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Language and Law: The **Incomprehensible** Lawyer – Part I

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Jyoti Sagar

Language is the most significant medium of communication. Other than “sign” language and “body” language, “language” is made of “words” that are used for oral and written communication. The main purpose of communication is to convey information and ideas.

As lawyers, we spend a large part of our time crafting, articulating, and delivering end products which are made up of words. Charles Alan Wright, a leading authority on legal procedures and practice of law, said,

> *“The only tool of the lawyer is words. Whether we are trying a case, writing a brief, drafting a contract, or negotiating with an adversary, words are the only things we have to work with.”*

Language of the Law

The two most significant exports from England are the English language and common law. English is the most popular global language. Common law is the most prevalent foundational law in countries which were colonies of the British Empire. English as the “language of the law” evolved over centuries.

As the customary language used by lawyers, it spread to other common law jurisdictions where English is the official or primary language of legislation and the court system. It includes not only distinctive words, phrases, and expressions but also manner of composition. Together, these form the “language of the law” – which has come to be associated with law, the courts, and the profession.

There is a difference between common speech and the language of the law. The latter has accumulated baggage of words and conventions – gathered and retained over centuries. That to the extent “English” as used by the

Profession is considered different from common speech "English". Non-lawyers find our language incomprehensible.

Will Rogers, a famous stage and motion picture actor, humorist, and newspaper columnist, of the 1920's and 30's in the United States summed it up best – ironically – in his speech at a meeting of the American Bar Association in July 1935 in Los Angeles:

> *"the minute you read something and you can't understand it you can almost be sure that it was drawn up by a lawyer. Then if you give it to another lawyer to read and he don't know just what it means, why then you can be sure it was drawn up by a lawyer. If it's in a few words and is plain and understandable only one way, it was written by a non-lawyer.*
>
> *Every time a lawyer writes something, he is not writing for posterity, he is writing so that endless others of his craft can make a living out of trying to figure out what he said…"*[1]

Mr. Rogers died in a mysterious plane crash in Alaska a few weeks after this speech. No lawyer claimed any responsibility!

For a long time, language of the law has been criticized and ridiculed. It has been a subject of jokes.

In 1556[2], an English Chancellor decided to make an example of a particularly bloated document (a 120 page replication where the court felt that 16 pages would have been enough) filed in his court. The Chancellor first ordered a hole cut through the center of the document, all 120 pages of it. Then he ordered that the plaintiff Milward's head be stuffed through the hole, and the unfortunate fellow was led around to be exhibited to all those attending court at Westminster Hall. The draftsman though got away unpunished.

Jonathan Swift wrote of a society of lawyers who spoke in "*peculiar cant and jargon of their own, that no other mortal can understand*"[3]. Thomas Jefferson complained in 1817 that in drafting statutes his fellow lawyers had the habit of "*making every other word a 'said' or 'aforesaid' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means….*"[4]

Another critic said that the language of the law is full of "*long sentences, awkward constructions, and fuzzy-wuzzy words*".[5] And laypersons joked that lawyers wrote strangely where in documents someone known as "party of the first part" did something or the other to someone known as "party of the second part".

Characteristics of the Language of Law

There are characteristics and the manner of composition of the language of the law which interact to produce this special language of the lawyers.[6]

- Frequent use of common words with uncommon meaning: Many common words that mean one thing in common speech but have a very different meaning for lawyers. Some examples:

Word	Law language	Common speech
action	*Law suit or other legal proceeding*	*the fact or process of doing something; a thing done; an act,*
demise	*transfer of property by lease.*	*a person's death*
executed	*Signed a document*	*Putting a plan into effect; carrying out a sentence of death*
motion	*Application to a court*	*Movement, process of moving*
presents	*This document*	*Gives or introduces*
save	*Except*	*keep safe or rescue; store for the future*
virtue	*Force or authority – by "virtue of"*	*behaviour showing high moral standards*

- Words of antiquity

Old English (OE) – covers the period 500 AD to 1100 AD (Norman Conquest). Middle English (ME) covers the period 1100 to 1500 AD. Modern English dates from 1500 AD. Modern English has much of OE and ME. Language of the law retains many of the words, meanings, and expressions from OE and ME which ceased to be part of general usage years back. These ancient words are used by lawyers all the time but not generally used by non-lawyers.

