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A Discussion on Controversial Features in Legal Language

Abstract

Language issues, such as genre analysis, syntax, and lexicon have been topics in the areas of ESP[1], LSP[2], and Linguistics. This article aims to discuss some controversial features in legal language from an angle of practicality to look at the legal language's nature, semantic interpretations, and perceptional difference over the statutes applied to real cases. Hu (2008) points out that vagueness is the primary problem in legal language, which contradicts the goal of precision. However, in this paper we hold a rather reserved attitude and instead suggest that vagueness is a necessary feature in legal language. In support of our ideas, we cite real-case examples from Anglo-American court judgments. Besides, we also propose several new perspectives, such as the elements of legal wisdom and reasoning behind legal language that have long been neglected.

1. Introduction

Swales and Bhatia (1982) point out that English for Legal Purposes (ELP) is an important but relatively uncultivated corner of the ESP field. One of the reasons could be the involvement in two areas of specialty, English legal language and the law, leading to more challenges than GE (General English) teachers expect. According to Richards/Rodgers (2001), there are three major factors needed to be taken into consideration prior to construct language teaching method, among which *approach* stresses the language's nature, familiarization, structure, and learning process. Thus, getting familiarity with English legal language and the law becomes a necessary condition for the ELP teachers on ELP teaching. According to Gibbons (1994), the research on the language and law usually falls within three major categories: (1) the study of language as a subject of the law, (2) the study of spoken language in legal setting, and (3) the study of written language of the law. The first category discusses the sources of the law, the origination of legal process, including statutory drafting for legislative purposes, and frame semantics in linguistic application. The second category involves forensic linguistics[3], from pre-trial to trial processes including police interview, language evidence in crime investigation, courtroom discourse, witness credibility, cross-exams, and plea bargaining. The third category covers legal language issues, its nature, and linguistic features in legal texts, which are a lot different from those of General English. In this thesis, we try to explore the third category with a focus on the controversial features in legal language. In addition, we also attempt to propose new findings which include legal logic, legal lexicon's flexibility reserving a certain degree of freedom for reasoning, semantic interpretations, and perceptional differences in legal language which have long been overlooked.

1 English for Specific Purposes.

2 Language for Specific Purposes.

3 Shuy (1993), Coulthard (1997), and Olsson (2004) believe that linguists could be of service to the judicial system, where linguists act as expert witnesses in cases involving language arguments.

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2. Methodology and instruments

This paper is based on the methodology of content research. The instrument employed in this study is Anglo-American court judgments. According to Carter (1997), the case method has been viewed as the most important learning method in law schools, such as Harvard University where casebooks are the primary materials used in classroom. A court judgment consists of approximately twenty to forty pages or more. There are many universities in Taiwan, i.e. Soochow University, the School of Law, that also have adopted Anglo-American real cases as teaching materials. Another reason to use the authentic materials is because the language displayed in the court judgments[4] and statutes is the most direct presence of English legal language.

3. Literature Review

3.1. What is ELP

ELP is a course designed for learners who need to use English for the study of the law and in the legal profession. Since ELP is also a specific language course, the learners could be those who speak English as a foreign language. According to Hutchinson/Waters (1987: 16-18), ELP is one subdivision of ESS (English for Social Studies) in the ELT (English Language Teaching), and in the continuum of ELT course types (Dudley-Evans/St John 1998: 9) Legal English is at position four. ELP, no matter where it is put, always has its place. In brief, ELP or Legal English (LE) can be designed separately for two purposes, one for academic and the other for occupational purpose. ELP links two areas of specialty: English language and the law. The ELP teacher is presumed to face the problem of semantic interpretations over the statutes associated with the taught content. Although ELP teaching does not get involved in case analysis or legal arguments, legal texts and statutory contents are written in the language of the law.

