Chapter 7
Language, power and the law

In this chapter you will:

- Consider some of the functions and purposes of legal discourse
- Examine some of the linguistic features associated with legal situations
- Explore some of the ways that legal language is used to enforce power and control

It seems obvious to state that the law is a powerful entity – it is an established institution, rooted in tradition and authorised by governing bodies. Its complex linguistic structures render it opaque and shrouded in mystery that only the very few are party to. And yet we are all subject to the law and, in order to comply with legal principles, we need to be aware of what these legal processes are and how they apply to us. The law is something that every citizen of the world must have a basic understanding of in order to function within local society and as a member of a global community, and yet we often do so with only partial awareness and understanding of the intricacies of legal discourse.

There have been many attempts to simplify official language. In the UK, the Plain English Campaign has worked hard to make many aspects of communication accessible to the masses. The Plain Writing Act of 2010, implemented in the United States, states that 'Government documents issued to the public must be written clearly', thereby ensuring that all citizens can gain access to Government information and services. Despite these initiatives, legal language remains impenetrable to the majority, creating a power asymmetry that can seem insurmountable.

In this chapter, you will consider some of the linguistic devices that make the language of the law so dense, and consider some of the ways that legal language is used in written and spoken legal contexts.

KEY TERM

Power asymmetry: a power imbalance between speakers shown by the unequal way they address each other

7.1 A register rooted in tradition

One of the aspects of legal language that appears so confusing to the lay person is the proliferation of seemingly obscure terms such as *habeas corpus*, *decree nisi* or *subpoena*, alongside an evident archaic register characterised by terms such as *heretofore, herein, to wit, aforesaid*, which are commonplace in court proceedings and legal documents. Legal language contains many such terms as a highly specialised register, many of which are not found in any other form of modern discourse. Thus, legal discourse remains extremely specialised and exclusive, employed only by those who are part of an in-group. This creates a level of professional cohesion, but can also be extremely alienating for those who are not members of this very powerful group.

It has always been necessary to establish laws to ensure the smooth running of any society. And with such a long standing legal tradition, administrations

and law courts worldwide draw on many features embedded into their own unique histories. This is certainly the case with the UK legal system. The English language, often described as a mongrel language, has its origins in Anglo-Saxon, French and Latin, and has borrowed extensively from all of these languages. While many borrowed terms have been naturalised so that we no longer consider them 'foreign' loans, legal language has retained many borrowed terms in their original form. This goes some way to explain the proliferation of Latin terms such as *habeas corpus* in legal discourse. Long regarded as an authoritative, learned language, Latin confers a gravitas and legitimacy to official documents and proceedings which perhaps would be absent if only Anglo-Saxon forms were used. French loanwords, such as *bailiff, counsel, justice, verdict* are also prevalent in legal discourse, a legacy of the ruling French classes following the Norman Conquest of 1066. French was used in courts of law during this time; it was considered to be the language of justice and seen as more precise and expressive than Anglo-Saxon. It was only in 1362 that the Statute of Pleading called for English law to be: 'pleaded, shewed, defended, answered, debated and judged in the English Tongue'. Ironically, the Statute itself was composed in French!

The development of the English language has seen an easy intermingling of Anglo-Saxon, French and Latin forms, and the language of the law reflects this rich and diverse history. A notable feature of legal discourse is the use of binomials, or pairings of words using the conjunction *and*, such as 'fit and proper', and 'goods and chattels'. Both these examples contain Anglo-Saxon terms (*fit, goods*) alongside French borrowed terms (*proper, chattels*). This mix of terms reflects the varied language of users in earlier times, so that no one was exempt from understanding the law. Rhymed or paired phrases such as 'to have and to hold', typical of Anglo-Saxon kennings, are also a key feature of modern legal language.

KEY TERMS

Archaic: an older word or style of language no longer in everyday use

Register: a variety of language that is associated with a particular situation of use

In-group: an exclusive group of people with shared interests or identity

Binomial: two-part pairs or phrases, with words linked by the conjunction *and*

Kenning: a two-word compound expression, often providing a metaphorical meaning to an object or entity

So, whilst at first glance legal language appears to be a confusion of styles and registers, a closer look at the origins of the language can help you understand some of the different languages that have helped to form modern legal language.

