

THE PLAIN LANGUAGE MOVEMENT AND MODERN LEGAL DRAFTING

Anna SOBOTA, M.A.

Department of English Studies, Wrocław University
ul. Kuźnicza 22, 50- 138 Wrocław, Poland
asani.sobota@gmail.com

Abstract: This paper aims to answer the question whether modern legal drafting is implementing the revolutionary changes argued for by the plain language movement and whether legal texts are made more user-friendly, particularly to their non-professional recipients. The paper discusses the main characteristics of modern legal drafting against the background of research conducted in 2011 and 2012 based on a broad selection of American consumer contracts. The interest centres on the successes rate of the plain language campaigners as well as the threats to their pursuit of plain legal drafting.

Key words: plain language, legal drafting, legal text, contract, plain legal drafting.

JEZYK UPROSZCZONY A JEZYK WSPOLCZESNYCH UMOW KONSUMENCKICH

Abstrakt: Artykuł ma na celu odpowiedź na pytanie, w jakim stopniu zasady plain language movement są wdrażane przez autorów tekstów prawnych i prawniczych, aby uczynić współczesny język prawniczy bardziej zrozumiałym dla przeciętnego odbiorcy, nieposiadającego wiedzy prawniczej. Artykuł przedstawia szczegółową analizę wyników badań ilościowych przeprowadzonych w 2011 i 2012 na podstawie ponad 80 autentycznych tekstów angielskich umów konsumenckich.

Słowa kluczowe: język uproszczony, sporządzanie dokumentów prawnych, tekst prawnny, tekst prawniczy, umowa, sporządzanie dokumentów prawnych językiem uproszczonym.

Introduction

For decades, legal language has been discussed not only by linguists but also by lawyers and legal theorists. They examined legal language not only from the perspective of the philosophy of language and logic but also text linguistics or sociolinguistics, which equipped researchers with knowledge sufficient to describe it thoroughly, concentrating not only on linguistic but also functional properties of legal language. The perception of legal language varies as Pieńkos (1999, 71) defines it as a "subsystem of ethnic language" similar to the language of experts, Gizbert-Studnicki (1986, 94) assumes that legal language may be defined as a register of language and Šarčević (1997, 9) states that there is no legal language but one should talk rather about legal languages as each and every legal system manifests its own legal language. However, the results give an input to further studies going beyond linguistics and covering such fields as psycholinguistics or sociolinguistics in order to see a legal text not only as a product but also as a linguistic tool used in communication not only within professional environment but also between professionals and laypersons. Although on the basis of legal regulations lawyers struggle

to use adequate linguistic means to argue their points, legal texts are still flooded with long complex sentences, passive voice, pronominal adverbs and jargon words, which may pose a challenge to a non-professional user. This paper, although, it explores the linguistic features of legal texts, showing legal language belongs to the category of "language for specific purposes" (Trosborg 1991, 69)⁴² used for drafting deeds, wills and contracts, it also addresses the issue of understanding legal texts by ordinary users as well as gives some consideration to the function of legal language.

Taking into account the modal revolution in legal writing (Williams 2006) and growing tendency of "shall-free legislation" (Garzone 2013, 69) the aim of this paper is to give a comprehensive picture of the employment of the plain writing rules in American consumer contracts expending the current studies by analysing plain lexical and syntactical structures in order to answer the question whether the legal environment is prepared for the revolutionary changes advocated by plain language campaigners. The paper is organized as follows. Section 1 offers a brief historical outline of the plain language movement and the basic principles of the plain writing style. Section 2 reviews the employment of plain writing rules in modern legal documents. The discussion is based on the results of the research conducted in 2011 and 2012 on a selection of contracts and agreements. Section 3 looks at the causes of the limited application of the plain writing style in legal texts and Section 4 draws some conclusions.

Historical overview

Never use a metaphor, simile or other figure of speech which you are used to seeing in print.

Never use a long word where a short one will do.

If it is possible to cut a word out, always cut it out.

Never use the passive where you can use the active.

Never use a foreign phrase, a scientific word or a jargon word if you can think of an everyday English equivalent.

Break any of these rules sooner than say anything outright barbarous.