3.2. The language of the law

What is the language of the law? There are a number of papers discussing on this issue, and here we give a brief rundown on some of them. First of all, we must know David Mellinkoff (1915-1999) because his research to these questions is the most highly praised. Mellinkoff (1963) criticized law for thriving on gobbledygook and also a profession of words. He strongly disagreed with lawyers' age-old use of technical legal language. He stressed that to be of any use, the language of the law (as any other language) must not only express but convey thought. With communication the object, the principle of simplicity would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference. Martin (2000: January) compliments Millinkoff on the enemy of legalese, whose work threw not merely a topical subject but also a movement in the 1970's and 1980's to simplify insurance policies and other consumer documents, to make state and federal legislation more efficient and to add writing instruction to law school curriculums. Mellinkoff (1982) further suggested the movement for simplicity and clarity in legal writing, which makes him the most enthusiastic advocator of *plain language* in the language of the law.

Elliott (1991) thinks that the problems of legal English did not start in the last century, and to understand its background and origin, it is necessary to go back to 1066 and before, to a time when the language of the law, the courts and decision-makers was predominantly Latin, written by priests, judges, and counselors to the Sovereign. Elliott gives a description of historical background to account for why Latin and old French words remain in legal language in which most of the legal lexicon looks abstruse to modern people.

4 Most court judgments can be found and freely downloaded from www.westlaw.com by keying the case name and citation numbers, for example, United States v. Robinson, 414 U.S. 218, 94 S. Ct.467, 38 L.Ed. 2d 427 (1973). The formats of casebooks provided by different sources may be slightly different but the full texts of cases are same.

Gibbons (1994) believes that the language of the law is distant in character from the every day language of conversation on most possible parameters. Every day conversation, which most linguists consider the most basic form of language, is often contextualized, referring to participants ad actions around the speakers. Legal documents, on the contrary, are mostly decontextualized, attempting through various means to encompass general classes of events and participants. In other words, the language of the law is full of terms of art and jargons, much of it incomprehensible to the layman who may not know the underlying legal concepts to which the jargon refers. The technicality in legal documents including grammar, vocabulary, formatting, and cohesion, is different from that of any other language.

Tiersma (1999) points out that one of the great paradoxes about the legal profession is 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. He strongly suggests that arcane vocabulary should be avoided in legal language and proposes simplicity in legal texts. Obviously, Tiersma's perspectives are in support of Mellinkoff's opinions which contend the use of plain language in legal texts.

In Taiwan, there are few researchers also involved in the research of legal language. Tsai (2006) initiates a corpus-based case study in search of the characteristics of legal language in Chinese Mandarin, in which some issues like corpus-based approach, and the merits and limitation of implementing a small corpus of legal language are discussed. His thesis is based on the purpose of legislative language, and the relation for the search of semantic units and function of legislative language in Chinese Mandarin.

Huang (2007) explores the semantics of legal language used in the criminal law, and analyzes the semantic differences between common citizens and legal professionals in reading the law. In her research, qualitative data are analyzed based on two linguistic theories, speech act theory and frame semantics.

Hu (2008) proposes that vagueness is the primary problem in legal language, which contradicts the ultimate goal of legal language - precision. In Hu's thesis, there are a variety of disputes over what interpreted words or terms in the legal system should be made. How do judges strike the balance between vagueness (uncertainty) and precision (certainty). Hu cites many statutes from the criminal law and explores the meanings of words, in which the linguistic approaches such as frame semantics, checklist theory, and prototype theory are used to construct the frame of legal language.