7.2 Functions and features of legal language in written discourse

Legal language is sometimes referred to as legalese, a term that suggests the dense and impenetrable nature of the discourse, which might sometimes appear as though it is designed to deliberately baffle the lay person, who has no specialised knowledge.

KEY TERM

Legalese: the formal, technical language of legal documents, sometimes considered deliberately alienating for those not working within the legal profession

But it can be argued that this level of complexity is essential to prevent confusion or ambiguity. Holders of a legal document must be certain that it is explicit and precise, otherwise the legitimacy and reliability of that document could be called into question. A legal document or contract must be watertight and cover all eventualities so that there can be no direct challenge. Thus, language that might seem obscure and incomprehensible is not just allowable given the context, but may well be necessary to avoid equivocation or vagueness which may allow the document to be contested. Linguist David Crystal (2010) states that '[legal] statements have to be so phrased that we can see their general applicability, yet be specific enough to apply to individual circumstances … Above all they have to be expressed in such a way that people can be certain of the intention of the law respecting their rights and duties.'

Text 7A, which is an extract from the beginning of a will, contains many features which are typical of written legal language.

Text 7A

THE LAST WILL AND TESTAMENT OF JOSEPH ALEXANDER DAVIES

I give everything I own at my death to my trustees upon the following trusts

(a) to pay my debts funeral and testamentary expenses and any tax due as a result of my death

(b) divide my residuary estate between such of my children as are living at my death and if more than one in equal shares

(c) in the event of any of my children dying before me leaving a child or children alive at my death then such children shall take in equal shares the share that his / her or their parent would have taken if he or she had survived me

This rather convoluted text might seem baffling and you might think that the following would be clearer:

> 'Once all outstanding costs have been made, all remaining assets should be given equally to my children. If any of them die before me, then my grandchildren will receive that share.'

Whilst the second version is certainly easier to read, there is great potential here for misinterpretation. Which costs are covered by the will? Which share would the grandchildren receive? And which grandchildren are intended here? The children of the dead child? Or any other grandchildren? So, whilst the original text may seem cumbersome and awkward, the language is explicit and unambiguous and ensures that Joseph Alexander Davies' final wishes are indeed met.

There are many different types of legal text, all fulfilling very specific purposes. Three broad types can be identified:

- legislative documents, having the power to make laws and regulations, such as the Freedom of Information Act, 2000
- private law documents, including all personal or business contracts
- procedural documents, or the rules which a court must follow.

ACTIVITY 7.1

Types of written legal document

Look at the following list of legal texts and decide which of the broad categories listed above each falls into:

- Last will and testament
- Music copyright licence
- Rental tenancy agreement
- The Press Commission Code of Conduct
- Document providing details to a jury about codes of behaviour during a trial
- Consumer Protection Act.

We encounter legal texts all the time, and we are so exposed to them that we often do not recognise the significance of them. Any time we purchase a new mobile phone contract or renew a television licence, legal language is paramount

to ensure that power roles are not abused: consumers' rights need to be protected but, should the consumer default on an agreement, then consequences are in place to make sure that organisations are also protected. Thus, although at first glance, power within the discourse may suggest that power roles are asymmetrical, in fact both parties hold a degree of power which is carefully balanced. And this means that a particular style has developed that seems particularly dense, with lengthy sentences containing multiple clauses, extensive listing and repetition to make certain that all eventualities are addressed, elaborate noun phrases to ensure clarity, and use of conjunctions in place of punctuation markers.

Take a look at Text 7B, which is taken from the terms and conditions of a credit card agreement, as set out by a British bank. It illustrates many of the features typical of legal contracts.

Text 7B

B9. Ending this agreement

We may end this agreement immediately if:

- there is illegal or fraudulent activity on or connected to the account;
- you are or may be behaving improperly – for example, in a threatening or abusive way;
- you have seriously or repeatedly broken this agreement in any other way.

