

**A LINGUISTIC AND DISCOURSE
ANALYSIS OF LEGAL LANGUAGE:
THE RIGHT TO UNDERSTAND LEGAL TEXTS
AND METHODS OF REWRITING THEM**

Thesis presented for the Degree of
DOCTOR OF PHILOSOPHY

in the Department of English
UNIVERSITY OF CAPE TOWN

Ailsa Stewart Smith

February 1999

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

CONTENTS

Chapter	Page
ACKNOWLEDGEMENTS	vi
ABSTRACT	ix
INTRODUCTION	1
1 LANGUAGE, POWER AND IDEOLOGY	4
I. INTRODUCTION	4
II. PERCEPTION OF LANGUAGE	5
III. LANGUAGE AND IDEOLOGY	7
IV. LANGUAGE AND POWER: LEGAL TEXTS AND THE LEGAL PROFESSION	10
2 WRITING AND READING TEXTS	15
I. PROCESSES AND BACKGROUND: REFERENCE, INFERENCE, CONTEXT AND CO-TEXT	15
1. REFERENCE AND CO-REFERENCE	15
2. INFERENCE	16
3. CONTEXT	17
4. CO-TEXT	20
II. TEXT STRUCTURE AND COHESION	21
1. 'NEW' AND 'GIVEN'; 'THEME' AND 'RHEME'	21
2. TOPIC	24
3. TEXTUAL UNITY	27
3 PROBLEMATIC LEXICAL CHARACTERISTICS OF LEGAL TEXTS	29
I. INTRODUCTION: THE RELATIONSHIP BETWEEN LEXIS AND SYNTAX	29
II. LEXICAL CHARACTERISTICS OF LEGAL TEXTS	30
1. SPECIFICITY AND GENERALITY	30
2. TECHNICAL EXPRESSIONS	31
3. FOREIGN AND ARCHAIC WORDS	31
4. COMMON WORDS WITH UNCOMMON MEANINGS	32
5. DOUBLET AND REDUNDANCIES	32
6. COMPOUND AND COMPLEX WORDS	34
7. GENDER REFERENCE	35
8. PREPOSITIONAL PHRASES	36
9. PRONOUNS	37
III. CONCLUSION	37

4	PROBLEMATIC SYNTACTIC FEATURES OF LEGAL TEXTS	39
I.	INTRODUCTION	39
II.	APPROACH TO ANALYSIS OF SENTENCE STRUCTURE	40
III.	MODIFICATION	41
IV.	SENTENCE TYPES	44
1.	COMPOUND SENTENCES	45
2.	COMPLEX SENTENCES	46
(i)	Conditionals	50
(ii)	Prepositional phrases	50
3.	PASSIVE CONSTRUCTIONS	52
(i)	Structure of the passive	53
4.	NEGATIVE UTTERANCES	57
(i)	Adversatives	59
V.	SENTENCE ELEMENTS	61
1.	THE VERB PHRASE	61
(i)	Modality	62
(a)	Modality: subjective and objective	64
(ii)	Tense	65
(a)	Tense and meaning	66
(b)	Tense and modality	68
(iii)	Aspect	69
(a)	Aspect and discourse	70
(iv)	Be and have	71
(v)	The subjunctive mood	73
(vi)	Directives	73
2.	THE NOUN PHRASE	76
(i)	Nominalisations	76
(a)	Abstract reference	78
(b)	Blurring of form class characteristics	79
(c)	Disruption of position: function relationship	80
(d)	Effect on causal relations	81
(ii)	Determiners	81
(a)	Types of determiners	81
(b)	Determiners as attributes	84
(c)	Determiners and propositional truth	85
(iii)	Pronouns	86
(a)	Pronouns and text cohesion	86
VI.	CONCLUSION	89
5	PLAIN LANGUAGE AS A FUNDAMENTAL RIGHT AND A NATIONAL POLICY	90
I.	THE DUTY OF THE STATE TO MAKE LAWS KNOWN	91
II.	PROCESSES OF PUBLICISING THE LAW	94
1.	PROMULGATION	94
2.	CODIFICATION	95
III.	PLAIN LANGUAGE	96
IV.	COUNTERING OBJECTIONS TO PLAIN LANGUAGE	99
V.	THE CASE FOR PLAIN ENGLISH	103

6	THE CASE FOR PLAIN ENGLISH IN SOUTH AFRICA	108
I.	INTRODUCTION	108
1.	LEGAL TRADITIONS AND THE LEGAL PROFESSION	108
2.	LINGUISTIC DIVERSITY IN SOUTH AFRICA	109
(i)	Languages	110
(ii)	Literacy	111
II.	LITERACY	122
1.	DEFINING LITERACY	122
2.	IMPLICATIONS OF DISPARITIES IN LITERACY LEVELS	124
3.	CURRENT STRATEGIES FOR DEALING WITH LITERACY PROBLEMS IN SOUTH AFRICA	125
III.	HOW TO ADDRESS THE CHALLENGES	126
7	REWRITING LEXIS AND SYNTAX	133
I.	INTRODUCTION	133
II.	STRATEGIES FOR DEALING WITH PROBLEMS IN TRADITIONAL LEGAL WRITING	135
1.	SUBSTITUTION	136
2.	PRUNING	136
3.	DEFINING	137
III.	CIRCUMVENTING LEXICAL PROBLEMS	138
1.	UNFAMILIAR TERMS	138
2.	AMBIGUITY	140
3.	REDUNDANCY	141
(i)	Doublets	141
(ii)	Lists	141
4.	POLYSYLLABIC WORDS	142
5.	PROBLEMS WITH SPECIFIC KINDS OF LEXICAL ITEMS	142
(i)	Rewriting nominalisations	142
(ii)	Pronouns	144
(iii)	Dealing with modals	146
IV.	CIRCUMVENTING SYNTACTIC PROBLEMS	148
1.	LONG SENTENCES	150
(i)	Information structuring in multi-clause sentences	150
(ii)	Dealing with coordination	152
(iii)	Dealing with conditions and exceptions	156
(a)	Conditions	156
(b)	Exceptions	157
2.	MARKED SENTENCE STRUCTURES	158
(i)	Passive constructions	158
(ii)	Negative expressions	160

V.	STRATEGIES FOR IMPROVING TEXT COHESION	163
1.	INFORMATION STRUCTURING	163
2.	CONNECTIONS BETWEEN SENTENCES AND TEXT SECTIONS	164
(i)	Reference and lexical cohesion	164
(ii)	Use of conjunctions	165
(iii)	Pronouns	166
(iv)	Determiners	166
(v)	Ellipsis	166
VI.	ORGANISATION AND LAYOUT	167
1.	WHERE TO PLACE DEFINITIONS	167
2.	CROSS-REFERENCING	168
3.	LAYOUT	169
4.	PRINT FORMAT	170
VII.	THE SOUTH AFRICAN SITUATION	171
VII.	CONCLUSION	174
	BIBLIOGRAPHY	176

FIGURES

Figure 1:	Percentages first language speakers of languages spoken in South Africa in 1996	110
Figure 2:	Percentage of the population aged 20 years or more in each educational category by population group in 1996	112
Figure 3:	Literacy categories in adults aged 20 years or more per province against population group per province in 1996	114
Figure 4:	Percentage semi- and non-literate adults aged 20 years or more per province against urbanisation per province in 1996	117
Figure 5:	Pupil:teacher ratios per province (1995) against population group per province (1996)	121

TABLES

Table 1:	Percentage of the population aged 20 years or more in each educational category by population group in 1996	112
Table 2:	Literacy categories in adults aged 20 years or more per province against population group per province in 1996	113
Table 3:	Percentage semi- and non-literate adults aged 20 years or more per province and urbanisation per province in 1996	116
Table 4:	Average pupil:teacher ratios by race (1991)	119
Table 5:	Pupil:teacher ratios per province (1995) and population group per province (1996)	120
Table 6:	Demographic characteristics of respondents in CASE survey	172

ACKNOWLEDGEMENTS

A thesis is, if not actually a labour of love, then certainly a labour to which the writer has to maintain commitment. I have been fortunate that disentangling legal language has continued to fascinate me, but even my inveterate desire to fiddle with other people's writing could not have kept me going throughout the project. This thesis would not have been written without the help and support of many people.

First and foremost, my law supervisor *Tom Bennett* who has given unstintingly of his time, wisdom and knowledge, his rigorous thinking equalled only by his wonderful humour. He was constantly involved and always supportive; a supervisor beyond compare. With apologies to Geoffrey Chaucer (an early promulgator of 'pleyne speche'), 'A bettre *supervisor* I trowe that nowher noon ys'.

Secondly, my husband Richard for his technical skills and expertise. He took on the confounding problems created when computer technology goes awry and threatens to self-destruct. He also project managed what at times seemed unmanageable. I could never have submitted the thesis without all his help.

Without Tom and Richard this thesis would never have been completed; I am so grateful to them, so, Thank You both so much, and may your laughs never diminish in volume!

I am also very grateful to my linguistics supervisor *Kay McCormick*. I benefited so much from her intelligent insights and her remarkable ability to turn disjointed chapters into connected text. I am deeply appreciative of her generosity and unselfishness.

Among the many other friends who contributed to this thesis, three must be singled out for special mention:

Mary Bock who read, reread and advised, and on whose gentle support and encouragement I could always rely;

Roz Emanuel turned hieroglyphics on index cards into a computerised bibliography. Her zest and optimism were always so restorative;

Wendy Kerby, with vigorous intelligence and undimmed humour took on the challenges posed by truculent computer technology.

Thank you all so very much.

My thanks also to others who gave me help, information and encouragement: Terry and Ruth Boxall, Bill Branford, Carli Coetzee, Martin Cutts, Ian Glenn (whose idea this originally was), Joe Kimble, John van der Westhuizen.

The staff of the Faculty of Law at UCT were generous with their time, free with their advice and were unfailingly courteous to a legal illiterate. Thank you all.

The financial assistance of the Centre for Science Development (HSRC, South Africa) towards this research is hereby acknowledged. Opinions expressed in this work, or conclusions arrived at, are those of the author and are not to be attributed to the Centre for Science Development. I am also grateful to the University of Cape Town for the financial assistance provided by UCT and Lestrade scholarships.

At a personal level, above all a quite inadequate thank you to Richard for his unwavering support. In particular, however, I am so very appreciative of the enormous efforts he has put into my thesis, setting aside his own very demanding work to solve technical nightmare's nest and manage the project to an achievable end. Thank you for everything.

To our daughters, Sarah and Emma, my thanks for their care and understanding and their optimistic belief that one day the thesis would be over.

Finally, to my beloved parents, my thanks for a lifetime of unconditional love and for the gift of education.

University of Cape Town

For Richard

carior oculis meis

ABSTRACT

This thesis argues four important features of South African legal and quasi-legal texts:

- First, these have (with a few very recent exceptions), been drafted in a style that is problematic for readers who have no legal training. Explanation is offered as to why this style is used, whose interests are served by it and whose are not (Chapters 1-4).
- Secondly, these texts should be more easily understood by the people affected by them without their having to resort to legal professionals. The assistance of literacy brokers is, however, both acceptable and often essential (Chapters 5-6).
- Thirdly, both legal and quasi-legal texts would be more accessible to people with ten or more years of schooling if certain drafting or redrafting guidelines were followed.
- Fourthly, from the outset these texts could be drafted in simpler language, and existing laws redrafted, if more legal professionals received the appropriate language training (with input from plain language specialists). This training could be situated either in in-service courses or as an obligatory component of the undergraduate curriculum.