(George Orwell, *Politics and the English Language*)

In his comments on the style of writing and analysis of "bad writing" (Orwell 1946) he underlines the fact that it is not archaic expressions that modern language should shed but much rather meaningless or less important words which decrease the value of an utterance. He emphasises that a vital element of an utterance is clarity and accuracy as well as the fact that the speaker should concentrate on the meaning he/she wants to convey, that is, the merit not the manner. A similar view is shared by plain language campaigners who wish to alter the traditional versions of official writing. The demands of western consumer movements for their rights to benefit from mass production and mass consumption created the need of unscrambling the enigmatic style of credit facilities, insurance policies or tax documentation. The first person who started the fight for clear and simple official writing was Chrissie Maher, who actively took part in introducing plain language rules. As a co-founder of the "Plain English Campaign",

⁴² Complete division of legal language in Trosborg, A. 1995. *Introduction. Special Issue on Laying down the Law – Discourse Analysis of Legal Institutions* [in:] Journal of Pragmatics 23(1). 1-5.

member of “the National Consumer Council” and founder of “The Benefits Shop”, she supported and still supports all who have problems with official paperwork. Chrissie Maher also launched *The Liverpool News* – a newspaper for the people who have difficulties with reading sophisticated texts. Another prominent plain language activist is John Walton, a lawyer, and the founder of “Clarity”, an organization of lawyers, linguists, public service workers, translators and plain language advisers from over 30 countries which organizes conferences on the plain language all over the world.

In the United States it was President Carter who in 1978 issued Executive Orders to simplify and clarify federal laws. A similar measure was implemented by President Clinton in 1998, who issued a Presidential Memorandum in which he called on federal employees to prepare documents according to the plain language principles. Meanwhile PLAN (PLAIN LANGUAGE ACTION NOW) started its active promotion of the plain writing style and throughout 80’s such organizations as the Centre for Plain Legal Language at the University of Sydney, Law Faculty in Australia, the Plain Language Society or The Canadian Legal Information Centre in Vancouver, Canada became actively involved in the plain language movement. Some financial institutions took steps to convert their “old” documents into plain versions. An early example is Citibank which in 1973, after frequent complaints from its clients, decided to change the archaic wording of its promissory note and other loan documents. Lately, similar actions have been taken by the British Parliament which initiated the action of rewriting “old” Acts using the plain language principles⁴³. Finally, President Obama signed the Plain Writing Act on October 13, 2010, which became the International Plain Language Day.

The aim of the plain language revolutionists is to build a common platform of basic principles which would serve as guidelines for those who draft official documents. Over the years the plain writing manuals have focused on linguistic and non-linguistic aspects of formal writing with the view that it should be processed in a most simple and clear manner by their ordinary recipients.

The recommendations below are only examples of the plain writing instructions:

- structural recommendations
 - (i) **use** simple and logical sentences, which are affirmative rather than negative
 - (ii) **reduce** the length of sentences
 - (iii) **avoid** double negation
 - (iv) **use** parallelism
- grammatical recommendations
 - (i) use of the active voice constructions over the passive voice constructions
 - use** modal verbs instead of *shall* (legal drafting)
 - (ii) **use** the present **simple** tense instead of *shall* (legal drafting)
 - (iii) **use** the personal pronouns he/she
- lexical recommendations
 - (i) **avoid** jargon
 - (ii) **use** precise verbs

⁴³ e.g. The UK Tax Law Rewrite Project mentioned by Ch. Williams in his article *And yet it moves': recent developments in plain legal English in the UK* (2008)

- (iii) **avoid** the negative compound **not** not able **but** use unable
- (iv) **avoid** the nominalisation **not** make payment **but** use pay
- (v) **omit** the unnecessary words **not** in the event that **but** use if layout recommendations
 - (i) **arrange** graphics in a logical form
 - (ii) **use** headings
 - (iii) **use** tables to be more explicit
 - (iv) **use** visuals (bullets, vectors etc.)
 - (v) **use** adequate fonts⁴⁴

In 2008 *Clarity* published an article by Hep Yi Chong, Abdul Rahman and Mohamad Zin Rosli in which they presented the results of their studies⁴⁵ conducted on 30 respondents who were executives, engineers, quantity supervisors or directors of consulting firms. The respondents were asked if they find a construction contract comprehensible, and if not, their job was to point out those aspects which contribute to the legalese and problems with achieving clarity. Out of eleven issues analysed, eight have been regularly indicated by the respondents as sources of clarity problems. In the first place the respondents underlined the length of sentences, that is, the fact that the sentences in the analysed construction contract were too long. The second threat to clarity of the analysed document noted by the respondents was “too many cross references between the clauses” as well as the fact that words are repeated. In the fourth place the participants of the research highlighted the extensive use of the passive voice, subsequently, “the negative style of language”, “ambiguous words or sentences which have more than one meaning”, “complexity of the noun phrase”, overuse of the modal verb *shall* – however, this category was “controversial as technical terms” go. As for the legalese, the analysis of the material showed that only three aspects had been raised by the respondents, that is, “unnecessary length and complexity of sentences”, intensity of legal terms, and “specialised vocabulary or legal jargon”. The results of the studies proved that 53% of the respondents believed the construction contract lacked clarity, the remaining ones saw the contract readable, however, the authors stress that the latter hold more than 15-year experience. The results are not surprising but they are based on only one contract, which may not be convincing as a verification of the use of plain language principles.

