cases in Nigeria.

Methodology

The qualitative research design is adopted in the present study. Four documents were randomly selected and some law texts were also used for the study. For the method of data collection, there is direct lifting of sentences and words from the selected documents/texts. Textual analysis is employed for data analysis. The writer visited some of the courts to obtain data and with the co-operation and permission of the court registrars, the writer had access to the data that were collected for this paper. Although the data to be analysed below were collected from the courts, some library materials were also consulted to complement the research.

Data Presentation and Analysis

The language of Law has retained some Old English and Middle English. This covers the period between 500 AD to 1100 and 1100 to 1500. Modern English has much of it and the law has retained many of the words, meanings and expressions. These ancient words are used by lawyers all the time but not generally used by non-lawyers. Below are examples:

Aforesaid, forthwith, herein, therein, whereas, whereby, thereabout, thereon, thereto,

The language of Law is also characterised by the use of Latin words and phrases. The English Language has borrowed many words from many languages largely from Latin and French. Many Latin and French words and phrases are now in common use and are distinctive of language of law. Examples include:

1. **Ab initio**: from the beginning or something being the case from the start, or from the instant a certain act was performed.
2. **Ex parte**: something done with respect to or in the interests of one side only or of an interested outside party.
3. **Pari passu**: ranking equally and without preferences.
4. **Res judicata**: a case in which there has been a final judgment and that is no longer subject to appeal or a matter that has been finally juridically decided on its merits and cannot be litigated again between the same parties.
5. **Alibi:** the defense by an accused person of having been elsewhere at the time an alleged offense was committed or a plea of absence.
6. **Affidavit**: a written statement confirmed by oath or affirmation for use as evidence in court or a sworn declaration
7. **Mala fide**: having a wrong or bad intention or in bad faith.
8. **Bona fide**: without intention or in good faith.
9. **In rem**: a judicial act directed against property rather than against a specific person.

10. **Mutatis mutandis**: the necessary changes having been made or all things being equal.
11. **Modus operandi**: the method or mode of operation.

All these are Latin words.
Most of the French words over time have become part of common speech. Examples of French words include:
1. Debt: A financial liability or obligation owed by one person, the debtor, to another, the creditor.
2. Crime: The intentional commission of an act usually deemed socially harmful or dangerous and specifically defined, prohibited and punishable under criminal law.
3. Court: Any person or institution often as a government institution with authority to adjudicate legal disputes between parties and carryout the administration of justice in civil, criminal and administrative matters in accordance with the rule of law.
4. Arson: It is the willful and malicious burning and charring of property.
5. Judgment: It is the decision of the court regarding the rights and liabilities of parties in a legal action or proceeding.
6. Parties: It is an individual or group of people that compose a single entity which can be identified as one for the purposes of the law and legal transaction.
7. Slander: It refers to making false oral statements about another person, harming their reputation.
8. Suit: It is a generic term for any filing of a complaint or petition asking for legal redress by judicial action.
9. Sort: To afford a presumption that a particular party has not been guilty of a crime.
10. Pledge: A bailment6 that conveys possessor title to property owned by a debtor to a creditor to secure repayment for some debt.
11. Treason: A crime of betraying a nation or a sovereign by acts considered dangerous to security.
12. Verdict: It is a decision that is given by the jury or judge at the end of a trial.

13. Heir: A person who inherits or has a right of inheritance in the property of a person who has died intestate.
14. Declaration: A written statement submitted to court in which the writer swears under penalty or perjury that the contents are true.
15. Evidence: A procedural regulation concerning the proof and presentation of facts.
16. Larceny: It is the illegal taking of property of another with intent to deprive the owner thereof.
17. Defendant: It refers o the person accused of committing a crime.
18. Contract: An agreement that specifies certain legally enforceable rights and obligations pertaining to two or more mutually agreeing parties.
19. Appeal: An appeal is the process in which cases are reviewed by a higher authority, where parties request a formal change to an official decision.
20. Indictment: It is a formal accusation that someone has committed a crime.
Other words used in legal documents and court proceedings include:

23. **Indictable and non-indictable offenses**: An indictable offence is an offence which on conviction may be punished by imposition of a fine and not being an offence declared by the law creating it to be punishable on summary conviction. Any other offence which does not come under the above qualifications or respects is a non-indictable offence.
24. **Felony:** A felony is a serious criminal offense punishable without proof of previous conviction, with death or with imprisonment for three years or more.
25. **Misdemeanors**: A misdemeanor is a crime usually punishable upon conviction by a small fine or imprisonment for not less than six months, but less than three years.
26. **Simple offenses**: All offenses other than felony and misdemeanors are simple offenses.