4. Questions and controversial features

From the existing literature, we can see that legal language has been criticized as an arcane language, and some legal issues have been discussed a lot as well, including the semantic interpretations and specific linguistic features. Among those discussions on the features of legal language, vagueness and precision seem the most controversial. We assume that legal language's nature aims to deliver clear legal information, not to cause more confusion and arguments. In that case, legal language is supposed to be a correct and clear language; otherwise, it would turn out to be a laughingstock, against the law-abiding rule. However, Hu (2008) points out that vagueness is the primary problem in legal language, which contradicts the ultimate goal of precision. Hu's suggestions are apparently problematic. First of all, vagueness should be viewed as a problem, or it is actually one of legal language's features? And is that appropriate to denote vagueness 'uncertainty'? Secondly, is precision the ultimatum goal of legal language? Can the statutes and rules be always precise? If the answer is negative, then what the reasons would be based on our assumption of legal language's nature mentioned above? To find out the answers, we have studied thirty-eight copies of Anglo-American court judgments by random sampling and have the following results and findings.

4.1. Simplicity vs. vagueness

With respect to the style of statutory drafting, the so-called legal language used has been discussed and summarized as certainty, clarity, complexity, comprehensiveness, consistency, precision, simplicity, ordinary meaning, vagueness, and detail (Thornton 1996; Dickerson 1986; Doonan 1995; Stark 1996). Among these features, the most controversial ones are complexity and vagueness because they conflict with detail, clarity, precision, simplicity. Let us examine these controversial features in the following examples and see how they conflict somewhat in some places but also interact with one another independently. Firstly, simplicity is supposed to be an advantage but it is also accompanied by vagueness in example (1) below:

> (1) [Instruction on manslaughter][5]
>
> [D] The essential elements of the offense of manslaughter, each of which the **Government** must prove **beyond a reasonable doubt** are: …
>
> (3) That the heat of passion was caused by **adequate provocation**; and …
>
> [L] It is necessary that the homicide has been committed without legal **justification or excuse**.

From [Instruction on manslaughter], **Government** in clause [D] does not signify clearly the representative subject, and it can denote the court, the states, or the government. Next, *beyond a* **reasonable** *doubt* does not specify the rational extent, which thus leaves room for imagination. **Adequate** in point (3)**,** is not given a standard measurement of adequacy and inadequacy, which thus increases vagueness. And in [L] the meanings of **justification** and **excuse** are beautiful words but somehow vague as well. If the law aims to be made with great precision, then it is impossible to give explanations with rough ideas.

Vagueness is not equal to ambiguity or uncertainty. The former means flexibility to a certain extent, and the latter points to various definitions. That is to say, if vagueness is reasonably used under certain situations, it is not only acceptable but also provides degree of freedom for supplementary interpretations. In the case of State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984)[6], there is a dispute between the consenting and dissenting judges over self-defense interpretations. The issue in the case is whether the defendant can contend her act purely in self-defense or not? If self-defense is applicable to this case, Kelly's killing her husband is justifiable. In the case, the Chief Justice, Wilentz, gave a very crucial opinion below:

> (2) …the court held that it was reversible error to instruct the jury that self-defense must be a response to reasonable belief that it is necessary to defend oneself against **immediate use of unlawful force**, rather than **imminent use**….
>
> (3) Expert testimony is admissible to prove the nature and effect of wife-beating just as it is admissible to prove the standard mental state of hostages, prisoners of war, and others under long-term life-threatening conditions. Thus, we can see the use of the word 'immediate' in the instruction on self-defense places undue emphasis on the immediate action of the deceased, and obliterates the nature of

5 D.C. Bar Association, Criminal Jury Instructions for the District of Columbia, No. 87, 1966; is also cited by Holmes v. Director of Public Prosecutions in [1946] A.C. 588, [1946] 2 All E.R. 124, H.L. There are clauses (A) to (J) under [Instruction on manslaughter], and we only cite three of them as examples in here.