In order to offer a most objective assessment of the actual application of the plain style in legal drafting I developed a corpus of contracts.

Verification of plain language claims

The research material is based on a corpus of 50 American consumer contracts that comprises of 537 050 words. The length of documents varies from 5 000 to 30 000 words. The documents were drafted and gathered after the year 2000, i.e. after plain

⁴⁴ Plain writing instructions based on Garner B. 2001 Legal Writing In Plain English. The University of Chicago Press, Ltd: London and A Plain English Handbook: How to create clear SEC disclosure documents.

⁴⁵ Detailed results in *Construction contract administration — an approach on clarity* In Clarity No.60, 2008.

language principles were defined and publicized and cover the period from 2001-2008. In majority, the material has been obtained from translation agencies located in Poland and from sources available on the Internet. After verifying over 120 agreements and contracts 50 of them were classified as written in "plain" writing style , mostly due to the employment of modal verbs, the use of the present simple tense, avoidance of borrowings or the graphical arrangement. However, none of the selected texts fully satisfied all the rules of the plain writing in grammar, vocabulary or syntax. They may be only considered attempts towards clarifying legal style. Consequently, throughout the remaining part of this paper the word *plain* will be used in inverted commas to underline that incompleteness.

Reduction of the length of sentences

Table 1. Reduction of the length of sentences.

Plain writing style	Traditional writing style
ca 10%	90%

Christopher Williams (2004, 122) states that long sentences in legal discourse are partly justified by the lawyers' way of forming their thoughts, Pieńkos (1999, 99), in turn, takes the position that long sentences or endless constructions always prove poor knowledge of legislative techniques and the lack of editorial skills. The study has covered complex compound sentences that hold at least one subordinate clause and exceed the number of approximately 20 words (Garner 2001, 27). The results illustrated above clearly show that ca 90%, of the inspected material holds long, complex sentences, which are enigmatic probably to the same extent for the reader and the writer. However, occasionally shorter sentences, rarely those of the S-V-O type, can be found constituting about 5% of the researched documents – in majority occurred in the "payment conditions" and "final provisions" part.

Avoidance of the passive voice

It has been found that the passive voice is a constant element not only of traditional but also "plain" versions of legal documents. After verifying 50 documents it may be clearly stated that the passive voice is present in every document, even when the context does not require its usage.

Use of modal verbs

Table 2. Employment of modal verbs.

Employment of modal verbs	shall	may	should	can	must
	70%	20%	4%	5%	1%

Based on the results above, it should be underlined that the modal verb *shall* , which in general language is used sparingly, predominates in the investigated legal documents. The results of the analysis indicate that the modal verb *shall* is not employed to express futurity, however, in 70% of the inspected material it is used to express obligation or prohibition. Nevertheless, it should be also stated that prohibition is

successfully but not commonly expressed by the negative form of the modal verb *may* when in 80% of its use the positive form of the modal verb *may* is applied to express permission. Despite the frequent occurrence of the modal verb *shall* noted above, a tendency of using the present simple tense instead of *shall* has been observed, especially in the first section of contracts, i.e. the “definitions” part. What is more, the modal verb *should* has been found to be replacing *shall* to introduce the obligatory character of a legal message. The growing occurrence of the modal verb *can* has been also detected, however, it is rarely employed to express permission or prohibition- in majority of cases it indicates ability or its lack. Finally, it is should be stated that the modal verb *must* advocated by plain language campaigners is regularly omitted in the analysed legal texts.

Avoidance of jargon & technical terms

(i) pronominal adverbs

Table 3. Employment of pronominal adverbs.

Employment of pronominal adverbs	Avoidance of pronominal adverbs	Adherence to traditional writing style
	2%	98%

A common practice observed in legal writing is the usage of pronominal adverbs and the results reveal that only 2.5% of analysed documents are free from such linguistic forms. The high level of pronominal adverb use may be justified by the fact that they are convenient for the writer and they do not require from the author the repetition of often relatively long expressions. Therefore, instead of “the list is included in Schedule No X **to this Agreement**” “the list is included in Schedule No. X **hereto**” may be used and “upon termination of this Agreement and without prejudice of Article X indicated **in this Agreement above**” “upon termination of this Agreement and without prejudice of Article X **hereabove**” may be used instead., it does not give any comfort to the recipient of a legal text, mainly because the use of pronominal adverbs requires background knowledge and high linguistic competence.

