Anna Trosborg

The Performance of Legal Discourse*

This volume is concerned with the language used in legal discourse (English, German and French) in general, and with contract law in particular.

Language, central to human affairs, assumes a particularly critical role in law. In fact, in a very basic sense, law would not exist without language. There are two primary functions of law; one is the ordering of human relations, the other the restoration of social order when order breaks down (see, e.g. Danet l980, l985).

With regard to the former, the function of the law is two-fold: **regulative and constitutive**. Law defines and regulates relationships between judicial entities; and by means of law, new relations are created where none existed before (cf., e.g. marriage ceremonies). Language used in activities aimed at restoring social order unfolds in civil law in conflicts between individuals and in criminal law in conflicts between the individual and the state.

This volume is concerned with the language used in 'the ordering of human relations'. Special interest is paid to the language and style used for the specific purpose of constructing documents, of **laying down the law**, which, in a broad sense, includes not only legislation, but also documents pertaining to private law, such as contracts, wills, and deeds. An analysis is also provided of the language employed in judgments, and, finally, conceptual/cultural problems relating to the translation of legal discourse are discussed.

* Some of the studies presented in this volume have been financed partly by The Danish Research Council for the Humanities, and Irene Baron, Karen Lauridsen, and Anna Trosborg would like to express their gratitude for this support.

The data of investigation have been drawn from a corpus of legal language within the field of contract law. The corpus consits of three

individual corpora (Danish-English-French)[1] each counting one million running words. The corpus covers six types of text relevant to the subject: Statutes, rules and regulations, travaux préparatoires, judgments, contracts, legal textbooks, and articles in law journals.[2]

l. Characteristics of legal language

Research into the English legal register has centred on syntactic and lexcical features, reporting a 'frozen' style where formulaic structures abound and old (archaic) structures defy the principles of modern writing (for example, many contracts are not written afresh but make use of old formulas). Furthermore, it is characterized by long sentences (50 words on average), an impersonal style with many formulaic expressions and typical legal vocabulary. Danet (l985, 278-87) provides an overview of linguistic descriptions of the legal register, of which the following is but a very brief summary.

The lexicon of the legal register has been of noticeable concern to researchers into legal English because of its distinctive features fundamental to the expression of concepts of law. Thus Danet (l985) has pointed to the following features as characteristic of the legal register: technical terms; common terms with uncommon meanings; archaic expressions; doublets; formal items; unusual prepositional phrases; a high frequency of *any* (see pp. 279-80 for references and examples).

Syntactic complexity accounts for many of the difficulties lay persons are confronted with in comprehending legal English. Sentence length and sentence complexity seem to go together. Gustafsson (l975) reports an average of 2.86 clauses per sentence, and typical syntactic features are the prominent use of nominalizations (Crystal/Davy l969, Gustafsson l983, Shuy/Larkin l978, Charrow/Charrow l979), and a high frequency of passive constructions (Sales et al. l977, Shuy/Larkin, l978, Charrow/Charrow, l979). The use of complex conditionals was noted by Crystal/Davy (l969), and a high incidence of prepositional phrases further complicates the discourse (Charrow/Charrow, l979). A characteristic likely to cause misunderstanding

---

1 The corpus has been compiled on the initiative of The Danish Research Council for the Humanities to promote research activities in LSP and LSP communication.

2 For further information on these corpora, see Faber/Lauridsen (in press).

is the omission of a *wh*-form plus some form of the verb *to be* ('whiz deletion' as in the following example: *agreement...(which is) herein contained or implied*) (Danet l980). Syntactical features adding to the complexity of legal syntax also include unique determiners (*such* and *said*), impersonality, negatives (in particular double negatives) and binomial expressions.

It must be noted that the characteristics of legal English presented above derive from language use in writings in which the level of formality can be characterized as frozen or formal. The texts examined comprise legislative language, administrative and testament language, jury instructions, and documents such as endowment-assurance policies, hire-purchase agreements, and insurance policies. A different picture might have emerged if samples of spoken legal English had been the focus of attention.

2. A differentiation of legal discourse

Modern legal language has become a highly differentiated variety of language, the specificity of which has invited the question of whether it should be considered a separate dialect, register, or sublanguage. Charrow et al. (l982) believe that the degree of linguistic variation of legal English may warrant its classification as a language variety, while Danet (l985) prefers to consider legal English a special register, viewed in the light of Bolinger's (l975) suggestion that 'register is mainly a matter of formality'.