6 The fact's excerpt: On May 24, 1980, defendant, Gladys Kelly, stabbed her husband, Ernest, with a pair of scissors. He died shortly thereafter at a nearby hospital. The couple had been married for seven years, during which time Ernest had periodically attacked Gladys. According to Ms. Kelly, he assaulted her that afternoon, and she stabbed him in self-defense, fearing that he would kill her if she did not act. Ms. Kelly was indicted for murder. At trial, she did not deny stabbing her husband, but asserted that her action was in self-defense. To establish the requisite state of mind for her self-defense claim, Ms. Kelly called Dr. Lois Veronen as an expert witness to testify about the battered-woman's syndrome. After hearing a lengthy voir dire examination of Dr. Veronen, the trial court ruled that expert testimony concerning the syndrome was inadmissible on the self-defense issue under State v. Bess, 53 N.J. 10, 247 A.2d 669 (1968). Apparently the court believed that the sole purpose of this testimony was to explain and justify defendant's perception of the danger rather than to show the objective reasonableness of that perception. Later, defendant raises six issues on appeal. (State v. Kelly 97 N.J. 178, 478 A.2d 364, 1984)

> the buildup of terror and fear which had been systematically created over a long period of time. 'Imminent' describes the situation more accurately. (State v. Kelly; 97 N.J. 178, 478 A.2d 364 1984)

If precision is the ultimate goal of the law and definitely required of any statutory interpretations without flexibility, then Kelly is guilty. According to the definition of self-defense, it must be a response to defend oneself against *immediate use of unlawful force*. However, what is the reasonable extent for **immediate** use of unlawful force? There is no strict definition to specify the length of time that **immediate** stands for. If we do give a strict definition, e.g. 5 seconds, another question may come up like 'is that reasonable?' The so-called dangerous situation relies on our intuitive judgment at the moment. As noted, vagueness is there in the definition of self-defense. However, maybe legal language is deliberate to give flexibility to a certain extent for logic reasoning in each case. After all, logic reasoning is always crucial, just as the opinions Chief Justice, Wilentz, gives in the case that **imminent** may describe the situation more accurately than **immediate** in consideration of the defendant's state of mind suffering form battered-woman's syndrome. Indeed, *the use of immediate* unlawful force maybe covers most possible situations in a case which would cause a response to defend oneself but apparently not all of the situations. Each single case has its episode which could be far more complicated than we think. The law is a cautious organization built on logic, reasonableness, justification, which does not allow bias and errors contrary to language which is tolerant of different interpretations. When using a language to deliver the law's spirit, every chosen word is extremely important, which can not be incorrect. In this case, correctness is always the primary consideration. In other words, the use of 'immediate' unlawful force is a bit vague but correct. With no restriction on the specific length of time for the definition of *immediate*, it provides the lawman with flexibility, degree of freedom, on reasoning.

4.2. Complexity vs. detail

When trying to explain things clearly, giving a detailed account is unavoidable. However, the more we try to say, the more confusion may be caused. Therefore, complexity and detail may be somehow to a certain extent linked. Besides, it is impossible to write all the unpredictable and possible situations into the statutes. In this case, statutory drafting can only consider a certain amount of reasonable situations, but still not all of them. This kind of language phenomena appears mostly in the rules, statutes, and laws. In spite of this, legal language's nature, which is believed, aims to give a clear and correct account or instructions not to make more confusion. If that is truly so, vagueness is allowed in legal language because simplicity may lead to vagueness; and by giving a clearer explanation, it may generate complexity. At the same time, legal language also attempts to keep its solemnity and precision. However, all the features may conflict with each other somehow but they also coexist with one another in legal language. Let us look the following examples.

> (4) If one person is perpetrating or attempting to perpetrate a rape and one or more other persons aids and abets him in so doing, and the first of these persons **in the course of the rape or attempted rape, as a part of the rape or attempted rape**, kills a human being, then the person or persons who aided him in the rape or attempted rape and the person who committed the killing are all guilty of murder in the first degree. (United States v. Heinlein, 490 F.2d 725 D.C.Cir., 1973)