27. **The warrant of Arrest**: A warrant of arrest is an instruction or authority in writing to a police officer or any other person by a Court to apprehend an offender or defaulter of the law.
28. **The summons:** It is a writing a statement of the substance of the allegation or complaint, the accused name, the date of issue, and being in duplicate must be signed by the Magistrate or justice of the Peace.
29. **Bail:** It is a process of setting at liberty a person arrested or imprisoned on security being given for his appearance until the conclusion of his case in Court or until investigation into an allegation is finalized by the Police.
30. **Stand mute:** Accused may stand mute and the Court shall call evidence to determine the cause of same.
31. **Autrefois Acquit or Convict**: It is a special plea foreclosing double jeopardy or punishment for a single for a single offence.
32. **Plea Bargaining**: It is an agreement whereby the State or prosecutor concedes to a defendant or accused person, that where he pleads guilty to a lesser offence or charge, he escapes the fuller or maximum punishment or sanction for the greater offence he ought or could have been charged with.
33. **Fines**: It is a monetary punishment or penalty imposed on an accused by a competent Court for a crime consequent upon his conviction.
34. **Restitution**: All properties stolen or what they were converted given back to the complainant/owner, either with or without his paying the possessor any amount ordered by the Court is called Restoration or Restitution.
35. **Parole**: It is a temporary or permanent release of a prisoner before the expiration of his sentence, on the promise of good behavior.
36. **Compensation**: A convict may be required to pay compensation for vexations and frivolous prosecution.
37. **Binding over**: A witness or anybody not necessarily the accused can be bound over to be of good behavior. The order can be made with or without sureties.

38. **Criminal Appeal**: This is a request or resort to a higher court to review, reconsider or reverse the verdict or judgment of a lower court.
39. **Allocutus**: It is a Court's inquiry from an accused person as to whether he has any legal cause to show why judgment should not be pronounced against him on a verdict of guilty.
40. **Judgment:** Here, the judge sums up, weighs or reviews the evidence for both sides. He then states his reasons for believing and accepting the case for either side and also gives his reason for disbelieving and rejecting the evidence for the other side and then gives his judgment on the same day. The judge may find the accused person guilty or not guilty as the case may be. This must be done according to law.
41. **Discharge/Discharge and Acquitted**: Where an accused person has not been found guilty, on merit, the judge will dismiss the information or charges and accordingly discharge and acquit the accused person as provided under the criminal procedure law. If the prosecution failed on a technicality, ten the court will usually discharge the accused, but not acquit him.
42. **Nolle Prosequi**: This is a special power resident in an incumbent Attorney General with origins in the English Common Law, under which the A.G can withdraw or discontinue any criminal proceedings, no matter by who initiated from the Court of prosecution.
43. **Final Address:** It is the articulation by counsel of the facts with the law, drawing inferences there from and making a submission to the court to see it in the party's own lenses or from its perspective or viewpoint.

This is a ruling based on the objection raised by the prosecuting council OOO to the tendering of the minutes of 22nd July, 2017 of the AAA family meeting minute book in evidence as an exhibit in the case through PW1 during cross examination to contradict the evidence of the said PW1

Legalese such as "prosecuting council", "objection" "tendering", "evidence" and 'exhibit' are used to typify a ruling read by the judge. Such words are mostly used in legal documents. A prosecuting Counsel always opens a criminal proceeding by calling evidence for the prosecution. He calls his witnesses and examines each in chief, tenders any exhibit they may have. The witnesses are in turn cross-examined by the defence counsel and re-examined by the prosecuting counsel as may be necessary and the case for the prosecution closes. The word 'Objection used mostly during proceedings is an official protest raised during a legal trial over a violation of the rules of the court by the opposing party.