The thesis falls into three main sections. The first chapter establishes the connections between language, power and ideology and relates these to the legal profession. Features of legal language that encode its power are identified. Legal genre, legal reference and the classificatory procedures involved in writing legal texts are discussed. These issues are linked to the information presented in chapter two which considers the degree to which legal texts are cohesive, how this affects communication between text and reader and the problems readers encounter in understanding texts generally and legal texts specifically.

Chapters 3 - 4 identify and closely analyse the textual features of legal language that cause comprehension problems. Obviously these involve the lexical and syntactic characteristics of written legal language, but, unlike many other studies of legal language, this thesis does not focus only on these. Text processing and organisation and their effect on comprehension are also dealt with.

From this, the argument for using plainer and simpler language to write legal texts is presented. There are two reasons why this should be done and these are discussed in the following two chapters. Chapter 5 deals with the ethical and constitutional right people have in avowedly democratic countries to understand the laws that bind them. Chapter 6 applies this argument to the South African situation and examines the practical implications of the country's high illiteracy rate. Some 40-50% of South African are illiterate and the majority of the population are not proficient in English. These people cannot afford professional legal advice and have to resort to literacy brokers. Commonly used legal texts must therefore be made intelligible to bilingual literacy mediators or brokers who are not legal professionals.

In the short term, there are guidelines which (if followed) are likely to produce texts that are intelligible to people with ten or more years of schooling, including legal literacy brokers. The Constitutional Assembly's team who evaluated the plain language component of the Constitution conducted extensive testing with a stratified national sample to validate their conclusions. To conduct similar tests in a thesis of this nature was not feasible and the writer has therefore, where necessary, extrapolated from their findings.

Underpinning this thesis is a view of literacy that is more complex than simply the ability to decode syntax and understand word meanings. Writing texts in simple language alone is not enough for them to be read and understood, since understanding is also dependent on what the reader brings to the text in the way of expectations, background knowledge and experience. It must therefore be recognised that the writing and editing that produces texts in accessible English is only the first part of a three part, longer-term process. The second part will require the production of legal and quasi-legal texts in plain versions of the other ten official languages. Finally, there has to be a widespread, successful civic education programme which will help people to develop the knowledge necessary for them to participate more fully in what, for most, is the secondary discourse of legal language.

The thesis concludes that ordinary people have the right to understand the laws that bind them and that writing legal texts in plainer language will be a major step towards granting them this right and making it a reality.

Ailsa E Stewart Smith

Cape Town
January 1999

INTRODUCTION

This thesis argues that South African legal and quasi-legal texts:

- are traditionally drafted in a style that is problematic for non-legal readers;
- should be more easily understood by those affected by them without recourse to legal professionals;
- would become more accessible at a realistic level of education (10 years schooling) if certain drafting and redrafting guidelines were followed;
- could be drafted in simpler language from the outset if more legal professionals received appropriate language training.

Overall, the thesis contends that traditional legal language is unnecessarily complicated, and prevents non-lawyers from understanding legal texts. This use of traditional legal language plays a significant role in establishing and maintaining the power imbalance that exists between legal professionals and lay people. The normative order of any society is constantly being adjusted by government to maintain its particular interests, and in this process legal professionals obviously play a critical role in formulating and drafting laws. Thus state power and legal language are closely linked. Similarly, institutions exercising disproportionate socio-economic power relate to individuals via contracts, codes of conduct and regulations, all of which are phrased in the same type of language. Particularly in post-apartheid South Africa this power imbalance is undemocratic and therefore against the spirit of the constitution. It will be shown why this is so and in what ways legal language can, and should, be written more simply.

The term 'legal texts' is used in this thesis to cover statutes, contracts, regulations and formal advisory documents dealing with obligations. These texts have common linguistic and discourse features and it is therefore possible to generalise about them. Where, however, a comment applies to one type of legal text primarily (or only), this is indicated.

The research process that gave rise to this thesis and the factors that intervened to refocus it, give an insight into the relationship between language and ideology. When I began my research in the late 1980s, I was concerned with the fact that not only did ordinary people have difficulty with the language of law, but many university students wanting to study law were prevented from succeeding because they could not master the intricacies of legal discourse. Since at the time - a period of severe repression during the apartheid era - it seemed unlikely that either the prevailing ideology or the legal system would change, it seemed essential to find a way of isolating the features of legal language that caused difficulty to law students so that better language courses could be devised to help them overcome the difficulties.

In 1990, unexpectedly, the radical transformation of the political system began. Crucial to this process was the notion that ordinary people should not be excluded from information that was in their interest. Hence, motivated by the drive for transparency in all departments of government, an informal parliamentary sub-committee was convened to publicise the need for and investigate the feasibility of making legislation more accessible to ordinary people. A change from an authoritarian style of government, with its attendant disempowerment of ordinary citizens and inaccessible legal texts, to a more democratic government stimulated a call for a radical change in the language of legislation and even private contracts.

A further result of the change in political dispensation was the removal of English, Afrikaans and Latin as qualifying courses for the practice of law. These requirements are obviously no longer necessary since nine of South Africa's indigenous languages were given status as official languages in the new constitution. Although English and Afrikaans no longer have a privileged position according to the new constitution, English remains the *lingua franca* and the language of record in government. For this reason it is still essential that the characteristics of written legal English and their related problems should be well understood.

In this thesis I argue that this understanding is essential in the training of lawyers, and particularly of drafters. There is a body of research on the general characteristics of spoken and written legal discourse. These characteristics have been studied from various angles, for example, what they show of the relationship between language, power and ideology and, at a more practical level, with the goal of rewriting legal texts to make them more comprehensible.

There has been a proliferation of linguistic analyses of legal discourse and the demand for plain language has grown accordingly. This work has not been matched by development of legal arguments supporting people's right to know and understand the law. This gap is the more remarkable since the call for knowing the law is as old as the Twelve Tables compiled in Rome in the fifth century BC.

Drawing on linguistic analyses of legal texts, my research identifies the important lexical and syntactic characteristics of legal language and establishes their interdependence in constructing legal genre. Structure is immensely important not only at the level of sentences but also at the level of the paragraph and text as a whole. It is structure which conceals or reveals crucial relationships between main and subordinate points and between actions and agents. In any attempt to write legal documents whose meanings are clear to the reader, lexis, syntax and discourse structure must be taken into account.

In summary, Chs 1 and 2 of this thesis deal with the relationship between language, power and ideology, particularly in the construction of texts within the legal genre. Ch 2, in particular, examines in some detail the interaction between writer, reader and text. Chs 3 and 4

identify the lexical and syntactic characteristics of legal discourse and describe the difficulties that readers have with some of these features. Chs 5 - 7 emphasise the need to change or modify many of these linguistic features. Ch 5 argues that plain legal language is a fundamental right and should be part of national policy, Ch 6 that this is imperative in South Africa where the literacy problem places an even greater burden on non-legal people and Ch 7 discusses how this can be accomplished. The thrust of the argument is that people have a fundamental right to know and understand their legal relationships. The suggestions for drafting and rewriting legal texts show that by adjusting the traditional style of legal writing, these rights can be realised without incurring any loss of meaning.

Several additional points must be made clear. The subject matter of this thesis involves two disciplines: English (grammar and linguistics) and law. Consequently, what may be obvious, even irritatingly so, to experts from one discipline may not be so to those from another. In order to accommodate readers from both disciplines, I have explained many terms which someone well acquainted with the area (linguistics, for example), may well find unnecessary. However, I believe it is better to include both legal and English readers at the risk of occasionally being over-careful to define and explain.

Secondly, although legal language has not been created and perpetuated by the legal profession solely to establish and maintain their position of power, this is certainly one of its effects. Equally obviously, the specialised language particular to other occupations, particularly professional ones, has the same effect; for example, medicine, engineering and information technology. The point is not that legalese has been knowingly and deliberately created, but that in its traditional form it entrenches the imbalance of power between those who can work effectively with legal texts (legal professionals) and those who cannot (the majority of society). All people have to deal with legal texts, they find them difficult, and this is unnecessary. The argument of this thesis is not based on an uncritical assumption that legalese has been developed simply to preserve a powerful position in society for its practitioners. It is rather that, whatever the many reasons that over time have contributed to the development of this traditional style, it remains obscure to lay people, and it both need not and must not remain so. The high illiteracy rate in South Africa makes a change in written legal style imperative.

Finally, although writing legal texts in more familiar English will go some way to addressing the problems outlined above, this thesis points out that this is only part, albeit an essential part, of a process that must ultimately be extended to all ten official languages.

Ordinary people have a right to understand the laws that bind them. Writing legal texts in simpler language will be a major step towards making this right a reality.

CHAPTER 1

LANGUAGE, POWER AND IDEOLOGY

I. INTRODUCTION

South Africa's new constitution is informed by a spirit of respect for and empowerment of all who live in this country. Recognising that the effect of the constitutional provisions would be weakened if ordinary people could not understand them, the Constitutional Assembly attempted to write a text that would be intelligible to those with little or no formal education. Plain Language experts helped with drafting the document and testing how comprehensible it was for people with different levels of education. A similar process created the final form of the Labour Relations Act, legislation which directly affects many South Africans with little or no formal education. The underlying assumption in both cases was that people have the right to understand the laws that bind them.

In everyday life, people are affected not only by the Constitution and by statutes but also by contracts, wills and the information in texts that precede them. (Henceforth, for convenience all these documents are collectively referred to as 'legal texts'.) It is common experience that even highly educated people find contracts and precontractual documentation very difficult to comprehend. These texts share many of the characteristics which make laws difficult to understand for those who do not have specific training. It might seem common sense that legal texts should be written in a style intelligible to the people who will be bound by them, but common sense and concern for efficiency are not the sole determining factors in the shaping of legal texts. Power relations between the parties involved are also at issue.

Maintenance of power relationships entails the retention of the types of texts that traditionally encode such relationships, changes to these relationships are necessarily accompanied by corresponding changes to the texts that encode them. If there is a move from an authoritarian to a democratic system, as in the case of South Africa, it should follow that those who genuinely endorse the change would also endorse the production of texts that are accessible to those they affect. By contrast, texts encoding relationships where there is no genuine desire to democratise, are unlikely to be re-formed to accommodate the interests of the less powerful.

As will be evident in subsequent chapters, most people in South Africa are not L1 (first or home language) speakers of English or Afrikaans, the languages in which almost all legal texts are written. Many are not literate in those languages; indeed many are not functionally literate at all. If there is genuine concern that no one should be disempowered by the impenetrability of legal and quasi-legal texts, these factors must be taken into account.

Against this background, this thesis argues that, although traditional legal English poses severe comprehension problems for non-legal readers, many of these problems can be resolved by

simplifying legal language. Drafting legal documents that are easier to understand is particularly important in South Africa where the majority of people are insufficiently educated to cope with the complexities of traditional legal English and are thus denied their democratic right to understand laws, contracts and other documents that bind them.

The remainder of this chapter establishes the perception of language and its relationship to power, topics that inform the rest of the thesis. The next three chapters examine the roles of the text structure, lexical and syntactic features traditionally found in legal documents. In each case, general principles are stated and the characteristic peculiarities illustrated by analysing examples. Attention is drawn to the particular features that are known to present difficulty to readers. In the remaining chapters the extent and effect of the literacy problems in South Africa are summarised and a set of guidelines and recommendations are developed for rewriting legal texts to simplify them and make them more comprehensible.