> (5) Construing a statute providing an increased sentence for someone who is armed with a deadly weapon at the time of commission of the offense, the court concluded that the statute does not apply to someone whose accomplice is **armed without the former's knowledge**. The statute, it said, requires a special finding of fact that an accused was either actually **armed with a deadly weapon** or was **constructively armed** with such a weapon. The phrase constructively armed with a deadly weapon and the accused must have had knowledge that the accomplice was so armed. (State v. McKim, 98 Wash.2d 111, 653 P.2d 1040, 1982)

In examples (4) and (5), they look complicated because they give a detailed description to differentiate each behavior and its involved degree in crime. However, they also look confusing, such as *armed without the former's knowledge*, *constructively armed with such a weapon*, etc. in exam-

ple (5). Especially the exact definitions of **knowledge** and **constructively** are not clearly given. In these two examples, the feature of vagueness does exist, so do detail and complexity. Principally, in order to decrease complexity and to satisfy simplicity, detail should be avoided, whereas without detail it may generate vagueness. In other words, these features in fact coexist. All in all, these features, more or less, affect comprehensibility of legal texts in which semantic interpretations may be thus made different because of perceptional difference of every individual.

Next, the borderline between complexity and detail seems difficult to draw clearly. By looking at the definition of Filled Milk in the *Filled Milk Act* below, it supports our ideas that detail and complexity are just like two sides to one coin, which coexist.

> (6) The Filled Milk Act of Congress of Mar. 4, 1923, defines the term **Filled Milk** as meaning any milk, cream, or skimmed milk, whether or not condensed or dried, etc., to which has been added, or which has been blended or compounded with, any fat or oil other than milk fat, so that the resulting product is in imitation or semblance of milk, cream, or skimmed milk, whether or not condensed, dried, etc.; it declares that Filled Milk, as so defined, '**is an adulterated article of food, injurious to the public health, and its sale constitutes a fraud upon the public'**, and it forbids and penalizes the shipment of such Filled Milk in interstate commerce. Defendant was indicted for shipping interstate certain packages of an article described in the indictment as a compound of condensed skimmed milk and coconut oil made in the imitation or semblance of condensed milk or cream, and further characterized by the indictment in the words of the statute, as 'an adulterated article of food, injurious to the public health.' (United States v. Carolene Products Co., 304 U.S. 144, 1938)

In example (6), the term *filled milk* is given a very detailed definition which differentiates any kinds of milk, from milk, cream, skimmed milk to added, blended or compounded with any fat or oil, etc. However, the detailed description of *Filled Milk* also incurs complexity, such as 'an adulterated article of food', 'injurious to the public health', 'its sale constitutes a fraud upon the public', in which the more redundant words are used, the more confusion there is. In fact, they can be defined as simple as *adulterated milk, harmful to people, its sale is illegal* respectively.

4.3. Comprehensibility vs. perceptional difference

From the examples, the style of statutory drafting appears abstruse to the layman, and anyone of us without full understanding of legal features may easily have wrong perceptions of a statute's interpretation. In the case of Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 (1983), the defendant's perception difference turns out the primary issue, in which the argument is whether petitioner (defendant-appellant) who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity must be released or not because he has been hospitalized for a period longer than he might have served in prison, had he been convicted. Justice Powell in the court judgment reversed the petitioner's appeal request that he is entitled to be released by giving the following opinions:

> (7) In light of the congressional purposes underlying commitment of insanity acquittees, we think petitioner clearly errs in contending that an acquittee's hypothetical maximum sentence provides the constitutional limit for his commitment.…His confinement rests on his continuing illness and dangerousness. Thus, under the District of Columbia statute, no matter how serious the act committed by the acquittee, he may be released within 50 days of his acquittal if he has recovered. In contrast, one who committed a less serious act may be confined for a longer period if he remains ill and dangerous. There simply is no necessary correlation between severity of the offense and length of time necessary for recovery. The length of the acquittee's hypothetical criminal sentence therefore is irrelevant to the purposes of his commitment. (Jones v. United States, 463 U.S. 354, 103 S.Ct. 3043, 77 L.Ed.2d 694 1983)