Example 1. Use of pronominal adverbs.

Except as set forth in Section 2(a)(ii) or elsewhere herein, APPLE will not edit, change or alter any of the COMPANY Content or Artwork without COMPANY'S prior written consent (such consent not to be unreasonably withheld, delayed or conditioned), provided that APPLE may modify metadata as reasonably necessary to correct errors or to append sub-genres or like information for artist and track categories...⁴⁶

(ii) Latin terms

Legal texts are not overloaded with metaphors or similes but from time to time one may find maxims or Latin terms, especially in such types of legal documents as

⁴⁶ The excerpt from DIGITAL MUSIC DOWNLOAD SALES AGREEMENT.

contracts. It is not a common practice but it is still observed. Although Pieńkos (1999, 81) claims that Latin maxims only emphasize the timeless character of legal documents it should be stated that in the examined contracts Latin terms and borrowings have been eliminated in 100%, which may only serve as evidence of the success achieved by the plain language campaigners.

Omission of unnecessary words

(i) Wordiness

Table 4. Use of wordiness.

Including but not limited to	35%
In accordance with	95%

Legal documents do not show a tendency of shortening words or expressions, but the opposite, the expressions used in legal texts are long and seem to be repeated. The analysed documents indicate numerous examples of wordiness, however, the two presented in the table above are the most common and their appearance in the verified texts seems to be quite frequent. The first is the traditional expression *including but not limited to*, which has been in 65% replaced by the expression *including*. The second expression that was analysed is *in accordance with*, which was very rarely substituted by *according to*. The replacement occurred only in 5% of the analysed material.

(ii) doubles and triples

Table 5. Use of doubles and triples.

between vs. by and between	20% vs. 80%
terms vs. terms and conditions	15% vs. 85%

The use of doubles and triples is another feature which in a conspicuous manner contributes to legal language. The results show that the average use of doubles and triples exceeds 80% of the verified documents. *By and between* seems to be irreplaceable as it has been recorded in 42 out of 50 cases. Similar results have been noted in the case of *terms and conditions*, which can be found in more than 85% of the analysed examples.

(iii) Nominalisation

Table 6. Use of nominalisations.

Avoidance of nominalisations	15%
Adherence to traditional writing style	85%

The situation where a verb is nominalised into a noun phrase is commonly observed in the analysed material. The diagram above demonstrates that nominalisations occur in 43 out of 50 analysed documents. Slightly more than 10% of the drafters decided to replace *make payment* with the verb *pay*, or eliminate the noun phrase *make an inquiry* and use the verb *inquire*, replace *conduct an inspection* with *inspect*, etc.

Layout of legal documents

The last aspect to be discussed is the design of the selected legal documents. The results definitely confirm that a major part of the documents, mainly due to the fact that they are in an electronic version, are equipped with graphic signs such as bullets, vectors etc., which present the layout of the documents in a clear, comprehensive and logical manner. What is more, the authors of the documents, to enhance the process of understanding, introduced tables. So far it has not been a common practice, and the same is the case with colour. For example, for completing a text with some details - the red colour is used, explanations supporting the provisions included in a document are in green and alternative clauses, which are obligatory only to some users of a contract are marked in blue. It has to be noted also that the analysed documents have been prepared in different fonts, beginning with the traditional Times New Roman and Arial, and going on to the more "casual" styles like Verdana.

Rationale for limited applications of plain language principles

The results evidently indicate that the plain writing style does not find much approval in the legal environment. One reason for such unwillingness and reserved position in relation to the changes argued for by the plain language movement maybe the Anglo-American common-law tradition and the fact that lawyers not only rely on court decisions and orders issued sometimes centuries ago but also on their content, transferring archaic grammatical and lexical constructions into modern legal texts.

Another reason may be attributed to the plain language movement. Some critical comments on its precepts are summarised below.

The legal texts do not function as self-explanatory texts

Francis Bennion (2007) clearly states that the plain language movement has faced failure and he sees its roots in the fact that plain language campaigners do not treat law as an area of expertise. After distinguishing four types of legal texts from "a text which is law" to texts about law directed to non-professionals, the author criticizes the plain language activists for their pursuit of self-explanatory legal texts claiming that:

The law is made up of what I will call law texts, that is texts that actually are law. They constitute the law, which resides only in words. The purpose of a law text is geared to this function of constituting the law. Many plain language campaigners fail to grasp this point. They think the purpose of a piece of legislation is to explain the law.