In this volume it is argued that legal language is a specific domain of Language for Specific Purposes (LSP), which domain, in turn, can be divided into a number of subdomains presumed to involve linguistic diversification. The language of the law is viewed as one among several sublanguages of legal language. As such my definition is seen within a conception of LSP which views LSP as a range of domains which branch into subdomains each encompassing a number of sublanguages.

The language of the law is to be distinguished from other types of legal language, as, for example, the language used in the courtroom, the language of legal textbooks, the language used to talk about the law in a formal, as well as an informal setting. See Figure l below, in which legal English has been classified according to external factors pertaining to the situation of use.

Figure l

This way of defining legal language and 'language of the law' is by no means the only way of delimiting the two concepts. In fact, Kurzon (l989, 283-84) argues in favour of a twofold division, where what he dubs 'language of the law' is used in narrowly defined legal domains and 'legal language' is the more embrasive term that covers more broadly defined varieties of language used in a diversity of legal contexts except those where the 'language of the law' prevails.

However, I view the language of the law as part of legal language; furthermore, I find it useful to take a more differentiated approach to what Kurzon (ibid) has classified as legal language. Only with the specification of subdomains can we begin to look for characteristics specific to a particular legal sublanguage constructed specifically to fulfil a particular function in a specific communicative situation.

In order to specify the characteristics relating to a specific communicative situation within a specific subdomain we must be concerned with socio-pragmatic aspects. Classification according to sender/receiver relationship (e.g. expert to layman) as well as communicative function (e.g.

directive, informative, expressive) is fundamental to any choice among alternative linguistic expressions (e.g. level of formality). The language varies according to the purpose of the communication. For example, when a lawyer addresses a witness in court, the language used will differ from the language used by a lawyer addressing a client, even though in both cases he/she would be addressing a layman. When addressing a client, the communicative intention could, for example, be one of informing the client about aspects of the law of inheritance, and giving him/her advice accordingly; it could be that of specifying a penalty, collecting a debt, etc.; and, consequently, the rhetorical functions would differ accordingly and involve either the written or the spoken medium (judgments are composed spoken language to be recorded in written form).

Outlining the levels of formality (frozen, formal, consultative, and casual), Danet places legal discourse towards the formal end of the scale. Frozen, written uses of legal English are encountered in documents: insurance policies, contracts, wills, etc.; frozen spoken genres include marriage ceremonies or witnesses' oaths (to tell "the truth, the whole truth, and nothing but the truth"). Formal written legal English comprises the language found in statutes, lawyers' briefs and appellate opinions, and spoken language in lawyers' examinations of witnesses in trials, lawyers' arguments in trials and expert witnesses' testimonies. Consultative style is restricted to lay witnesses' testimonies, lawyer-client interaction and the like, whereas casual style is found only in informal conversations, e.g. between judges and lawyers at lobby conferences, lawyer-to-lawyer conversations out of earshot of their clients, etc. (See Danet l980, 474-82, l985, 275-277).

With regard to function, we anticipate **regulative functions** in legislative texts. In contrast, we expect that legal textbooks will be **informative**, that counsel/witness exchanges are likely to involve rhetorical techniques characteristic of **argumentation**, and that lawyer/ client interaction will display a somewhat wider range of functions.

Verdictives (e.g. *acquit*, *convict*) consist in "the delivering of a finding, official or unofficial, upon evidence or reasons as to value or fact, so far as these are distinguishable" (Austin, 1962:152). A verdictive is a judicial act as distinct from legislative or executive acts, which are both regulative acts. In the framework proposed by Searle (1976), a verdict is treated as a **declaration**. If the judge declares you guilty, then for legal purposes you are

guilty. The performance of declarations is dependent on extra-linguistic institutions.

2.1. The language of the law

A specific type of declaration is the enactment of the law. When passing a law, each statute is preceded by what is known as **the enacting formula.** In Britain, the enacting formula, the so-called **promulgation formula**, usually has the following form:

> BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: - [3]

In speech act terms, the enacting formula, which is an explicit performative containing the performative verb *to enact*,[4] establishes the illocutionary force of the whole text, viz. its macro-function (cf. the notion of a 'master speech act' employed by Fotion l97l). The promulgation formula constitutes the performative part of the act, while the collection of rules makes up the propositional content.