The case's fact is that petitioner was arrested for attempting to steal a jacket from a department store. Petitioner subsequently pleaded not guilty by reason of insanity, and finally the Superior Court committed him to St. Elizabeth pursuant to §24-301(d)(1). The problem is that his act merely constitutes a petit larceny, a misdemeanor punishable by a maximum prison sentence of one year. Naturally petitioner would think that he could be released no later than one year. This case is

a traditional example of perceptional difference. In most cases, semantic interpretations are associated with perceptional difference affected by comprehensibility of legal language. Can we thus conclude that the statutes are incomprehensible resulting from vagueness? Of course not, the language of the law, we believe, consists of many features, which may appear vague sometimes only because they are unable to be defined with precision under a circumstance unlikely to be expected. However, the style of legal writing tends to use arcane words and professional expressions to defend its solemnity not only for a formality but also as a ritual. As a matter of fact, English legal language must reserve a certain degree of flexibility for logic reasoning to cope with any sudden situations when necessary. There is no denying that individual perception may also affect our comprehension in reading legal texts before we fully understand the spirit and wisdom of law.

5. Research results and findings

Through real-case examples, we can understand why the statutes can not be extremely precise because every case has its complexity and differences from one another. Hu (2008) cites partial statutes without examining their applicability in real cases and then jumps to conclusions quickly. As a consequence, Hu ignores some key features in legal language such as perceptional difference, legal logic, and the degree of freedom for reasoning purposes, and errs on the conclusion of vagueness in the laws contradicting the ultimate goal of legal language – precision. In fact, vagueness is not equal to ambiguity; on the contrary, vagueness is an acceptable feature in legal language aiming to reserve space, degree of freedom, for the purpose of reasoning. For example, **justification** is a vague word, but it satisfies simplicity, conciseness, and correctness. After all, it is not possible to consider all the prospective events conforming to acceptability; in the case the language of the law is prone to simplicity. When simplicity is not good enough, giving a detailed account becomes an option. However, details could unavoidably cause complexity. Since vagueness is not only unavoidable but also acceptable, precision turn outs to be an unreasonable requirement. In other words, vagueness should not be interpreted as uncertainty, and precision is not always accomplishable in real situations. As a consequence, we suggest correctness a more appropriate description of the primary goal of legal drafting.

Whatsoever, the language of the law attempts to deliver discrete and correct messages and instructions in which legal wisdom is hidden in the laws. More examples, such as **a reasonable man**, **a heat of passion**, and **self-defense** are not given exact definitions but they also leave space for logic reasoning applicable to any situation. To sum up our discussions, the statutes are filled with legal logic and wisdom, but the language used in the law is somehow arcane that is also a truth. Through a study of real cases, we prove that vagueness is a necessary feature in legal language, as same as the opinion of Endicott (2000). We agree with Mellinkoff's suggestion of using plain language in legal texts to increase its readability. However, how to strike the balance between legal language's solemnity and practicability is another issue worth further discussing. We believe that legal language is supposed to be more user-friendly able to meet the majority's expectation. After all, law-drafting is for all people, not especially designed for specific people in legal community.

6. Research limitation

ELP points to English language used in all areas of law. Law covers many different sub-fields, including criminal law, civil law, tort law, family law, company law, to commercial law, etc. where English language's usage and writing style could be slightly different from one another. Unfortunately, there is research limitation in this study in which our discussions are on English language used in the case decisions related to criminal law only.

7. Future research

With the increasing globalization of world trade and cross-border commercial transactions, not only law school students but also many workers plan for a career involving international aspects. Under such a circumstance, international litigations and legal issues could be more and more. Based on this unavoidable trend, employers are increasingly searching for employees who can prove that they have the necessary legal English skills to enter the global market. Accordingly, developments in ELP are necessary and predictable. In addition to language issues in ELP, we believe further discussions on ELP curriculum, teaching, as well as materials are also noticeable topics in future research.

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