II. PERCEPTION OF LANGUAGE

Language is a symbolic system essential to human experience. Through language people formulate ideas and communicate information, feelings and beliefs¹. Knowledge of a language enables the user to combine sentences into larger units or discourses to express and communicate complex thoughts and ideas. 'Well structured discourse follows certain rules and maxims, such as "be relevant," that makes the discourse coherent. There are also grammatical rules that affect discourse'.² Analysis of discourse involves linguistic analysis of units of language in order to identify 'the unspoken rituals, strategies, and implications built (unconsciously) into them and the inferences to be drawn from them'.³ This concept of discourse is based on a perception of language as embedded in social reality rather than of a system existing outside it.⁴ This perception is central to the analysis of legal language in this study.

While it is no doubt true that '[M]an can be seen as language, as the intersection of the social, historical and individual'⁵, it is less obvious whether individuals and broader social processes determine language forms or vice versa. This question has led to an enduring debate amongst linguists and philosophers⁶. On the one hand, individuals subjectively formulate utterances for their own specific purposes, and their formulations are influenced by the ideologies and power divisions in

¹ Pinker *The Language Instinct*, 18-22.

² Fromkin and Rodman *An Introduction to Language*, 165.

³ Burchfield (ed) *The New Fowler's Modern English Usage*, 216. This thesis, however, challenges the notion that all strategies and inferences are unconsciously presented in discourse.

⁴ Fairclough *Language and Power* 24 also sees discourse playing an active role in society and social relations. Discourse is a process that involves the production and interpretation of texts. Any instance of discourse is simultaneously a piece of text, an instance of discursive practice and an instance of social practice. See also Fairclough *Discourse and Social Change* 4.

⁵ Coward and Ellis *Language and Materialism*, 1.

⁶ See for example, Lyons J (ed) *New Horizons in Linguistics*, 142 ff., Whorf in Carroll (ed) *Language Thought and Reality*, 213-4 and Pinker's theory (n1), 55-82.

society. On the other hand, language is no mere reflex of individual thought and social process. Because it supplies the means of expression from which choices are made, language itself exerts an influence on patterns of thought. The claim that language does not represent an external and independently knowable reality, but rather constitutes that reality, is very much part of postmodernist and poststructuralist thinking.⁷

According to Foucault,⁸ for instance, discourse actively constructs society by directing conceptual frameworks for thought, by evaluating what is considered worthwhile knowledge and by fixing social subjects and relationships. '[T]he speaking subject [is not] outside the system, operating it and unaffected by it. The subject is caught in the moment of enunciation, and is in some way constructed by it, put in place by it'.⁹ Particularly relevant to an understanding of the functions of legal language is Kress's account of the organisational role that discourses play. He says that discourses are 'systematically-organised sets of statements which give expression to the meanings and values of an institution. Beyond that they define, describe and delimit what it is possible to say and not possible to say (and by extension - what is possible to do or not to do) with respect to the area of concern of that institution, whether marginally or centrally'.¹⁰

Discourses do not occur in isolation. Each exists within a larger system of discourses, some of which oppose or contradict the current discourse. The choices to be made by writers are influenced by an accumulation of discourses.¹¹ Hence, each particular discourse occurs against a pre-existing 'reality' of preconstituted ideas and social subjects, which affects choices made in subsequent discourses.¹² Present texts affect the reading and interpretation of contemporary and historically prior texts, a circumstance of 'intertextuality' that produces a cumulative effect on the reader. When readers confront an instance of a particular type of discourse for the first time, however, they are disadvantaged by their lack of knowledge of the other texts that helped to constitute it. This is particularly striking and problematic in the case of lay people reading legal texts (as will be shown in chapters 2, 3 and 4).

The content and structure of the many discourses occurring on a particular topic create and sustain particular world views. Hence, an analysis of texts can reveal much about dominant thought patterns, the interests of power groups and the political and social structures supporting them.¹³ The

⁷ Bertens *The Idea of the Postmodern, a History*, 1.

⁸ Coward and Ellis (n5) 62.

⁹ Foucault in Fairclough *Discourse and Social Change* 39.

¹⁰ Kress *Linguistic Processes in Sociocultural Practice* 7

¹¹ Foucault's view that objects of knowledge and social subjects are shaped by discursive practices (see Ch.1) puts discourse into an active (not passive) relation to reality. Cited in Fairclough (n9) 42-3.

¹² This principle applies to written as well as spoken language. Deconstructionalist theory works with texts from this perspective. In legal texts a simple example is the 'textual mapping' feature, i.e. the use of reference to other parts of a document for relevant information. See Maley 'The Language of the Law' in Gibbons (ed) *Language and the Law* 25.

¹³ Mackenzie in Fairclough (ed) *Critical Language Awareness* 226.

rest of this chapter considers in broad terms the connections between language, power and ideology, and the law. Subsequent chapters will examine the linguistic devices traditionally used to encode and maintain certain power and ideological positions in legal and official texts.

III. LANGUAGE AND IDEOLOGY

The ideology underlying a legal system is reflected in its language¹⁴, and, conversely, the cumulative effect of laws and the language in which they are inscribed is to support a prevailing ideology. The opposite also holds true, of course. Through language and other means, ideologies may be challenged and adjusted (which is evident in South Africa's recent history).

In common parlance, ideology denotes the thoughts, emotions and attitudes employed by political actors to motivate and legitimate their actions. In early Marxist theory, ideology denoted a distorted or corrupted view of reality.¹⁵ Later it came to be regarded not as a mere illusion but rather as a partial representation of the world.¹⁶ In the metaphor of the stage, reality provided a script which ideology modified through directions as to intonation, tone and emphasis.

An ideology predetermines a subject's available choices or at least predisposes people to think in particular ways about the world.¹⁷ Certain institutions or 'ideological state apparatuses' - classically the church, schools and the legal system - select, ordain and control representations of the world.¹⁸ By restricting certain, crucial signifiers to particular meanings, these institutions limit perceptions of reality to a closed set of choices. This understanding of ideology does not deny the possibility of free action, for individuals can still act and take responsibility for their actions,¹⁹ but the decision to act is influenced by how individuals perceive their roles in relation to other individuals and institutions in society.²⁰

Classification of certain beliefs and values as appropriate (or others as inappropriate) is fundamental to an ideology²¹. From a range of possible options some are chosen and others discarded. Not only inclusion but also exclusion is implied in this process, and it should be noted that

¹⁴ Kress and Hodge *Language as Ideology* 63 and Fowler, Hodge, Kress and Trew *Language and Control* 186.

¹⁵ An understanding that was radically changed by the work of Gramsci, who showed that class domination resulted as much from the consensus of the dominated as from their physical repression. See Hall *On Ideology* 45ff and Milner *Contemporary Cultural Theory* 66ff.

¹⁶ Althusser's contribution in, inter alia, *Lenin and Philosophy* 141ff was critical in this regard. See McLennan *On Ideology* 77 ff.

¹⁷ See Butler *Interpretation, Deconstruction and Ideology* 103ff.

¹⁸ Althusser cited in Fowler in van Dijk (ed) *Handbook of Discourse Analysis* 67. 'Ideology is always more than ideas; it is a material force in that it constructs subjects in specific relation to the social relations. The materiality of this force is affirmed by its investment in concrete institutions.' Coward and Ellis (n5) 73.

¹⁹ The more subjects feel that they are the initiators of their acts, the less constraining the ideology. The reverse is also true: Coward and Ellis (n5) 67.

²⁰ In three related propositions, Fowler et al. (14) identify language as an integral part of social process. They contend that: the language used and received by individuals embodies specific views of reality; language is part of the social process, not simply an effect of social organisation and process: the discourses of groups and institutions are inseparably related to social and economic factors.

²¹ Classification supports an ideology by controlling both physical and social reality and society's control over conceptions of that reality: Kress and Hodge (n14) 63.

exclusion is as effective an ideological mechanism as inclusion, for whatever is omitted is treated as if it has no existence. Hence, whatever is ideologically unacceptable may either be expressed in negative terms or omitted. 'Showing less means someone else seeing less. And seeing less means thinking less.'²²

Classification is fundamental to all language operations, since appropriate language forms, whether syntactic or lexical, are continuously being selected in the process of formulating utterances. Aspects of Saussure's concepts of 'langue' and 'parole' are relevant here. 'Langue' is the abstract system of language from which individuals draw to formulate their own, particular usages, 'parole'.²³ Any language user has a general understanding of what words are germane to a situation and in what patterns they may be arranged. Thus classification denotes a set of 'basic assumptions about reality which are built into the language at so deep a level that they act largely unconsciously'²⁴. Choices are not always unconscious, however, for, whenever the range of permissible forms is restricted, deliberate selections must be made from existing categories in the classification system. This is particularly true when the user is working with the High form (or register) of a language, as writers of legal texts do.²⁵

A classification system may be constructed for a specific purpose and it can be modified by factors external to language, such as changes in the economic, social, political, technological or ideological environment.²⁶ Currently, significant classification systems in South Africa are being rejected or revised in the light of political changes.

Literary texts encourage varied and individualistic expression, but legal and other professional texts demand compliance with certain external constraints.²⁷ To produce texts conforming to the recognised format, deliberate choices have to be made, based on an established classification of vocabulary and style. In these circumstances, the classification system tends to empower the group able to work with it and disempower the out-group.

In combination, the features characteristic of legal texts amount to a genre. Genres have specific forms and meanings that derive from and encode the intentions and meanings of social institutions and occasions. They therefore provide significant information on the social situation of a particular community.²⁸ Genre is both restrictive and generative. The legal genre is restrictive in the sense that writers must constantly observe the dictates of a pre-ordained formula if their texts are to

²² Kress and Hodge (n14) 22.

²³ See Norris XXX; Belsey *Critical Practice* 39-40; Culler *The Pursuit of Signs* XXXXX

²⁴ Fowler et al (n14) 63.

²⁵ See Ferguson's comments on diglossia in Hymes (ed) *Language in Culture and Society* 429-439.

²⁶ Kress and Hodge (n14) 64.

²⁷ And knowledge of these constraints distinguishes professionals from non-professionals.

²⁸ Kress (n10) 19.

be read as valid laws.²⁹ It is generative in the sense that distinctive content and internal organisation have the potential to produce more of the same genre.

Particular lexical items, such as technical terms and those that have acquired technical status through semantic appropriation, must be chosen over words in everyday use. (Semantic appropriation works by defining a particular conception of meaning and simultaneously excluding any other meanings.)³⁰ The intention of the text is also conveyed through the syntax framing lexical choices.³¹ Here too, the writer chooses syntactic structures 'classified' as most appropriate for the genre. Legal texts, for instance, show a high incidence of passives, nominalisations and other linguistic characteristics that make the structure of sentences complex and compound.³²

Through the illocutionary force of language,³³ the ideological tenets encoded by legal texts can acquire material existence. Moreover, because law is not only an ideological apparatus but also a 'repressive state apparatus' (which means that law may involve the use of physical force centralised in the state itself to impose a particular construction of the world on all subjects),³⁴ it can both constitute and enforce a reality. Apartheid legislation is a good example of these propositions. The legislative division of South African society into ethnic units was presented as a 'natural' phenomenon. Behaviour that violated limits fixed by the law as 'natural' were perceived as 'unnatural', and punished accordingly. The apartheid world thus rested on linguistic objectification, and society had to conform to the objective world presupposed in the stated rules of law.