For example: *aforesaid; forthwith; said (as adjective – for example, the "said" building or the "said" company); henceforth and thenceforth; herein and therein; whereas and whereby; thereabout; thereon; thereto; (and several other "there" words); "witness whereof, I have set my hand hereto…"*

- Latin words and phrases

English has borrowed many words from many languages. Large number from Latin. Many of the Latin words are now in common use. For example, *affidavit; alias; alibi; bona fide; mala fide; quorum; proviso*.

But there are many other Latin words which are distinctive of language of the law. For example, *ab initio; ex parte; et al.; ex post facto; de minimis; in pari materia; in personam; in rem; innuendo; mens rea; mutatis mutandis; pari passu; res judicata; quasi; quid pro quo; sui generis; vis major.*

- French Words not in the general vocabulary

Like Latin, French has also provided many words to English. Many of these words relate to field of law but have over time also become part of common speech.

For example: *action; appeal; arson; conditions; contract; court; covenant; crime; declaration; defendant; debt; damage; devise; easement; evidence; guarantee; heir; indictment; judgment; justice; larceny; partner; parties; plaintiff; pleadings; pledge; possession; servant; slander; suit; tort; treason; verdict.*

However, there are several French origin words which are preserve of the language of the law. For example: *chose in action; estoppel; laches; metes and bounds; quash; save (in sense of except); style (as in name and style).*

- Terms of the art

A term of the art is "a technical word with a specific meaning".[7] Every profession has its terms of the art. There are many words which language of the law uses to communicate in shorthand.

Some of these are: *agency; bail; contributory negligence; defendant; dictum; ex parte; felony; garnishment; injunction; landlord and tenant; negotiable instrument; master and servant; lessee; lessor; letters patent; life tenant; novation; prayer; plaintiff; principal; surety.*

- Argot

Argot is more like slang or jargon – a specialized vocabulary common to a group. Argot has the connotation of a language of communication within a group. Sometimes deliberately designed to exclude those outside the group.[8] Argot is insufficiently technical or specific to qualify as a "term of the art".

For example: *at issue; cause of action; court below; due care; four corners of the instrument; inferior court; superior court; on all fours; show cause; purported; pursuant to; raise an issue; record; process; set down for hearing; reversed; remanded; time is of the essence; well settled; without prejudice.*

- Formal words and expressions

There are many words which provide the ceremonial and ritualistic flavor to the language of the law. Many of these words are not customary in common speech.

For example: *"To All To Whom These Presents Come, Greetings"; "Know All Men by These Presents"; "for such other and further relief as which this Hon'ble Court may deem just and proper to meet the ends of justice"; "may it please the court"; "the truth, the whole truth, and nothing but the truth, so help me God"; prior (instead of "before"); subsequent (instead of "after");; "Before Me, a Notary Public".*

- Words and expressions with flexible meanings

Lawyers also deliberately use flexible words. This is contrary to the usual stance that language of the law is precise and clear.

For example: *about; adequate; and/or; apparently; as soon as possible; clearly erroneous; due care; due process; excessive; doubtless; extraordinary; fair; improper; it would seem; lately; more or less; obvious; on or about; palpable;*

promptly; reasonable care; reasonable man; reasonable time; remote; shortly after; similar; sound mind; substantial; sufficient; suitable; unsatisfactory; unusual; usual; unsound.

- Words attempting extreme precision

Recurring choice of absolutes: *all; none; never; irrevocable; outright; wherever; whoever; whatsoever; howsoever.*

Restricting the restricted: *and no other purpose; shall not constitute a waiver; shall not be deemed a consent; shall not include*.