When a declaration is properly performed (and only then), it brings about a change of the world. To this end, the appropriate linguistic formula must be used. A will written in the wrong formula is not at will at all, and a marriage ceremony performed faultily is not "happy" (in Austin's (1962) and Searle's (1969, 1976) sense of the word).

The successful enactment of the law (by means of the promulgation formula) is a necessary condition for 'laying down the law'. In fact, this feature marks the act in question as a **declaration** and is the condition on which a statute is effectuated. Likewise, documents like contracts deeds and wills must be written in the right formula and properly signed to be legally valid.

3. The papers in this volume

---

3 Minors' Contract Act 1987.

4 A 'performative verb' signals the illocutionary force of an utterance, e.g. I (hereby) order you to leave.

Studies of legal discourse have been concerned in particular with outlining the characteristics of legal English, and there has been little comparative work. The studies in this volume (some of which are contrastive) build on corpora of contract law in English, German and French, compiled according to the same principles.

English law belongs to the family of Common Law legal systems, whereas Danish and French law belong to the so-called Romano-Germanic family of legal systems. In the latter system the rules of law are conceived as rules of conduct intimately linked to ideas of justice and morality. Rules and "doctrines" are formulated by legal scholars, while the actual administration and practical application are the responsibility of legal practitioners. By contrast, the Common Law legal system consists of rules which seek to provide the solution to a trial rather than to formulate general rules of conduct. It is, therefore much less abstract than the characteristic legal rule of the Romano-Germanic family (see David/Brierley (1985:22, 24).

Previous research has centered almost exclusively on syntactic and lexical features. The present volume, broader in scope, offers studies of both syntactic, lexico-semantic and pragmatic features of legal language.

Baron is concerned with the syntactic complexity of NPs in French legal texts. With valency theory as her point of departure, she introduces a system of classification according to which the heads of the NPs are subdivided into predicative and non-predicative nouns. Both classes may have bound and free expansions in the form of compliments and modifiers, thus allowing for a final classification of NPs comprising eight different categories. The syntactic distinction is supplemented, on the semantic level, with a grading according to the number of valents.

Syntactic complexity, being a characteristic of scientific language in general, is not a prerogative of legal English (Kurzon 1989, 287). What sets off one domain from another need not be syntactic criteria, although this is the field to which most researchers have turned so far; it may be fruitful to look to other dimensions of linguistic science in order to point to distinctive features of legal language.

One area which has been almost totally neglected in the study of legal writings is pragmatics (ibid, p 288). An analysis of features of legal language

at the discourse level has hardly begun, but Danet (l985, 285) has pointed to cohesive devices as an obvious object of study. Furthermore, it would be useful to analyse the various domains of legal language in terms of communicative functions (or rhetorical techniques, to use the term of Trimble l985).

The literature on English legal discourse has pointed to a specific meaning and use of the modals *may* and *shall* (cf., e.g. Crystal/Davy (1969), Danet (1980. 1985), Kurzon (1986, 1989), Levi (1986), and Maley (1987). In this volume, the paper by Lauridsen points to a specific use of the modals *can* and *may* in four text types in English Contract Law: 1. Statutes, rules and regulations, 2. Travaux préparatoires, 3. Judgments, and 4. Contracts. It focusses on the meaning and use of these modals, and as such it is concerned, in particular, with lexico-semantic and pragmatic parameters.

A pragmatic analysis of German and Danish judgments is performed by Engberg. He investigates the relations between the textual conventions of this genre and the speech acts performed within the genre. In search of appropriate translation equivalents, he points to the need of a qualitative concept of textual conventions thus dismissing the mainly quantitative concept proposed by Reiss. He concentrates on the use of 'performative verbs', which is one of the characteristics of legal discourse. He is, however, able to point to differences in use of these devices in German compared to Danish judgments.

The paper by Blom/Trosborg analysing English contracts centres on the use of regulative and constitutive functions, and quantitative as well as qualitative analyses of the realization patterns of these acts are provided. The findings show that the language of contract law characteristically selects patterns of directives which differ in level of directness from the patterns typically selected in everyday conversational English. This difference can be explained in terms of the specific function of legal documents (as regulating the behaviour of the parties to the contract) and as a consequence of the face redress required by the socio-pragmatic situation.