We may ask whether contracts and agreements are the type of documents that constitute law. Undoubtedly, they define and regulate relations between individuals and introduce norms and standards of mutual legal behaviour. However, Francis Bennion insists that the cause for the miscomprehension of legal texts by laypersons lays in an inadequate composition of the "old" texts and not in the use of technical terms.

Technical terms ensure precision

Jargon words and technical terms are a part of legal language, the language of professionals, and their replacement with general terms raises doubts and inclines to the belief that such a substitution may affect the balance between simplicity and precision. Giszbert-Studnicki (2001, 52-53), discussing the methods of translating texts, underlines that apart from background professional knowledge, the selection of an adequate term is extremely important in the translation process, especially the process of translating legal documents, where one inadequate word may ruin the intention of the sender and introduce miscomprehension to the recipient. He points out that behind a simple sentence "Peter is the owner of a house" stands a specific factual state of affairs, which has to be understood to translate the sentence correctly. In order to show how the technical terms are fundamental to legal drafting and how general vocabulary may deform the meaning of a legal text, supporting the way of thinking presented by Giszbert-Studnicki (2001), let us discuss the meaning of the following apparently simple sentence: "John **has got** a house". Although the sentence uses expressions that belong to general language in legal context it may find different interpretations. Firstly, the verb "have" may indicate that John **owns** the house, which in the light of law means that John because **is the owner** of the house by paying an agreed amount of money with all rights to it transferred to him at the moment of purchase. Secondly, the general verb "have" may, in turn, suggest that John is only the **user** of the house under, for example, a perpetual usufruct right, generally granted for 99 years. The examples above illustrate how significant it is to maintain technical terms in a professional text and how important it is to save the triple *hold, possess, and enjoy* for the sake of precision. At first sight, doubles and triples may be considered ambiguous, however, from the legal point of view adequate and exact legal drafting is not possible without them. Examples may be multiplied but even such a commonly used expression as *terms and conditions* does not leave any doubts. *Terms* are optional for the parties to a contract, whereas, *conditions* must be satisfied before the transaction becomes binding upon the parties, therefore, routine employment of the said double is fully justified. The same is the case with *the party represents and warrants*, that is, it not only declares the factual state of affairs but it also warrants that such a state will remain unchanged for the term of an agreement.

However, it should be underlined that the notion of precision is not similarly perceived and understood in all legal languages. In Polish, for example, the concept of clarity and precision significantly differs from the presented above. The use of more than one verb of similar meaning introduces miscomprehension leaving the recipient with interpretation turmoil irrespectively whether it is a professional or a layperson. The cluster of two verbs of similar meaning does not provide abundantly clear language construction. The answer to the above may lay in the phenomenon of legal culture - by Lawrence Friedman (1975, 15) defined as "social forces...constantly at work on the law", which would justify the fact that although English and Polish legal language are not free from lexical redundancy, its employment may be dictated by different reasoning stemming from either the culture of producing legal texts as in English legal texts or the legal system itself, mostly illustrated by applying repetitions as observed in Polish legal documents.

Conclusions

The results of the studies clearly indicate that the legal environment is not inclined to dispose of their advantage in the process of formulating legal regulations and the proposals submitted by plain language activists meet with considerable criticism. Firstly, it is believed that a legal text cannot function as a self-explanatory text as it does not explain law but it becomes law. The results shown above only prove that the opinion expressed by Bennion (2007) is shared by a considerable number of anonymous legal drafters. Secondly, the claim that the use of technical terms ensures precision and clarity seems to be reasonable and, as has been underlined by Bhatia (2012), plain language activists concentrate their efforts on the accessibility or availability of legal discourse, ignoring other factors, e.g. meaning and precision, which call for the use of precise terms, i.e. technical terms. Thirdly, the opinion presented by Jerzy Pieńkos (1999) and Maciej Zieliński (1972) that it is general language which in legal contexts deforms the meaning of a message and introduces confusion and miscomprehension to the recipient has its supporters. How much useful is a message which, despite being clear and simple, does not convey the right meaning and does not express the intention of the author?

The only reasonable behaviour in that case is to save common sense and keep the balance between precision and plainness, providing the recipient with an efficient, coherent and accurate message. In order to conduct a satisfactory process of modernising legal discourse without prejudice to its effectiveness one has to avoid “fake simplicity” (Orwell 1946, 264) and the desire for “repairing” texts with simple words and sweeping away precision and, at the same time, the clarity of the message. The plain language movement should be supported in its efforts to achieve clear texts deprived of archaic expressions such as *witnesseth*, *hereinafter* or *notwithstanding the forgoing*, the modal verb *shall* or pronominal adverbs and wordiness to equip modern documents with more fresh and natural sounding language, however, there is a thin line between ease and expertise which should not be crossed.

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