And making the broad more broad: *including but not limited to; or other similar or dissimilar reasons; shall not be deemed to limit; nothing contained herein shall*.

Style of Composition

Style of composition also adds to the distinctiveness to the language of the law.

- Too many words

Lawyers use too many words. It takes them a long time to get to the point. Repetition; doubling of words; superfluous words which add no real meaning; using three or four words where one word would do.

For example: *"In the event that" instead of "If"; "at this point in time" instead of "now"; "written document" instead of "document"; "totally null and void" instead of "void".*

Instead of *"The Parties agree"* – the lawyers write *" Now, therefore, in consideration of the premises, the representations, warranties, covenants and undertakings of the parties hereinafter set forth, and for other good and valuable consideration, the parties agree among themselves as follows.."*

An example from over a hundred years back:

"*And in the outset we may as well be frank enough to confess, and, indeed, in view of the seriousness of the consequences which upon fuller reflection we find would inevitably result to municipalities in the matter of street improvements from the conclusion reached and announced in the former opinion, we are pleased to declare that the arguments upon rehearing have convinced us that the decision upon the ultimate question involved here formerly rendered by this court. even if not faulty in its reasoning from the premises announced or wholly erroneous in conclusions as to some of the questions incidentally arising and necessarily legitimate subjects of discussion in the decision of the main proposition. Is, at any rate, one which may, under the peculiar circumstances of this case, the more justly and at the same time, upon reasons of equal cogency, be superseded by a conclusion whose effect cannot be to disturb the integrity of the long and well established system for the improvement of streets in the incorporated cities and towns of California not governed by freeholders' charters."****[9]***

Sentence length: 179 words

Plain English: Our earlier decision was wrong.

- Complex

The meaning is hard to find when long and difficult words are used; sentences are long; and when there are pages of unbroken text. Let alone laypersons, even those proficient in law find it hard to find the meaning.

As an example, here is an extract from a judgement:

"This batch of writ petitions preferred under Article 32 of the Constitution of India exposits cavil in its quintessential conceptuality and percipient discord between venerated and exalted right of freedom of speech and expression of an individual, exploring manifold and multilayered, limitless, unbounded and unfettered spectrums, and the controls, restrictions and constrictions, under the assumed power of "reasonableness" ingrained in the statutory provisions relating to criminal law to reviver and uphold one's reputation. The assertion by the Union of India and the complainants is that the reasonable restrictions are based on the paradigms and parameters of the Constitution that are structured and pedestaled on the doctrine of non-absoluteness of any fundamental right, cultural and social ethos, need and feel of the time, for every right engulfs and incorporates duty to respect other's right and ensure mutual compatibility and conviviality of the individuals based on collective harmony and conceptual grace of eventual social order; and the asseveration on the part of the petitioners is that freedom of thought and expression cannot be scuttled or abridged on the threat of criminal prosecution and made paraplegic on the mercurial stance of individual reputation and of societal harmony, for the said aspects are to be treated as things of the past, a symbol of colonial era where the ruler ruled over the subjects and vanquished concepts of resistance; and, in any case, the individual grievances pertaining to reputation can be agitated in civil courts and thus, there is a remedy and viewed from a

ismatic perspective, there is no justification to keep the provision of defamation in criminal law alive as it creates a concavity and unreasonable restriction in individual freedom and further progressively mars voice of criticism and dissent which are necessitous for the growth of genuine advancement and a matured democracy."

First sentence: 73 words. Second sentence: 226 words

Plain English: Is criminalization of defamation constitutional? How to balance these two rights – the citizen's fundamental right to freedom of speech and the rights of others to effectively protect their reputation? (Two sentences. 30 words).