In the High Court of Anambra State of Nigeria in the High Court of Awka Judicial Division Holden at Awka before his Lordship XXX on Monday 6th July, 2015
Between the State vs SSS
Defendants in Court
DDD Senior State Counsel for State

In the illustration above, words and phrases like 'Holden', 'defendants', 'senior state counsel', are used to depict a court atmosphere and the language of law. This legalese may conceal the intended message (from the respondent) because the respondent is not learned in the language of law and so cannot interpret such jargons and can also not comprehend the underlying meaning. Hence, the services of a lawyer become necessary. However, these words, phrases and sentences have specialized meaning within the legal context. This further implies that the power of legal language lies in its ability to entice both the court and the listener(s). A defendant is the person against whom a complaint, charge or information is made or filed. They were called 'accused persons' before the change of terminology meant to promote the presumption of innocence.

Finally, with respect to the document having made during the pendency of this suit, this charge was proffered and defendants arraigned before this Honourable Court on the 7th July 2020 whereas the document in question is dated the 2nd of July 2020. Section 83(3) of the Evidence Act 2011 proved:
"Nothing in this section shall render admissible as evidence any statement made by a person of interest at the time when the proceeding was pending or anticipating in ruling a dispute as to any fact which the statement may tend to establish"

Words like 'suit' 'charge' 'arraigned' 'evidence' 'admissible' 'ruling' and dispute are also typical examples of legal language. A suit is a generic term for any filing of a complaint or petition asking for legal redress by judicial action. A charge is a document containing the statement and particulars of offence (s) with which an accused is charged or brought before a court for criminal trial upon his default. Arraignment of a defendant is a very fundamental aspect of criminal procedure. It involves the appearance or placement of the defendant before the court where the charge is read and interpreted to each defendant individually in the language that s/he understands by the Registrar or Clerk of the court to the satisfaction of the court. The defendant, thereafter, is asked to take a plea of either 'guilty' or 'not guilty' to the charge as read to him/her. An evidence is matter produced before a court of law in an attempt to prove or disprove a point in issue, such as the statements of witnesses, documents, material objects. A document is said to be admissible if the evidence is capable of being or bound to be admitted in a court of law. A ruling is a decision of someone in authority, such as a judge. A dispute is an argument or disagreement between people or groups.

Findings

This present study found that the language of law is highly technical. Although it is intended to be informative and persuasive, not much has been achieved, as the layman cannot interpret the

language of law without the help of a legal practitioner. This variety of language use does not enhance the layman's understanding of the court proceedings, because the language lacks clarity and brevity. This study, therefore, brings to the fore these intricacies as they all play a vital role in the overall analysis of meaning. On the whole, the research found that courtroom discourse is a highly organised discourse with predictable structures. The structural harmony achieved in it is premised upon the linguistic features employed by the counsel or lawyer during the interrogation of accused persons and in legal drafting since it is on all these features that the success of the interrogation and documents lie.

Conclusions and Recommendation

In the light of the above, legal documents are hardly read for leisure unlike other discourses. Mostly, they are read and studied for purely academic and professional purposes. Most people read them if they are compelled to as a result of their involvement in legal desired issues. This attitude it was discovered, emanates from the complexity of the structures of legal English. This study shows that the complexity is deliberate and it is caused by incessant use of the linguistic items used by the draft men to follow forms and precedents of the old legal document drafting. The use of these words and linguistic features really makes the readability of the legal documents very difficult. Therefore, this paper attempts to extol some of the linguistic features in some legal discourses. This study has shown that the English Language can be structured in a certain way to achieve another purpose. The study has also shown that the legal draft men can never change their way of writing so as to maintain the solidarity of their members and to keep the non-lawyers at respectable distance, hence they call themselves 'LEARNED' gentlemen compared to other people who they refer to as 'EDUCATED'

The study recommends that the arcane use of language in legal documents and proceedings should be jettisoned to give way for

newer words to accommodate both those in the field and those outside the field.

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