Once ideological constructs are accepted, people tend to treat them as absolute and given. The activities of people who are subject to the law then gives the words a referential meaning. For example, the 1950 Population Registration Act³⁵ forced all South African citizens to type themselves by race, thereby giving substance to terms such as 'Coloured', a racial category that had had no previous existence and which had no intrinsic, positive defining characteristics. The racial boundaries linguistically described in the Act (and enforced by the police and judiciary) created and concretized the underlying ideology of racial segregation and white preferment. The Group Areas Act³⁶ of 1950 then cast the racial divisions of apartheid ideology into tangible form by reserving specific areas for

²⁹ Even statutes of different legal systems resemble one another in general format and structure. However, 'The actual configuration of elements, both obligatory and optional, may vary for jurisdiction and certain types of statute have a specific generic structure.' Maley (n12) 19.

³⁰ Goodrich 'Law and Language: An Historical and Cultural Introduction' (1984) 11 No 2 *Journal of Law and Society* 189.

³¹ Hodge and Fowler in Fowler et al (n14) 16.

³² Bhatia 'Cognitive structuring in legislative provisions' in Gibbons (n12) 140.

³³ 'Illocutionary' refers to what an utterance accomplishes when uttered in a specific context. Danet (1980) 14 *Law & Society Review* 458.

³⁴ Althusser (n16) 143-4. See Coward and Ellis (n5) 73.

³⁵ Act 30 of 1950.

³⁶ Act 41 of 1950. This Act was amended and consolidated by Act 77 of 1957 and again by Act 36 of 1996.

the different races. The numerous bureaucratic offices set up to enforce and maintain these legal changes became demonstrable proof of the ideology in practice.³⁷

There can, however, be no absolute correlation between ideology and the law. A legal ideology underlying the legal system can be referred to only at a broad level of generality, since different regimes and legal groups have different ideologies. Some laws remain on the statute books despite changes of government, because they are acceptable to regimes espousing different ideologies. Both apartheid and post-apartheid South Africa protects private ownership of land against squatting, for example.³⁸ A new ideology may have emerged, but this need not necessarily exclude all the values of the previous ideology.

IV. LANGUAGE AND POWER: LEGAL TEXTS AND THE LEGAL PROFESSION

In any society the dominant group will have vested interests which it will seek to retain and protect. The powerful may obviously further their interests through control of legislative, executive and judicial organs of state. Since this group has the power to encode its interests in prescriptive rules, it may legislate boundaries on acceptable behaviour and administer penalties for infraction of those boundaries.

Only persons drawn from the ranks of qualified professionals are entitled to produce and interpret these rules and only the legal profession has authority to mediate the effect of the rules on society. The phrase 'legal profession' generally denotes those who are authorised to administer the law and are professionally qualified to draft and interpret legal texts. For the purpose of this thesis, however, the expressions 'legal profession', 'legal practitioners' and 'law makers' will together be used to distinguish those who are authorised members of that profession from those who are not. The bulk of the population - people who are bound by the largely incomprehensible restrictions of the law - falls into the latter group.

Laws and regulations are encoded in an elaborate development of the standard dialect of a country's dominant language. This form could be said to exist in a diglossic relationship with the standard dialect of everyday usage.³⁹ To give effect to the main concerns of western systems of law - precision and certainty,⁴⁰ - legal texts use 'extensive and obscure etymologies, inert and calcified meanings 'to fix meanings'⁴¹ and thereby to reduce semantic debate. This is contrary to the normal dynamics of language, where meanings are constantly shifting.

³⁷ An example was the Western Areas Removal Scheme of 1954 under which some 60 000 residents of Sophiatown were forcibly removed. Suzman *In No Uncertain Terms* 35.

³⁸ See O'Reagan (1989) 5 *South African Journal of Human Rights* 393.

³⁹ See Ferguson in Hymes (n25). See also Danet (n33) 473-4.

⁴⁰ 'Of all values, the law prizes certainty above all - even occasionally, above the claims of justice.' Maley *The Language of Legislation* 35. See also Danet (n33) 474-86.

⁴¹ Goodrich (n30) 188.

As a 'high' register, legal language is deliberately constructed, the product of learning and specialisation. Because it is by and large incomprehensible to lay people, whoever has control of the conditions under which legal language is used and the knowledge to understand it, has power. The legal profession closely guards its dominion over this language. 'For lawyers language has a special interest because it is the greatest instrument of social control.'⁴² Some opposition to plain language movements,⁴³ which seek to reform legal discourse, may be a manifestation of legal practitioners' fear that they may lose their traditional power positions vis-a-vis non-practitioners.⁴⁴

The interests of the legal profession, as a relatively affluent, educated group, generally tend to overlap with the interests of the dominant group, but an exact identity of interests never exists. Values will obviously differ from individual to individual, depending on accepted ideology, or depending on an individual's membership of a particular specialisation within the legal system, whether as a judge, advocate, attorney, drafter, academic or state bureaucrat.

Members of the legal profession may exploit their privileged knowledge and control of language in various ways. Because laws provide objective standards for behaviour, they must describe precise boundaries for the permitted or forbidden. Legal language exerts a considerable, almost autonomous force, for words 'count' in law. This proposition is true not only because legal texts have a source in the institutions of state power, but also because it is through language that the intentions of a law-giver are made manifest, judgments are pronounced and social behaviour is regulated. Those who do not know how to use the particular language forms characteristic of the law are at a disadvantage.

Because non-lawyers cannot understand the law, they may be distrustful and cynical about it, or cowed and bewildered.⁴⁵ Additionally, not understanding a legal text may have serious consequences for the individual - consequences far more serious than failure to understand utterances in ordinary language. However, ignorance of the meaning of a law is no excuse for non-compliance; people must therefore rely on legal practitioners to assist them in understanding what laws mean. Even when individuals do happen to understand the law, if they have to appear in court, they generally have no authority to argue their own case unless they are accompanied by qualified practitioners.⁴⁶

⁴² Williams cited in Benson (1994-1995) 13 *New York Review of Law & Social Change* 350. This urge to dominate and control is not unique to legal discourse, because '[D]iscourses tend towards exhaustiveness and inclusiveness; that is, they attempt not only for an area of immediate concern to an institution, but attempt to account for increasingly wider areas of concern.' Kress (n10) 86.

⁴³ See Ch 5.

⁴⁴ 'None of the opponents ... oppose clear legislation or better drafting. What they reject is the kind of revolution in *statutory language* (my italics) that codification produced in nineteenth century continental Europe.' Hofman in Prinsloo et al. (eds) *Language, Law and Equality* 97.

⁴⁵ Kimble (1992) 9 *Thomas M Cooley Law Review* 27.

⁴⁶ The small claims courts, established under the Small Claims Courts Act 61 of 1984, are a notable exception to this rule.

Legal texts and utterances do more than encode regulations; they also have a 'performative' function. The term 'performative' was coined by the language philosopher J L Austin,⁴⁷ who distinguished three aspects of utterances: 'locutionary' (the making of sounds), 'illocutionary' (the work an utterance accomplishes in a specific context) and 'perlocutionary' (when in saying the utterance the speaker performs the act mentioned).⁴⁸ When a judge pronounces 'The defendant must pay costs', the statement indicates not only that a decision has been reached but also that the decision is binding on those concerned. Thus, the utterance is 'performative' and directive, in the sense that failure to obey entails a penalty.

The validity of legal performatives lies partly in their being uttered by persons with authority to make the stated action take place. In the example above, the case is disposed of and the words become the act. Only a judge may validly use the formula. A lay person may not use legal language with the same illocutionary and performative force as qualified lawyers.

The performative function of legal language indicates that, if pronounced in appropriate settings, a legal text can create new social relationships and change existing ones. The referential function of language, on the other hand, is to denote preconstituted objects (i.e. concepts and things) thereby 'signifying' the creative and constitutive aspect of language that links the word to the entity it represents.⁴⁹ For example, if a marriage officer were, in the appropriate context, to say to a couple I now pronounce you man and wife, the words would create a new social reality: the conjugal state.⁵⁰ Here we see language, through its referential (or signifying) and performative functions, exerting a direct influence on the creation and maintenance of the social order.

The power (or illocutionary force) of legal texts lies not only in the institutionalised source of the texts but also in the way access to meaning is controlled. Behind the surface meaning of legal language lies another reality, one to which the layperson has no direct access: general conventions and expectations about meaning - a 'cultural syntax' of the law - that differentiates legal language from ordinary language⁵¹. Professionals use these covert meanings when applying laws to particular

⁴⁷ *Philosophical Papers* (1970) and *How to do Things with Words* (1970) cited in Danet (n33) 457-60.

⁴⁸ Other philosophers have drawn on this classification to describe speech acts. Searle *Expression and Meaning* 12-26 identified "assertives" (which commit the speaker to something being the case); "directives" (future-oriented acts that seek to get hearer to do something); "commissives" (which commit the speaker to a future act); "expressives" (which express the speaker's psychological state); 'declarations' (utterances whose successful performance brings about a correspondence between what they say and reality). See also Danet (n33) 457-60. Both Austin and Searle's typologies apply to written utterances also. Crystal *Rediscover Grammar* 28 identifies a range of directive forms that have the common aim of affecting the receiver but where the force used to do this varies from imperious command to benign good wishes. A significant relationship therefore exists between syntactic form and the communication of illocutionary force.

⁴⁹ Fairclough (n9) 60.

⁵⁰ Context is also highly relevant of course. If, for instance, an actor in a play or other unauthorised person were to say I now pronounce you man and wife, their utterance would not change social relations.

⁵¹ Boyd-White 'Essays on the rhetoric and poetics of the law' *Heracles' Bow* 63. See also Kress in van Dijk (n17) 160.

disputes.⁵² Language patterns particular to specialist languages, such as legal language, create 'discursive formations',⁵³ which are the less observable patterns of communication in and about an institution that reflect and recreate the social structure of that institution.⁵⁴

The surface meaning of many legal terms may appear obvious, but, as I shall show in Chapter 3, these terms may have underlying meanings known only to the legal profession. Rules must be encoded in terms flexible enough to anticipate activities that could not be foreseen and detailed by the law-maker. Such rules are usually encoded in highly abstract terms, such as reasonable, just and equitable, with no definable referents. From their grasp of words and phrases with indeterminate meaning, lawyers derive power. Not only do they know the technical meanings of specific words, but they also know the limited range of possible meanings implicit in ambiguous terms. They can manipulate these ambiguities to suit particular occasions.⁵⁵

Hence, the meaning of a word such as reasonable can be fixed only when it is appraised in relation to the facts of particular cases and the legal system as a whole. Explicit indicators of power differences occur when the choice of words from a range of options contained in a set is governed by a known grammatical or lexical system, and that system is known to one party but not the other. When only the legal profession is competent to make that appraisal,⁵⁶ its knowledge carries power.⁵⁷

Language is a powerful medium through which the institutions that preserve existing social hierarchies effect their control on the world.⁵⁸ Knowledge of the appropriate language empowers the professional and disempowers the layperson. Inclusion in or exclusion from this kind of knowledge, however, is not absolutely tied to membership of the legal profession. Access to an understanding of law occurs on a continuum, for members of society are likely to have different levels of comprehension. Whereas *Keep off the grass* is easily understood,⁵⁹ other statements may be almost incomprehensible. If any loan is novated in terms of the Usury Act or otherwise, any security given by the borrower for the loan will apply to the new loan which arises from such novation,⁶⁰ for example, means very little to the uninitiated.