Distinctive lexical features, such as technical terms, archaic expressions and common terms endowed with meanings specific to legal usage seem to be unique to legal language. This area is taken up by Grøn who considers the problems and pitfalls facing the legal translator. She points out that not only

are the "languages of the law" as varied as the cases that reach the courts every day, but translation is further complicated by the lack of exact lexical equivalents between source and target languages, often caused by differences in the legal systems involved.

So far analyses have mainly concentrated on individual languages. An important goal for future research is the comparison of aspects of legal discourse across languages and cultures.

For a bibliography of the research on legal language, see Engberg (in preparation).

References

Austin, J. L. (l962): *How to do things with words*. New York: Oxford University Press.

Bolinger, D. (l975): *Aspects of language*. New York: Harcourt Brace Jovanovich.

Bungarten, Theo (Hrsg.)/Engberg, Jan (Bearb.): *Recht - Sprache - Kommunikation: eine juristische Bibliographie.*

Charrow, R. P./Charrow, V. R. (l979): Making legal language understandable: A psycholinguistic study of jury instructions. In: *Columbia Law Review*, 79, l306-l374.

Charrow, W.R./Crandall, J.A./Charrow, R.P. (1982): Characteristics and functions in legal language: In: R. Kittredge/J. Lehrberg (eds.): *Sublanguage*. Berlin: Walter de Gruyter.

Craies, W. F. (l97l): *A treatise on statute law*. Ed. S. G. G. Edgar, 7th ed. London: Sweet and Maxwell.

Crystal, D./Davy, D. (l969): *Investigating English style*. London: Longman.

Danet, Brenda (l980): Language in the legal process. In: *Law and Society Review*, l4, 445-564.

Danet, Brenda (l985): Legal discourse. In: *Handbook of discourse analysis*, vol. 1, ch. ll. London: Academic Press.

David, Rene/Brierley, John E.C. (1985): *Major legal systems in the world today: An introduction to the comparative study of law*. London: Stevens.

Eyben, W. E. von (1989): Juridisk stil og sprogbrug. In: Eyben, W. E. (ed.): *Juridisk Grundbog 2*. København: Jurist- og Økonomiforbundets Forlag.

Faber, Dorrit/ Lauridsen, Karen M. (in press): The compilation of a Danish-English-French corpus in Contract Law. In: Stig Johansson/Anna-Brita Stenstroem (eds.): *English computer corpora*. *Selected papers and bibliography*. Berlin: Mouton de Gruyter.

Fotion, N. (l97l): "Master speech acts". *Philosophical Quarterly*, 2l.232-243.

Gustafsson, M. (l975): *Some syntactic properties of English law language* (Publication no. 4). Turku, Finland: University of Turku, Dept. of English.

Gustafsson, M. (l983): The syntactic features of binominal expressions in legal English. In: *Text*, 4, l23-l42.

Kurzon, Dennis (l986): *It is hereby performed...Explorations in legal speech acts*. Pragmatics and beyond, v. VII:6. Amsterdam/Philadelphia: John Benjamins Publishing Company.

Kurzon, Dennis (l989): Language of the law and legal language. In: Christer Laurén/Marianne Nordman (eds.): *Special language: From humans thinking to thinking machines*. Multilingual Matters: Clevedon/Philadelphia.

Levi, Judith N. (1986): Applications of linguistics to the language of legal interactions. In: Peter C. Bjarkman, /Victor Raskin (eds.): *The real world linguist: Applications in the 1980s*. Norwood, N.J.: Ablex, pp. 23O-265.

Maley, Yon (1987): The Language of legislation. In: *Language in Society*, 16, pp. 25-48.

Sales, B. D./Elwork, A./Alfini, J. (l977): Improving jury instructions. In: B. D. Sales (ed.): *Perspectives in law and psychology 1*. New York: Plenum.

Searle, John R. (l969): *Speech acts*. Cambridge: Cambridge University Press.

Searle, John R. (l976): The classification of illocutionary acts. In: *Language in Society*, 5, l-24.

Shuy, R. W./Larkin, D. K. (l978): *Linguistic considerations in the simplificational clarification of insurance policy language*. Washington, DC: Georgetown University and Center for Applied Linguistics.

Trimble, Louis (l985): The rhetoric of EST discourse. In: Louis Trimble: *English for science and technology. A discourse approach*, l0-2l. Cambridge: Cambridge University Press.