Transactional lawyers are not far behind. See this example from an Insurance Policy. The triple and quadruple negatives, the provisos, the exceptions and embedded preconditions make it impossible even for lawyers – let alone a layperson – to understand, the risks and perils covered by the policy:

"Exclusions:

This Policy does not cover liability directly or indirectly caused by, arising out of or in any way connected with damage to property owned, leased, hired by, under hire purchase, on loan or rented to the Insured or otherwise in the Insured's care, custody or control other than:

1. *Premises (or to contents thereof) temporarily occupied by the Insured for the purpose of carrying out works thereto or thereon, but no indemnity is granted for liability in respect of physical damage to or destruction of that part of any premises or contents on which the Insured is or has been working on if the physical damage or destruction arises from such work;*
2. *Premises tenanted by the Insured*
3. *Directors', employees' and visitors' clothing and personal effects; or*
4. *Other property (not owned by the Insured) temporarily in the Insured's possession provided:*

4.1 No indemnity is granted for liability in respect of physical damage to or destruction of that part of any property upon which the Insured is or has been working on if the) physical damage or destruction arises from such work; and

4.2 The Company's limit of liability under this clause 7.2.4 does not exceed the sub limit as stated in the Policy Schedule under Terms & Conditions,

Provided further that no indemnity is granted under this Policy in respect of liability assumed by the Insured under any contract or agreement which requires the Insured to effect material damage insurance on premises, property or goods not owned by the Insured."

- Pompous

Pomposity gives an air of importance out of proportion to the substance of the statement. Language of law is full of it. When used by a Hon'ble Judge it seeks to convey the "majesty" of law; when used by a learned counsel it seeks to convey strong conviction of correctness of her case and equally disdain of the opponent's case.

For example: *in my considered opinion; solemn duty; disposes of the reasoning advanced; obviously correct; clearly justified; clearly pointed out; overwhelmingly corroborated; it must follow; utterly absurd; unconscionable; patently fraudulent; unsound on the face of it.*

The Deadly Cocktail

Here is an extreme example of a combination of all what ails the language of the law – excerpts from a recent judgement of one of the High Courts:

"However, the learned counsel appearing for the tenant/JD/petitioner herein cannot derive the fullest succour from the aforesaid acquiescence occurring in the testification of the GPA of the decree holder/landlord, given its sinew suffering partial dissipation from an imminent display occurring in the impugned pronouncement hereat wherewithin unravelments are held qua the rendition recorded by the learned Rent Controller in Rent Petition No.[..] standing assailed before the learned Appellate Authority by the tenant/JD by the latter preferring an appeal therebefore whereat he under an application constituted under Section 5 of the Limitation Act sought extension of time for depositing his statutory liability qua the arrears of rent determined by the learned Rent Controller in a pronouncement made by the latter on ….

The summom bonum of the aforesaid discussion is that all the aforesaid material which existed before the learned Executing Court standing slighted besides their impact standing untenably undermined by him whereupon the ensuing

sequel therefrom is of the learned Executing Court…".

On appeal, a bench of the Hon'ble Supreme Court of India, having failed to understand the judgment, set the verdict aside. According to a newspaper report, the bench commented "*We will have to set it aside because one cannot understand this*" though it did not record it in the written order sending the matter back to the high court judge for re-drafting his judgment.[10]

Jyoti Sagar is the Chairman and Founder of J Sagar Associates, and the Managing Partner of K&S Partners. An abridged version of this article was first published in The Economic Times on March 3, 2018.

References:

[1] *Weekly Article 657 (July 28, 1935) The Lawyers Talking*

[2] *Milward v. Welden 21 Eng. Rep. 136*

[3] *Gulliver's Travels (1726)*

[4] *The Writings of Thomas Jefferson (Lipscomb 1905)*

[5] *Rodell, "Goodbye to Law Reviews; Woe unto you, Lawyers! (1936)*

[6] *David Mellinkoff's succinct analysis and exposition in The Language of the Law*

[7] *Webster's New International Dictionary*

[8] *Menken, The American Language*

[9] *Chase v. Kalber, 153 Cal. Dist. Ct. App. 1915*

[10] *The Hindustan Times, April 18, 2017*

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