In any other case, we will give you two months' notice in writing. You can give us notice to end the agreement at any time. If either of us gives notice to end this agreement:

- you must stop making any transactions, destroy all cards, cancel any recurring transaction instructions and repay your full balance;
- the agreement will continue until you have repaid all amounts you owe us including amounts added to your account after notice was given; and
- if your standard interest rates are linked to the Bank of England Base Rate, they will no longer be linked to it from the last working day of the month in which your notice was given. But if you give us notice in the last 7 working days of the month, we may not be able to prevent any Base Rate changes in that month taking effect on your account.

Extract from Halifax Credit Card terms and conditions

Pronouns are used carefully throughout this text, and this is a common way of presenting power behind and within a text. This text addresses the audience directly, throughout. This places responsibility on the audience, suggesting that they are accountable for their own actions. This is reinforced through the use of directives aimed at the audience, such as:

- 'you have seriously or repeatedly broken this agreement'
- 'you must stop making any transactions'
- 'until you have repaid all amounts you owe us'.

The bank itself is not named, but the collective pronouns 'we' and 'us' are used throughout. This effectively creates an 'us' versus 'you' situation – 'we' (the bank) provide the service which 'you' (the customer) are obliged to follow in the ways set out in this agreement. The collective but almost anonymous 'we' creates a degree of objectivity that is a characteristic of legal texts and contracts.

Modal auxiliary verbs and conditional clauses also feature heavily in legal discourse, stressing elements which are or are not allowable given the terms of an agreement:

- 'we may end this agreement immediately if there is illegal or fraudulent activity…'
- 'you must stop making any transactions'
- 'If either of us gives notice to end…'
- 'If your standard interest rates are linked to the Bank of England Base Rate…'
- 'If you give us notice in the last 7 working days…'.

Modal auxiliary verbs clearly state the role of both the bank and the customer, and the conditional clauses aim to set out a number of alternatives and possible scenarios. This means that the bank is essentially 'protected' from any unforeseen situation and it is able to safeguard its own interests.

These language features are typically found in most 'private law' documents and illustrate power within the discourse. There are other notable features of 'legalese' which help to present a tone of top-down authority, evident even in the graphology and typography of a text (as shown in Text 7C). A lack of visual imagery can seem a little austere to the lay person, but puts increased emphasis on the use of upper case or bold typography, so that the most important aspects of a legal text are immediately seen.

Text 7C

PROPERTY FIRST, High Street, Watford UK

AST Agreement – 178 Main Street, Watford UK

DATE of Agreement – 19th July 2018

ASSURED SHORTHOLD TENANCY AGREEMENT

For letting a ~ furnished flat on an Assured Shorthold Tenancy under Part 1 of the Housing Act 1988 as amended by the Housing Act 1996.

This agreement is made the _____ day of _____

1. Particulars

1.1. Parties

1.1.1. The Landlord

MR J SMITH

Address: _____

_____

The "Landlord" shall include the Landlord's successors in title and assigns.

1.1.2. The Tenant

MRS MARYLAND

Address: _____

_____

1.1.3. The Guarantor

Not Any.

1.1.4. The Landlord's Agent

The "Landlord's Agent" shall mean PROPERTY FIRST or such other agents as the Landlord may from time to time appoint.

Where the party consists of more than one person the obligations apply to and are enforceable against them jointly and severally.

1.2. The Landlord lets and the Tenant takes the Property for the Term at the Rent payable upon the terms and conditions of this agreement.

Legal documents contain a high number of nouns and noun phrases to reflect the need for clarity. Typically anaphora is used in other texts to avoid repetition and offer varied expression. In legal texts, where transparency and precision is key, anaphora is rarely found as substituting one word for another could lead to ambiguity. Frequent use of nouns and explicit naming of participants often results in extensive repetition, and even listing to ensure that all eventualities are taken into account.