⁵² Much apartheid legislation, for example, while purporting to benefit all race groups, in fact entrenched white dominance. For example, the Prevention of Illegal Squatting Act 52 of 1951, although on the face of it colour-blind, was used principally to evict landless and dispossessed Africans. See O'Reagan (n38).

⁵³ Pecheux (1992) cited in McKenzie (n13) 225.

⁵⁴ McKenzie (n13) 225.

⁵⁵ Goodrich (n30) 178.

⁵⁶ See Boyd White (n51) 62ff.

⁵⁷ See Kress and Hodge (n14) 95-8.

⁵⁸ Fowler in van Dijk (n18) 64.

⁵⁹ This is, of course, only a valid assertion if even simple instructions are in a language in which the user has some competence. Any such competence presupposes literacy. There is also the question of the domain of the reference; i.e. the instruction has to be situated in a supportive or appropriate context. *Keep off the grass* makes no sense if there is no visible grass.

⁶⁰ Terms and Conditions of Revolving Credit Plan (RCP) loans granted by The Standard Bank of South Africa Limited, 06570 – 1991/10 (D-171) SB12.

In order to manage social and political power effectively, the origins of control must be shielded from public scrutiny, for power 'is tolerable only on condition that it masks a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms.'⁶¹ The extent of and intentions behind concealment stem from ideological needs and beliefs. A clear example of this is the 'justification' by the then Minister of Native Affairs, Dr H Verwoerd, of the 1953 Bantu Education Act. This statute deliberately condemned Black children to an inferior education, yet Dr Verwoerd explained it as a policy of reason and concern:

Racial relations cannot improve if the wrong type of education is given to Natives. They cannot improve if the result of Native Education is the creation of frustrated people who as a result of the education they receive have expectations in life which circumstances in South Africa do not allow to be fulfilled immediately... Therefore, good racial relations are spoiled when the correct education is not given.⁶²

Sources of power are kept distant and obscure in several ways. In the first instance, the law-makers themselves⁶³ are often unknown. As a result, they cannot be held accountable for the content and consequences of the laws they passed. The executive branch of government and members of Parliament may be known to their constituents by name, but legal drafters are nearly always anonymous functionaries. What is more, because laws are expected to remain in force long after the time of their promulgation, those who made the laws become both spatially and temporally removed from the society that is to be governed.

The identity of the author of a law (and often the author's real intention) may also be concealed in an impersonal, abstract linguistic form marked by features such as nominalisations, passives and negatives. While the implications of these features will be discussed in a later chapter on syntax, suffice it to say here that certain linguistic forms may eliminate or conceal information about the agent responsible for a process. Competence to use these techniques is empowering, for those involved in producing and interpreting legal texts may know what the deleted information was and why adjustments were made.

When the language of control is backed up by the reality of power, the more massive the deletion, especially of the fact of power and coercion, the more powerful, mystified and irrational is the control.⁶⁴

⁶¹ Foucault *History of Sexuality* vol 186. See also Boyd White (n51) 67 on invisible discourse in legal texts.

⁶² Hansard vol 83, col 3576, 17 September 1953.

⁶³ At least three groups are involved in 'making laws': the executive branch of government and members of Parliament are responsible for the content of a law, which drafters transcribe into the appropriate style.

⁶⁴ Hodge and Fowler in Fowler et al. (n14) 17.

CHAPTER 2

WRITING AND READING TEXTS

I. PROCESSES AND BACKGROUND: REFERENCE, INFERENCE, CONTEXT AND CO-TEXT

In linguistics, the term 'text' is commonly used to denote any passage, whether spoken or written, of whatever length, that forms a unified whole.¹ While its unity is realised by internal features of structure and content,² its intelligibility depends on external factors. These include both its relationship to other texts ('intertextuality') and to the non-textual context. This chapter will examine the relationship between structural features of texts and how readers read and extract meaning from texts. The intelligibility of a particular text depends on the reader's familiarity with other similar or related texts and with the broader context relevant to it. The more distant the worlds of writer and reader, the more difficult it becomes for writers to collaborate with their target readers to facilitate a successful interpretation of the text.

In order to create texts which communicate effectively, writers try to take into account the reader's mental representation of the world that their target readers probably have. This is admittedly a difficult task, because readers have individual ways of understanding based on their own distinctive experiences. '[N]o one individual's discursive history can be exactly that of another, no matter how similar their personal and social histories.'³

The professional writers and the non-lawyers who read legal texts do not draw on fully shared socio-cultural and discourse knowledge. What is more, the inferences people draw from the words they read are unpredictable and matching these inferences exactly to the world is impossible. Thus a lay reader's response to information found in legal texts may be very different to what the writer intended, a difference that creates the greatest potential for misunderstanding by non-lawyers.

None the less, writers can select and present terms so that the world created by the discourse is more accessible. When the linguistic expressions used are familiar to readers, a reader's understanding is more likely to correspond to the writer's intention.

1. REFERENCE AND CO-REFERENCE

The initial meeting place for writers and readers is in the field or domain to which the text refers, for the readers' predisposition to read a text as a coherent unit derives from their experience of the world.⁴ Hence, for each and every linguistic text, a close match of referential understanding between author and reader makes for easier and more successful communication.⁵

¹ Halliday and Hasan *Cohesion in English* 1.

² With the proviso that 'this does not mean there can never be any uncertainty': i.e. textual unity does not guarantee clear and unambiguous meaning. Halliday and Hasan (n1) 1.

³ Kress *Linguistic Processes in Sociocultural Practice* 32.

⁴ Brown and Yule *Discourse Analysis* 201.

⁵ Brown and Yule (n4) 205.

Reference is successful when readers can immediately identify the intended referent from the expression used by the writer. However, reference is more than a relationship between expressions in a text and entities in the world. The meaning of referential terms is affected by both context and, more important in the present argument, co-reference. Words act upon one another 'co-referentially' when they are repeated either in full or as proforms.⁶ Another species of co-reference is 'endophoric reference' whereby the reader is instructed to look inside the text to see what is being referred to.⁷ Such a reference establishes a chain whereby readers can trace back and identify a referent.⁸

2. INFERENCE

Whatever message a writer wishes to convey must, in the first instance, be discovered in the words written; but lexical and syntactic devices are not the only source of meaning.⁹ In order to interpret what the author intended the receiver must draw on prior experience: the process of inference. Thus readers rely on the situation in which a text is encountered, their experience of similar texts, their knowledge of language and their experience of the world.

Language users have vast stores of knowledge and experience on which they can draw to compose and comprehend language. The processing of information may be 'bottom-up' (i.e. interpreting words and patterns in a sentence) or 'top-down' (i.e. combining information that occurred earlier in the text with that presented in the sentence under scrutiny in order to work out meaning).¹⁰ In other words, they make connections between 'world-knowledge' and the 'words on the page'.

Sometimes inference involves no more than restoring a term that had been elided. In Immediately upon receipt of the card the Card Holder must sign the card in the space provided,¹¹ the reader may reasonably infer that it is the Card Holder who will receive the card. In many instances, however, the process is more complex.

Inferences may be elaborative or evaluative.¹² The former implies that readers supply details, which they think can explain poorly connected sections of text. The phrase, Immediately upon receipt of the card, for instance, requires a simple elaborative inference: that it is the *applicant* for the credit card who will receive the card. When making evaluative inferences, however, inference is less simple and less predictable because readers' values and beliefs are involved. Understanding tends to be more individual and personal, and therefore open-ended, because writers cannot accurately predict each reader's evaluative response. The statutory guarantee that Every person shall have the right to life,

⁶ Brown and Yule (n4) 199-204.

⁷ Brown and Yule (n4) 199. 'Exophoric co-reference' requires the hearer or reader to look outside the text to see what is being referred to; Look at that. The terms are attributed to Halliday and Hasan (n1).

⁸ Brown and Yule (n4) 200. This process is more likely to be an occasional strategy than a regular procedure, because it is interruptive and time-consuming.

⁹ Brown and Yule (n4) 223.

¹⁰ Brown and Yule (n4) 234.

¹¹ Standard Bank *Terms and Conditions of Use of Queenspark Card* 2.3.

¹² Warren, Nicholas and Trabasso cited in Brown and Yule (n4) 262 and 268.

for instance, means different things to those against the death penalty and to anti-abortionists, because of what they differently understand by person and right to life.

Brown and Yule explain inference in terms of schemata theories.¹³ According to them, schemata are analogous to socio-culturally determined perceptions of a story-grammar, (i.e. expectations based on perceived elements and associated sequences). They may range from the deterministic,¹⁴ such as the effect of racial prejudice, to the active and developing,¹⁵ i.e. a knowledge base which changes continually with experience and supplies information perceived to be appropriate. Since writers cannot know exactly what sorts of schemata readers will bring to a text, it is impossible for them to predict exactly how a reader will receive their work. None the less, writers must acknowledge that readers will bring individual schemata to their interpretation of discourse.

Because inference works on supplying what is presumed to be missing, it is a process operated by *readers* not by *texts*,¹⁶ a fact that has significant implications for writers. The process of inference shows that reading is interactive, for the linguistic configuration and situation of a text affect the way readers acquire information. Since readers expect coherence, they look to the available evidence to support their assumption. The margin for error in drawing inferences from the text depends on how it guides or obstructs a reader's understanding.¹⁷

Texts are clear when their structures are expected, known and logically connected, since readers are better equipped to predict what will come next and when to refer back to discover connections. (In this regard, a clear structure of given-new and theme-rheme is essential - see discussion in II 1 below, particularly n41.) Where a chain of causation is not clear, readers cannot supply answers to fundamental questions about the text: who, what and where? Instead, using their knowledge of the world, as seems appropriate to understanding the text, readers must rely on inference. If their knowledge is faulty, their inferences will inevitably be skewed.

3. CONTEXT

Factors affecting communication lie both within the text (co-text) and outside it (context).¹⁸ The former refers to the grammatical structures in which terms are placed and the latter to the wider physical, social and textual environment(s) in which a text was written and is being read.

Understanding context is vital for the reader, because it may help to determine an obscure meaning, and different contexts dictate the entailment or the range of possible meanings of a term.

¹³ See Brown and Yule (n4) 238-56.

¹⁴ Brown and Yule (n4) 247-8.

¹⁵ Brown and Yule (n4) 249-50.

¹⁶ Brown and Yule (n4) 260.

¹⁷ Drawing inferences is a 'process which is context-dependent, text-specific and located in an individual reader (hearer)'. Brown and Yule (n4) 266.

¹⁸ Brown and Yule (n4) 35, 46.

(Entailment refers to the limiting of possible interpretations.) In the interests of certainty, legal language aims at a high degree of entailment by fixing the meaning of many commonly used terms. When meaning is successfully fixed, the importance of context is reduced, since interpretation by that means becomes unnecessary.

Love contends that the operations of legal language are 'context-neutral'.¹⁹ His argument is based on a 'fixed code' theory,²⁰ namely, that words have meanings fixed in relation to all other words and that meaning is not dependent upon reference to some outer reality. He demonstrates this argument by pointing to judicial methods of resolving disputes about meaning. The authors of statutes are never called upon to declare what they meant by particular words and syntactic structures. Instead, 'demand is made of the form of words which constitute the law that it yield a determinate answer ... the words in which a law is couched are taken in this sense to have a life of their own.'²¹

According to Love's theory, therefore, the meaning of legal terms seems to owe nothing to a wider social context. This proposition is debatable. Context must always be relevant since it is, in part, the institutional and ideological domain in which legal texts operate.²² In any event Love's argument can be supported only if it suggests that legal language operates in a context that is, because of its specialisation, insulated from society. My argument, however, is that legal language is not insulated from society; in fact it enters into the context of people's everyday lives because of the regulations that bind society.

Having established that context is important, it is now necessary to explore types of context. Every referent has two contexts. One is the present context or immediate environment, such as a paragraph of text in which the referent occurs.²³ This occurrence itself is affected by the role or function of the referent in the extended text or co-text, namely, what has gone before and how it links with what is to come.²⁴ In addition, all text is affected by exterior factors, namely, the world outside the text. Writers are influenced by their history, the situation and the reasons for writing a text, and readers similarly interpret according to their own experience. Texts communicate their meaning most effectively when writer and reader have similar knowledge of both textual and extra-textual contexts.²⁵

The meaning or effect of words in a given text is affected by three kinds of context. First,

¹⁹ Love (1985) 5 No 1 *Language and Communication* 3

²⁰ Love (n19) 8.

²¹ Love (n19) 8.

²² See Halliday cited in Maley 'The Language of the Law' in Gibbons (ed) *Language and the Law* 15. Halliday claims that a relationship exists between discourse type and social situation. Like Leech's 'domain' (Leech, Deuchar and Hoogenraad *English Grammar for Today* 9-10) Halliday's term 'field' refers to the nature and purpose of the ongoing activity. Both Halliday and Leech therefore consider that meaning shifts according to the type of social situation.

²³ Brown and Yule (n4) 25.

²⁴ Co-text acts as a previous discourse co-ordinate 'which includes specific reference to what has been mentioned before as in phrases like *aforementioned*.' Brown and Yule (n4) 46

²⁵ Factors affecting contextual influence can be termed 'co-ordinates' or 'relevant factors'. Brown and Yule (n4) 38-46.

intention is a crucial context prefiguring all texts. Secondly, the social context in which language is produced, notably the various legal institutions, such as the legislature and judiciary, must be taken into account. Many texts derive their validity, and hence their power to affect users, from social context. For example, the performative sentence, I now pronounce you man and wife, when uttered by a marriage officer has the power to effect a legal change, only if the social context is appropriate. The same pronouncement uttered by an actor in a play has no validity.

The third context is the specialist one: the form in which legal texts may be produced - the 'cultural syntax' - that determines what is to be written.²⁶ Thus context is more than a tangible physical environment.²⁷ It also denotes more text. All texts endlessly defer meaning to other texts in a process of *déference* (to use Derrida's famous neologism). According to Foucault,²⁸ the deferral of meaning generated by inexplicitness within texts is increased by factors external to texts. He perceives an interdependency of the discourse practices of a society or institution, with texts continually drawing upon and transforming other contemporary and historically prior texts. This process he terms 'intertextuality'. It follows that in order to understand legal texts fully readers ought ideally to know the entire corpus of legal writing in a particular legal system.

This (almost) impossible achievement is made even more difficult by the type of analysis demanded of the reader of a legal text in order to arrive at the meaning. Legal language not only informs but also expresses judgment (although as far the non-legal reader is concerned not necessarily explicitly). The meaning of legal terms 'must be determined by a process of interpretation and judgment to which the rule gives no guidance whatever'.²⁹ This is an invisible reasoning process that underlies surface meaning. Hence, the real discourse of the law - a complex linguistic and cultural system - is concealed from non-legal readers.³⁰

It follows that finding out what a legal term means entails more than reference to a dictionary definition. The persevering reader must understand how the rule is applied, as its meaning will vary with circumstance. For instance, Every person shall have the right freely to choose his or her place of residence anywhere in the national territory³¹ may superficially appear to give the information unambiguously that anyone is free to set up residence anywhere in South Africa. But such an apparently unrestricted freedom is in fact more narrowly applied: free choice of residence does not entitle someone to reside on a military base or to take over property owned by someone else.

Even for the lawyer, interpreting the scope of meaning of a legal term defies simple deductive

²⁶ This also indicates that '...the relation between form and content is not arbitrary or conventional, but that form signifies content.' Fowler, Hodge, Kress and Trew *Language and Control* 188.

²⁷ Lyons *Language, Meaning and Context* 220. See also Love's argument about the 'content-neutral' environment of legal terms in this section. Love (n19) *Language and Communication* 3.

²⁸ In *The Archaeology of Knowledge*, cited in Fairclough *Discourse and Social Change* 39.

²⁹ Boyd White *Heracles' Bow* 65.

³⁰ Boyd White (n29) 67.

³¹ Section 19 of Act 200 of 1993.

reasoning, because of implicit meanings which are always liable to be contested. Depending on context, one meaning may supersede another. Both writer and reader require knowledge to understand these different meanings and to decide which one is applicable. What does a term mean in the text in which it occurs? What does it mean in the context of other legal texts?³² And what will it mean in particular cases in which the possible meaning is debated?

In summary, for many (if not most) utterances, meaning can only be understood 'against a set of background assumptions about the contexts in which the sentence could be appropriately uttered'.³³ Obviously all background assumptions cannot be expressed in the text, because they are too numerous. Moreover, when communication occurs between parties of unequal knowledge and power, language has the potential of becoming a covert instrument of control rather than a simple medium of communication.

4. CO-TEXT

Co-text, a previous discourse co-ordinate,³⁴ exerts a constant influence on meaning. Terms must be understood with reference to what precedes and what follows them. Hence co-text operates not only lexically but also syntactically in the sense that the position of a term in a text will affect its meaning. Simple examples of co-text are phrases that specifically refer to preceding text, like the *forementioned*, and devices such as text titles and marginal notes.

Effective communication uses co-text to clarify meaning. In general, 'the more co-text there is, the more secure the interpretation is'.³⁵ In legal documents, however, use of co-text is made especially complex by frequent cross-referencing, a device that may impede comprehension by incorporating information that is not readily available to the reader, especially to the lay reader. Reference to another section in a document, especially to one following the reference, is disruptive. Even greater disruption is caused by reference to another document altogether, such as another statute.

Legal texts also make extensive use of co-text within sentences, a practice that increases the length of the sentence and interrupts the development of clauses. Unlike the patterns of ordinary discourse, which would use co-text to link whole sentences, legal English uses co-text to link clauses. While most other types of discourse 'convey connected information in a series of short sentences which need linking devices to show their continuity ... legal English moves in the opposite direction by putting all such sequences into the form of very complex sentences capable of standing alone'.³⁶

Co-text extends from individual words, to whole utterances, to large chunks of discourse and finally to a world external to the text. Thus co-text ultimately shades off into context, for what a reader

³² How, for example, does a statutory provision relate to the texts of the common law?

³³ Searle *Expression and Meaning* 117.

³⁴ Brown and Yule (n4) 46.

³⁵ Brown and Yule (n4) 50.

³⁶ Crystal and Davy *Investigating English Style* 201.

understands a text to be about will be partially governed by such external factors as where the text is encountered and why it is read.³⁷

II. TEXT STRUCTURE AND COHESION

Texts are organised thematically and in terms of their information structure. Readers assume that the form in which a text is cast will best convey the anticipated content. This section considers the importance of the placing of information, both within sentences and within longer texts. Comments on text structure involve four related frameworks; three from discourse structure: new and given; theme and rheme; topic and stress; and one grammatical: main and subordinate clauses.

1. 'NEW' AND 'GIVEN'; 'THEME' AND 'RHEME'

A critical assumption made by any reader of English is that initial and final units of a text will be semantically and structurally connected. This linkage is implicit, given that sentences are structurally hierarchical and temporally linear (they are spoken, written and read one word after another).³⁸ The basic English sentence pattern is Subject-Verb-Object. Readers expect the meaning of a sentence having this structure to be progressively disclosed as the sentence develops.

Disclosure of meaning may be analysed in terms of one of two dichotomies:³⁹ moving from the 'given' to the 'new' or from the 'theme' to the 'rheme'.⁴⁰ The former emphasises the *coherence* of a text and the latter the organisation of *content* in clauses.⁴¹

'Given' information is that which the addressor believes is known to the addressee. 'New' information is that which the addressor believes is not known to the addressee. Declarative sentences are expected to convey new information, but within them parts (or 'chunks') may say nothing new. Information in such sections is presupposed or backgrounded.⁴² Hence, according to Halliday, 'given'

³⁷ In order to understand a text, readers need to know the answers to a set of *who, what, where* and *when* questions. Warren, Nicholas and Trabasso cited in Brown and Yule (n4) 260.

³⁸ 'One of the constraints on the speaker/writer is that he can produce only one word at a time. When he orders these single words into sentences, and those sentences into texts, he confronts what has come to be called the "linearisation problem".' Brown and Yule (n4) 125. This applies to speech and writing in all languages.

³⁹ Halliday (1970) in Lyons (ed) *New Horizons in Linguistics* 162-4.

⁴⁰ The terms are used to identify the language elements which mark these different information units. The theory that given and new information is presented in linguistically different ways means that meaning is presented through a synthesis of syntax and content. See also Brown and Yule (n4) 154.

Halliday (n39) distinguishes between 'given' and 'new' and 'theme' and 'rheme'. Although there is often an overlap, they are not synonymous terms. 'Given and new thus differ from theme and rheme, though both are textual functions, in that "given" means "here is a point of contact with what you know" (and thus not tied to elements in clause structure), whereas "theme" means "here is the heading to what I am saying".' (163). Brown and Yule (n4) 126ff define theme as the leftmost or starting point of an utterance; rheme is everything else that follows consisting of or referring to the starting point. The generality of the concept rheme aligns with Halliday's distinction, because the position indicated by the term rheme is the only place in the unit where new information could be situated. The connection between theme and rheme also indicates how units of discourse interconnect, i.e. the thematisation or cumulative development of discourse. For the purpose of this thesis, Brown and Yule's definition is more appropriate.

⁴¹ Halliday and Hasan (n1) 325.

⁴² Givón (ed) *Syntax: A Functional-Typological Introduction* 323.

denotes what is 'recoverable either anaphorically or situationally',⁴³ while 'new' denotes information presented by the speaker or writer as 'not being recoverable from the previous discourse'.⁴⁴

Both sets of dichotomies (given and new and theme and rheme) can be used as a framework for the analysis of single sentences or extended texts. Additionally, both the given/new and theme/rheme pairings posit relationships that are already known to readers through their linguistic experience and the acquisition of their language skills. Readers' prior experience leads them to expect these paired concepts to be related to each other through particular sets of linguistic devices; i.e. that there will be a connection between the given and its progression to the new and that the theme will be expanded by rheme information.

Although no mandatory syntactic structures mark 'given' information, there are several *lexical* forms that perform this function. Pronouns and noun and verb phrases very often express what is already known. Hence, information that is already known can be indicated by:

- (i) repetition of words, particularly those in definite expressions; for example, the applicant used repeatedly.
- (ii) words that can reasonably be associated with the semantic field of a previously mentioned lexical unit; i.e. referents whose meanings have context-logical connection; for example, When the judge entered the court, the orderly asked for silence.
- (iii) the back reference (anaphoric) function of pronouns following a full lexical form; for example, The judge entered the court. He wore a red robe.
- (iv) pro-verbals, i.e. verb-like words, such as *do*, that substitute for full verbs. For example, the defendant was asked to admit that he had lied, which he did.