KEY TERM

Anaphora: the use of a word referring back to a word used earlier in a text to avoid repetition

As with any profession, a special register uses technical terms limited to the field of law, including fixed expressions such as 'beyond reasonable doubt'. Some terms gain a specific meaning when used in a legal context which is not reflected in non-legal usage. For instance, 'suit' simply refers to an outfit of clothing, but in a legal context it refers to legal action. To 'strike' something is to delete it from the record, not to physically attack something.

These kinds of language features help to create a legal style that should be regarded as functional rather than decorative or deliberately rhetorical.

ACTIVITY 7.2

Analysing legal documents

Study Texts 7D–7G, taken from various terms and agreements that we are frequently exposed to. What language features are used to enforce rules and codes of behaviour?

Are any language features used which might suggest that the audience's rights are also being protected?

Text 7D

We will share personal information with companies, organisations or individuals if we have a belief in the good faith that access, use, preservation or disclosure of the information is reasonably necessary to meet any applicable law, regulation, legal process or enforceable government request.

Extract from Google terms and conditions

Text 7E

We believe in the power of communications to make a better world. That means we want our services to help customers freely express themselves and share information. But that shouldn't be at the expense of other people's safety and rights.

That's why we have a few rules on how our services can and can't be used. This policy explains them, what we might do if you break them, and what to do if you've got any concerns.

Extract from British Telecommunications plc Consumer Acceptable Use Policy

Text 7F

The Library reserves the right to take appropriate action to ensure compliance with the policy, including withdrawing the right to access the Internet. We will contact the police in cases which involve illegal activity.

Extract from Hounslow Library Code of Conduct

Text 7G

If the service on which you have booked to travel is cancelled or severely disrupted you may be entitled to compensation or a refund. If the train company allows us to issue this refund on their behalf, we shall do so. If not, we will provide you with the contact details of the relevant train company and you will need to make a claim directly with the train company concerned.

Extract from Virgin Trains terms and conditions

7.3 Spoken language in the courtroom

American law professor Peter Tiersma (1999) stated that: 'lawyers are, on the one hand, among the most eloquent users of the English language, while, on the other, they are perhaps its most notorious abusers. Why is it that lawyers, who may excel in communicating with a jury, seem incapable of writing an ordinary, comprehensible English sentence in a contract, deed, or will?'

You have seen that legal language certainly can seem to be overly complex with impenetrable structures and phrasing, and yet language within a courtroom setting serves a very different function. Lawyers must choose language to persuade jury members to accept their arguments and use probing questions to interrogate witnesses and elicit the facts about a case, all while trying to engage with a number

of different audiences. A trial lawyer will be communicating with a judge, fellow lawyers, the jury, the defendant and a variety of witnesses, often including those offering expert testimony. At the same time they must also be aware of the wider audience, including the families of those involved in the case, and even those who just have an interest in the case or in legal proceedings. Alan Durant and Janny Leung (2016: 71) describe trials as 'a battle, contest, performance, or process of storytelling'. It is the very nature of legal language within the courtroom as all of these things that make it such a fascinating area of linguistic study.

The legal system of countries such as the UK, the United States of America, Australia, India and many other countries that have seen British colonial influence is one based on adversarial law. In an adversarial court of law, an impartial judge or jury will attempt to determine the truth about a case on the basis of the arguments presented by two legal counsels, and pass judgement accordingly. Thus, roles are clearly defined, and all those involved will use specific language techniques to achieve their purposes.

7.3.1 Opening and closing statements

Opening and closing statements form a pivotal role in courtroom proceedings. It is often said that a 'good story must have a strong opening' and trials subscribe to this maxim. Opening statements allow both defending and prosecuting lawyers to summarise the main aspects of the case that will be explored more fully during the trial. This often takes the form of a narrative – a story that the audience, or jury, can engage with, allowing them to almost imagine themselves as part of the events that took place. The narrative will also lead to a projection of the likely outcome of a 'guilty' or 'not guilty' verdict. This is an opportunity to influence the jury about the legitimacy of the case, about the character of the defendant, and even about the credibility of the lawyers themselves. Thus, although narrative in approach, there will be strong persuasive elements, designed to get the jury on side and to ultimately win the case.

ACTIVITY 7.3

Analysing opening statements

American energy company Enron was the subject of a financial scandal and, in 2006, former CEOs Kenneth Lay and Jeffrey Skilling were prosecuted by the US government for fraud and insider trading.

Read Text 7H, the prosecution's opening statement at the trial. How does the speaker attempt to convince the audience of Kenneth Lay and Jeffrey Skilling's guilt? How does the speaker present the victims of their alleged fraud?

In particular, focus on the use of:

- emotive language
- modal verbs
- repetition
- modifiers
- varied sentence types.

Text 7H

> The government will take you inside the doors of what was once the seventh largest corporation in this country, Enron. In the year before Enron declared bankruptcy, two men at the helm of the company told lie after lie about the true financial condition of Enron, lies that propped up the value of their own stock holdings and lies that deprived the common investors of information that they needed to make fully informed decisions about their own Enron stock. You will see that the Defendants Lay and Skilling knew key facts about the true condition of Enron, facts that the investing public did not know. With that information, Defendants Lay and Skilling sold tens of millions of dollars of their own Enron stock. The victims in this case, the investing public, their employees, those who did not have that information, those who were not able to sell their stock before Enron entered bankruptcy were not as fortunate as these two men. These men are Defendants Ken Lay and Jeffrey Skilling. This is a simple case. It is not about accounting. It is about lies and choices. This case will show you that these Defendants worked to lie and to mislead. They violated the duty of trust placed in them. They violated it by telling lie after lie about the true financial condition of Enron.

Closing statements are similarly powerful. After what can often be quite lengthy courtroom proceedings, a closing statement seeks to summarise the most crucial elements of a case. It is also an opportunity to rebut the opponent's arguments, explain how the evidence that has been presented meets all legal requirements for the final verdict, and direct the jury into making a decision based on the testimonies that have been presented. Crucially, it is the last opportunity a lawyer has to influence the judge and jury, and so must be carefully constructed.

7.3.2 Questioning and presupposition

One of the key features of courtroom discourse is the way that language choices are shaped to elicit 'truth'. This may be through careful use of questioning techniques, through presupposition, or even reformulation of witness statements.

In a conventional adjacency pair pattern, questions are designed to elicit an answer to the question, and the respondent provides that response, allowing both parties to take up fairly equal floor space. In courtroom discourse, the function of questions is more complex than this, with the formulation of questions that are designed to provoke, to contest, to lead and to coerce the witness. Open-ended questions, such as those beginning with *what, where* or *why* are rarely used. Instead, questions are deliberately shaped to offer only restricted responses, sometimes confined to mere *yes/no* responses.

Paul Simpson and Andrea Mayr (2010: 82) state that presupposition strategies are frequently used during interrogation and cross-examination. Presupposition assumes knowledge of what a response will be based on how a statement or question is phrased.

- Iteratives: e.g. 'Did you visit the crime scene *again*?' Again states that this is a repeated action. Here, the presupposition is that the defendant has already attended the crime scene. Phrasing the question as 'did you' allows only for a yes/no response, and therefore does not allow for the initial idea of 'visiting the crime scene' to be disputed.
- **Change of state verbs:** e.g. 'Did you *continue* to threaten my client?' This presupposes that the client was threatened by the person being interrogated; what is being asked here is if that threat was repeated, not if the *threat* actually happened.
- Factives: e.g. 'Do you *regret* entering the house that night?' This question seeks to clarify how the defendant feels about an action; a yes/no response does not allow for the defendant to deny actually entering the property.
- **Alternative questions:** e.g. 'Were you inside *or* outside the building on the night in question?' Although an optional question is provided, both options presuppose proximity to the building. The structure of the option question is limited to only one of two possible options: *inside* or *outside*.
- Cleft structures: e.g. '*It was you* who prompted the sick attack.' Phrasing this as a statement does not allow the defendant to respond, and does not allow the defendant to argue against whether or not the 'sick attack' took place. Stating 'it was you' at the start of the statement presupposes that the defendant is responsible for the 'sick attack'.
- **Comparators:** e.g. 'The co-accused seems to be *as short tempered as you*.' Agreement or denial does not challenge the presupposition that the defendant is 'short tempered'.