The more a text departs from expected ways of expressing the given-new relationships, the more likely that the purpose of communication will fail. In the case of legal texts, this is a particular danger, because they have a high information content. While readers are generally more amenable to linguistic challenges in literature, because of its genre and the generally more recreational environment in which reading occurs, legal texts are usually consulted only when required (i.e. in a remedial and often stressful situation).

'New' information, on the other hand, may be marked by both lexis and syntax. For instance, noun phrases lacking a definite article (indefinite expressions) introduce new concepts, while definite expressions refer back to known concepts. Although the structure of a sentence may not appear to indicate known and unknown information, it does indicate the writer's presuppositions. Thus within a sentence 'new' tends to follow 'given', in an expected progression.

⁴³ Halliday (n39) 211.

⁴⁴ Halliday (n39) 204. 'New' does not necessarily mean that the information was not previously mentioned, although usually this is the case.

Progression implies movement and, by association, change. Hence the 'given' of one utterance may not be the 'given' of the next, and new information, once delivered, is no longer 'new'. 'New' units displace the 'given', becoming themselves the most recently 'given'. This dynamic not only contains its own inexorable momentum but also facilitates cohesion in discourse.

Expressions referring to previously mentioned information, but in modified form, act as displacing expressions. These do not introduce new referents nor do they exactly repeat earlier ones, but they none the less contain some back reference. Thus a displacing expression remains 'given', because it is known to the reader, but it is no longer the most immediate given.

Modification has a significance that goes beyond the mere addition of information. Terms of modification may give prominence to a referent that has already been mentioned, thereby maintaining the currency of the referent in the discourse (although it is no longer the one most immediately mentioned). In other words, although more, new, information can be added, the earlier referent remains a factor in the meaning of the text. When coupled with the dynamic movement from given to new, modification makes possible the progressive accretion of information. An unmarked term introduces a referent; modification marks this term by adding new information (for example, by inserting adjectives or adverbs) and it develops the scope of meaning.

The way in which modification adds new information to a sentence suggests that both horizontal and vertical dynamics are at work. The former introduces and the latter, by connecting information units, develops meaning. The linear progression of sentences implies a horizontal movement in the accumulation of information, that of given to new. Subordination adds a vertical dimension by linking dependent information to units in the main sentence.

Subordination, however, can be also expressed horizontally and vertically within the same clause.⁴⁵ Grammatically, the difference is that elements modifying a head word are horizontally subordinate to it (Adj+Adj+Adj+Noun). Vertical subordination describes the relationship between subordinate phrases and the main function units of Subject, Verb and Object.

The horizontal-vertical distinction also applies to discourse analysis of the discourse-as-process type. The terms distinguish between how phrases interrelate (horizontal) from the beginning to the end of a sentence, and how interruptions (vertical) to this development affect comprehension. Grammatical and discourse analysis perspectives are thus mutually supportive. By interposing additions, subordination interrupts the linear progression of a sentence, which implies that subordination may impede effective communication. By including information in a subordinate position the writer may obscure what is 'given' information, and also the distinctions between given information, displaced information or new information.

⁴⁵ See Ch 4 III and IV (2) and Leech, Deuchar and Hoogenraad (n22) 137.

Syntactic hierarchy affects comprehension because the relationship between syntactic units reflects the relation between referents. Just as subordinate units postpone realisation of the full meaning of the unit they modify, so the development of 'current given' to 'displaced given' information indicates a development in the meaning of the sentence. Known information, whether or not it ever had new status, is accorded varying degrees of prominence, so that the referents are seen in connection with each other and with the emergent new information. This sliding scale of 'givenness' gives a topic an overall cohesion, for, if ideas have not been discarded, they must be assumed still to be relevant to the topic.

To illustrate the points made above consider the following example. In At its first sitting after it has been convened under section 46(2), and after the election of the President, the National Assembly, with the Chief Justice or a judge of the Supreme Court designated by him or her acting as the chairperson, shall elect one of its members to be the Speaker, and shall thereafter elect another of its members to be the Deputy Speaker,⁴⁶ the usual progression of a sentence from one main unit to the next is seriously disrupted because the information provided by subordinate units must be held in memory until it can be linked to the unit it modifies. In addition, the reader must check each phrase or clause to determine whether it is the main one to which the modifying phrases would apply. Once the main clause has been identified, the modifying information that precedes and follows it must be applied to provide the theme. A reader would then expect to look ahead to discover the rheme - what the rest of the sentence is about - but here, too, intervening subordinating phrases separate process (verb and affected object) from agent (in this case new information about the election of a Speaker). The rheme as a whole thus becomes difficult to understand.

2. TOPIC

The effect of given-new and theme-rheme relationships on reader expectations is rooted in how meaningful discourse functions. Implicit in the communicative function of texts is a 'topic' around which information is marshalled. 'The notion of "topic" is clearly an intuitively satisfactory way of describing the unifying principle which makes one stretch of discourse "about" something and the next stretch "about" something else.'⁴⁷ Topic is therefore, in essence, a common content or theme.⁴⁸

A tension exists between first and last positions in a sentence. Meaning develops as the sentence moves from the first phrase or clause, in the 'topic position', to that in the final 'stress position'.⁴⁹ The final position in a clause or sentence has a significant effect on comprehension, because, until this final position is reached, readers are aware that full meaning has not been realised. '[A] reader is in the stress position when the reader knows there is nothing but the present material left in the

⁴⁶ Section 41(1) of Act 200 of 1983.

⁴⁷ Brown and Yule (n4) 70.

⁴⁸ 'Topic' is not synonymous with 'title'. A title is a deliberately chosen phrase intended to focus a reader's interpretation in the way intended by the writer.

⁴⁹ Gopen (1987) 54 No 4 *The University of Chicago Law Review* 1187 and 1191. See n41 above on the related concepts of 'given' and 'new' and 'theme' and 'rheme'.

sentence.⁵⁰ Apart from concluding the meaning of a sentence, the stress position functions to emphasise information. Because English sentences develop towards a final point, a reader will expect writers to use this position for material they wish to highlight.

Information placed in the topic position initiates movement towards the concluding unit and focuses reader expectations. The topic position also affects the readers' recollection of what they have read. When they cannot understand a sentence, readers tend to reread the beginning and guess at what the rest conveys.⁵¹ Excessive interruptions to the linear progression or using topic and stress positions inappropriately will confound reader expectation.

For example, in At its first sitting after it has been convened under section 130(1), and after the election of the Premier of the province, a provincial legislature with a judge of the Supreme Court designated by the Chief Justice acting as the chairperson, shall elect one of its members to be the Speaker,⁵² the agent (a provincial legislature), of the action, shall elect, is positioned mid-sentence. This important information is difficult to find in such a position. In addition, what is commonly the topic position is filled inappropriately by units that syntactically cannot have topic function.

The preceding six prepositional phrases that modify the noun phrase, a provincial legislature, cannot perform as agents, for they are subordinate structures dependent on a main phrase. Since the meaning of subordinate phrases can only be realised once the main phrase occurs, they cannot function thematically or informatively as main phrases. What is more, the main noun phrase (a provincial legislature) is separated from its process (shall elect) and from the affected entity (one of its members to be the Speaker) by four more modifying structures.

A tension similar to that between first and final positions in a single sentence also connects the sentence sequences that make up extended text.⁵³ The information concluding one sentence can provide the starting point for the next.

Identifying the topic of discourse involves both the writer and reader. Far from being passive recipients of texts, readers have to interpret and reconstruct the text before them. Writers, however, have a fundamental power to influence their readers' reconstruction by the way in which they express their topics. A critical issue in discourse is therefore marking changes of topic or 'topic shift'.⁵⁴ To identify a new topic in a piece of discourse, the writer may insert a paragraph (an orthographic device) or a conjunction. Words like furthermore, however, or consequently typically perform this task.

Identifying a topic in a piece of discourse can seldom be done with precision. In order to write more effectively, however, writers need to be aware of how language forms can indicate what a text is

⁵⁰ Gopen (n49) 1187.

⁵¹ Turk and Kirkman *Effective Writing* 103.

⁵² Section 132 (1) of Act 200 of 1993.

⁵³ See I(3) and (4) above on context and co-text.

⁵⁴ Brown and Yule (n4) 94.

about. For this purpose a 'topic position', situated at the beginning of a unit of discourse, should be identified (see earlier discussion of theme-rheme, p21). Readers will assume that the information contained in this position constitutes the theme of what follows.⁵⁵ The topic position may also, but not invariably, be filled by the grammatical subject.

What is placed in topic position may be the given, depending on how the sentence content relates to preceding sentences, or the new, in order to give introductory prominence to a new concept. Whether 'given' or new, whatever occurs in this position acquires prominence, a consequence that can be syntactically exploited. For example, in *The Commission may establish committees from among its members*,⁵⁶ thematic and grammatical subjects are the same. Because the example is quoted out of context, it is not possible to tell whether *The Commission* is new or given information, although the definite article could indicate that this noun has occurred before and is therefore given. Nevertheless, in this example, the agent in topic position forms an effective comprehension link to the action.

Topic position corresponds to the theme and given concepts, all of which accord significance to the leftmost, or initial, position in a structure. The importance of this introductory position is endorsed by the basic S-V-O syntactic pattern in English. The same principle applies to extended discourse, whether sentences, paragraphs, chapters or books.

Variation, within limits set by the syntactic options available in the language, is obviously permissible. It is therefore both possible and sometimes advisable to adjust the S-V-O pattern to achieve variation and emphasis; for example, when adverbs or adverbial phrases precede the grammatical subject, they locate the utterance in time, place or manner.⁵⁷ The basic premise upon which readers operate is that the action referred to in a discourse occurs within the same time and place situation until they are advised of changes to one or both of these factors. Adverbs commonly perform this function, thus helping to establish spatio-temporal cohesion.

Changing the expected order of syntactic elements has the effect of redirecting reader expectations. In other words, repositioning is a focusing strategy that works with the linear progression of sentences (given to new and theme to rheme). If the leftmost constituent or theme is not the grammatical subject, it still conveys information that is assumed to be important because of its position. Leftmost positioned information provides more definite evidence for what a unit is about; for example, an adverbial phrase of time will emphasise the importance of when an event occurred, and if the information on the agent is less important than knowing the time of the action, the adverbial phrase should occupy the leftmost position, preceding the agent.)

The prominence accorded the information occupying this leftmost position allows writers to use this position for emphasis and 'staging'. 'Staging is a dimension of prose structure which identifies the

⁵⁵ Gopen (n49) 1192.

⁵⁶ Section 169 (1) of Act 200 of 1993.

⁵⁷ Brown and Yule (n4) 46-50.

relative prominence given to various segments of prose discourse.⁵⁸ It allows writers to introduce and emphasise information that the text proceeds to deal with. Effectively used, staging provides a powerful connection between the first item encountered by a reader and what follows. For example, the formulaic *Once upon a time* prepares readers for the historical fiction of a folk tale.