- **'Wh-type' questions:** e.g. '*Where* exactly did you put the stash?' This presupposes that the defendant was the agent; the question simply seeks to clarify location of 'the stash'.
- **Genitive constructions:** e.g. 'Where exactly did you put *your* stash?' The possessive determiner frames the defendant's ownership of 'the stash'.
- **Definite referring expressions:** e.g. 'Where exactly was *the* stash?' This presupposes that the defendant knows exactly what 'stash' is being referred to.

KEY TERMS

Presupposition: an implied precondition or assumption

Iterative: a statement or expression that denotes repeated actions

Factive: a verb that asserts the truth of a following clause

Cleft structure: a sentence or clause that is split to form an additional, foregrounded clause using the structure *it + form of the verb be + focus + relative clause...*

All these techniques are designed to elicit a response that will help the lawyer build a stronger case, to either prove innocence or guilt.

A further strategy favoured by lawyers is to reformulate a response, allowing for clarification for the audience. However, a reformulation will not always use the exact phrasing that was initially used, and thus allows for the lawyer to present the statement in terms which will further the argument, as Text 71 shows.

Text 71

Witness: I did not tell them everything.

Lawyer: [...] You did not tell them everything, did you, so you *concealed* certain things did you not?

Extract from Durant and Leung (2016)

Here, the lawyer reformulates the witness's use of the vague term 'everything'. The lexical choice of 'concealed' implies secrecy and underhand behaviour, which could be used against the witness to suggest that he or she is not reliable.

ACTIVITY 7.4

Question formulation and reformulation

Read Texts 7J–7M, which are all questions presented to Jeffrey Skilling during cross-examination at the Enron fraud trial. How are the questions formulated? What is the purpose of these questions? Are they all designed to elicit information or are some questions intended for other purposes?

Text 7J

Mr Skilling, you said in your testimony that you are somewhat of a business history buff. Can you think of a bigger mess in business than we have here with the Enron situation in recent history?

Text 7K

I want to tell you, if you look at Ms. Watkins testimony, she says it in a sentence. 'My understanding as an accountant,' she says, is that a company could never use its own stock to generate gain or avoid a loss on its income statement. Is that true? Were you aware of that?

Text 7L

Fitzgerald: What was the Enron equity?

Skilling: I don't know.

Fitzgerald: You didn't know?

Skilling: No.

Fitzgerald: Did Enron put its own stock into the Raptors?

Skilling: I believe if you go back to the board minutes where it was approved, that would have laid out in detail what the specific...

Fitzgerald: You were aware Enron had issued its own stock to the Raptors, were you not?

Text 7M

Now, Jordan Mintz, an Enron lawyer, testified that he tried to get you to sign approval sheets for the LJM deals and reminded you that your signature was required. I understand that you've said that you didn't believe your signature was required. Is that correct?

RESEARCH QUESTION

There are many examples of fictional courtroom proceedings, both in literature, such as *To Kill a Mockingbird*, or *The Crucible*, and as part of television dramas such as *The Good Wife*, or *Silk*. Examine an example of courtroom interaction, whether that is in opening and closing statements where the jury may be directly addressed, or in the cross-examination of witnesses, including expert witnesses. Consider patterns of legal language use in these texts. How closely do they reflect real courtroom proceedings?

You could compare a fictional account with the dramatisation of a real trial, such as *American Crime Story: The People v. OJ Simpson*, to see how closely the drama has reflected the trial.

Wider reading

Read more about the nature of power and legal language in the following books:

Conley, J.M. and O'Barr, W. (2005) *Just Words: Law, Language and Power*. (Second edition). London: University of Chicago Press.

Durant, A. and Leung, J.H.C. (2016) *Language and Law: A Resource Book for Students*. Abingdon: Routledge.

Mooney, A. (2014) *Language and Law*. London: Palgrave Macmillan.

Simpson, P. and Mayr, A. (2010) *Language and Power: A Resource Book for Students*. Abingdon: Routledge.