3. TEXTUAL UNITY

All elements in discourse are interdependent. Successful communication is therefore predicated upon a unified, cohesive text, in which structure and content operate in harmony with one another.⁵⁹ Cohesive texts demand less speculation from their readers, so the more writers can do to limit areas for speculation (and the ensuing process of inference) the greater the likelihood that readers will understand what was intended. Highly cohesive texts may require more space to convey information, but they will not demand much interpretive work by inference.⁶⁰

A balance can be struck between cohesiveness and length.⁶¹ Traditionally, legal texts have sacrificed brevity in the interests of cohesiveness, but the devices which ensure cohesiveness, and contribute to text length, create other problems: many features of legal genre interfere with the transmission of information or distract recipients from receiving it.⁶² In fact, as we saw in chapter 1, legal texts may conceal as much as they reveal. Stylistic complexity clearly interferes with transmission from sender to receiver by adding to the filters that affect comprehension of a text.⁶³

The very notion of interdependence of syntax and semantics might seem to indicate a supremacy of structure over content, i.e. that the unity of a text depends more on syntax than on word meanings. Referential meaning, however, also contributes to cohesion both through clear connections between referent meanings and because of readers' expectations. In the process of reading '[w]e are prepared to supply [the underlying semantic relation] for ourselves, and thus to assume that there is cohesion even though it has not been explicitly demonstrated'.⁶⁴

Referential unity is created by both 'cataphoric' and 'anaphoric' relationships. Cataphoric relationships refer forward in the text for their interpretation, while anaphoric refer back to an earlier

⁵⁸ Clements (1979) cited in Brown and Yule (n4) 134.

⁵⁹ Chapter 4 analyses the syntactic features of legal language, showing the interdependence that occurs in all linguistic units, from phrase through to sentence. In this discussion - of how larger texts are shaped - the focus is on similar relationships but with reference to extended discourse. In both situations, however, interdependence is conveyed by syntax and content, because language is organised as a multi-layered system: semantic (meanings), lexicogrammatical (forms), phonological and orthographic (expressions). Halliday and Hasan (n1) 5.

⁶⁰ Brown and Yule (n4) 269 argue that a 'highly cohesive text which has few 'missing links' will require a lot of space to convey very little information but will not demand a lot of interpretive 'work', via inference, on the part of the reader.'

⁶¹ A well-connected text is usually short and to the point. One of the advantages cited by plain language writers is that when repeated or unnecessary information couched in long sentences is eliminated, and more effective texts result. See Cutts *The Plain English Guide* 15-6 and 40ff. The reworked Mortgage form in the State of Victoria, Law Reform Commission *Plain English and the Law* Appendices ss26-28 illustrates this.

⁶² Tubbs and Moss *Interpersonal Communication* 33.

⁶³ Tubbs and Moss (n62) 21.

⁶⁴ Halliday and Hasan (n1) 229.

reference. They are both part of 'endophoric' reference, i.e. reference whose meaning can be found within the text, as opposed to 'exophoric' reference which directs the reader to look outside the text.⁶⁵ A reference may be realised later in the text or an element may refer back to a previous reference for full realisation of meaning. Such relationships are achieved by lexical and syntactic 'ties'. For example, a masculine subject or object can be expressed by the word *he*, which refers back to a previous noun.

Cohesion is achieved by indicating the nature of the relationship of parts of the text to one another.⁶⁶ Although syntactic patterns provide for a high degree of regularity in these relationships, writers cannot rely exclusively on a syntactic device to produce the intended connection. For example, the conjunction *and* can convey nuances of meaning other than simple addition of information. It can indicate result (He got up early and met the train) as opposed to time sequence (He got up early and went out).⁶⁷ In other words, meaning can be conveyed through implicit factors, and factors other than linguistic markers provide interpretative cohesion.

One such factor is the reader's assumption that a text will have cohesion. When language is presented in sequences of sentences that seem to belong together, readers will understand the second sentence in the light of the first. This process is repeated with contiguous sentences and with larger chunks of discourse composed of sentence groups. Formal expressions of cohesion are unnecessary because of a basic principle of language experience: 'we insist on interpreting any passage as text if there is the remotest possibility of doing so.'⁶⁸

From our experience we assume that texts make sense. 'Text', in other words, becomes a self-fulfilling construct. 'Texts are what hearers and readers treat as texts'.⁶⁹ If sentences convey information that seems appropriate to the text, coupled with a consistent register, readers will assume coherent meaning.

⁶⁵ Brown and Yule (n4) 192.

⁶⁶ Halliday and Hasan (n1) 4 identify five kinds of tie: reference, substitution, ellipsis, conjunction and lexical cohesion. From these, more general taxonomies of linguistic markers can be produced. Brown and Yule's (n4) 191 taxonomy corresponds. In language, categorisation and taxonomies indicate regularities, not unbreakable rules of use with inalterable meaning. Regularities in discourse analysis are based on the frequency with which a particular linguistic feature occurs under certain conditions. If the frequency is high, then the phenomenon described may appear to be categorical. Brown and Yule 22.

⁶⁷ Halliday and Hasan (n1) 12. See also Crystal *Rediscover Grammar* 188.

⁶⁸ Halliday and Hasan (n1) 23.

⁶⁹ Brown and Yule (n4) 199.

PROBLEMATIC LEXICAL CHARACTERISTICS OF LEGAL TEXTS

I. INTRODUCTION: THE RELATIONSHIP BETWEEN LEXIS AND SYNTAX¹

This chapter identifies the lexical characteristics of legal English and analyses their implications for successful communication.

Exact and unambiguous communication of meaning is not in reality possible, given the nature of language. Language is basically a system of signs, normally connecting sounds (and letters) with concepts.² The connection is an agreed convention, not a natural and inevitable one.³ Thus language is always at a remove from the world represented through the agreed combination of sound, spelling and concept. The sign is in an important sense arbitrary - the sound *dog* has no more necessary or natural connection with the concept *dog* than has *chien* or *Hund*.⁴ It follows that meanings are always liable to be contested and that language is inherently ambiguous.

Traditionally, legal texts were regarded as complex and difficult to read simply because of their particular professional vocabulary. But, as indicated in the previous chapter, it is now appreciated that some words have both lexical and syntactic function. Pronoun usage is an example. The low incidence of pronouns in legal texts is a feature of both word choice and sentence structuring. What is more significant, from the standpoint of this thesis, is that complex syntax is more damaging to successful communication than complicated lexis. Nonetheless, the vocabulary characteristics of legal texts need to be examined, since vocabulary does indeed cause difficulties for lay readers of legal texts.⁵

Many of the words used in legal texts may be opaque⁶, but their effect on comprehension extends

¹ 'Lexis' is a linguistic term that refers to the vocabulary of a language. It refers to words which have lexical meaning: i.e. semantic content as opposed to words whose sole function is to signal grammatical relationships; for example of, to and the in English. Crystal *A First Dictionary of Linguistics and Phonetics* 209-10. 'Syntax' is a traditional term applied to the study of the rules governing the way words are combined to form sentences in a language. An alternative definition is 'the study of the inter-relationships between elements of sentence structure and of the rules governing the arrangement of sentences in sequences.' Crystal 346.

² The terms 'signifier' and 'signified' were coined by Saussure. According to his theory, language is a system of signs. A sign consists of a signifier (sound-image or written shape) and a signified (a concept). In combination these produce the 'signs' or words by means of which the world is represented and communicated in language. These signs are defined by their difference from each other in the network of signs that makes up the signifying system. See Belsey *Critical Practice* 39-40 and Ch1 n23.

³ Belsey (n2) 41.

⁴ Belsey (n2) 41.

⁵ Mellinkoff's work, *The Language of the Law* 11-23 on the most obvious characteristics of legal language is regarded as pathbreaking. Danet's (1980) 14 *Law & Society Review* 444-563 is, however, more valuable for the purposes of this thesis, since, as far as possible, it categorises these characteristics as lexical or syntactic.

⁶ Mellinkoff (n5) lists: frequent use of common words with uncommon meaning (action, hand); Old English and Middle English words which are now archaic (here- and there- words and phrases); Latin words and phrases; Old French and Anglo-Norman words which have not been absorbed as English words (tort, lien); technical and argot expressions (common counts, without prejudice); words with flexible meanings (adequate cause); specific (and no more) and general expressions (including but not limited to). See Mellinkoff (n5) 11. Danet's list includes all these plus: polysyllabic words (undersigned); doublets (will and testament, rights and remedies); unusual prepositional phrasing (in the event of default); many formal expressions (a petition shall be filed by or against any of the undersigned). See Danet (n5) 476-82.

beyond the initial problem readers may experience with word meaning. A single word need not be a serious obstacle to understanding, because its meaning can often be recovered from the text. When several words are unknown and unknowable, however, the text becomes incomprehensible, for there is too little accessible co-text to help the reader. Problems of understanding lexical items are further compounded when sentences are complex.

II. LEXICAL CHARACTERISTICS OF LEGAL TEXTS

According to Mellinkoff, the lexical characteristics of legal language contribute to its wordiness, vagueness, pomposity and dullness.⁷ Some of the more obvious lexical characteristics of legal texts are: a high incidence of polysyllabic words (observance, undersigned); archaic vocabulary (forthwith); Latin and French words and phrases (*prima facie*, tort); and a high frequency of formulaic expressions (for such other and further relief as to the court may seem meet and just). While these features may pose problems for the lay reader, some at least can be readily solved by reference to a dictionary. The aspects of the legal lexicon which cause the greatest confusion are: technical expressions; archaic and foreign words; common words with uncommon meanings; doublets and redundant words; compound expressions (which include polysyllabic words and unusual prepositional phrases); a low incidence of pronouns; and gender bias.⁸

All of the features above contribute to the simultaneous specificity and generality of legal texts. While these qualities frequently contradict each other, they are both essential to the operation of the law.

1. SPECIFICITY AND GENERALITY

Writers of legal texts strive for certainty and precision of meaning (i.e. specificity) in order to ensure that rules can be exactly applied.⁹ Thus a term with a wide field of reference (homicide) will be divided into more specific referents (manslaughter, infanticide). At the same time, however, a certain amount of flexibility is also necessary¹⁰ so as to give courts the discretion whether to apply a rule. Thus specific referents may be incorporated under general ones (fraud, negligence, homicide).¹¹

Those with no knowledge of the meaning of specific technical terms are obviously at a disadvantage. The use of more general terms, however, also disadvantages non-lawyers, for generality gives lawyers a discretion to interpret what is meant in given situations. Non-lawyers, who tend to expect all legal language to be specific, are not prepared for the high level of generality in legal texts, (even though it is both necessary and inevitable). So, when they come across general terms, they try to establish a specific meaning.

The authors of legal texts have the power to decide on the degree of specificity of the referents

⁷ Mellinkoff (n5) 24.

⁸ See Mellinkoff and Danet (n5).

⁹ Hart *The Concept of Law* 119 claimed that legal terms have a 'core of certainty', but also a 'penumbra of doubt'.

¹⁰ Mellinkoff (n5) 11, 20.

¹¹ Maley *The Language of Legislation* 36. See also Delmonte and Dibattista (1995) 5 *Working papers in Linguistics* 2.

they use. The general nouns person, man, for example, are used frequently, because they can be both general and precise. When they are used without an attribute or modifier, their referential scope is wide: 'they can pick up the maximum set of human entities available'.¹² The level of generality, however, can be altered by modification, and consequently reference can be made to more specific classes of individuals. For example, person is general but such person refers to a previously identified type of referent. When demonstratives such as that are used, the reference is more specific; that person, for instance, has very precise reference, again to a previously identified type of referent.

The reader of a legal text, who is looking for precision, will therefore be confronted with a paradox: apparently specialised terms can actually have general meaning.¹³

2. TECHNICAL EXPRESSIONS

Technical expressions are typical of legal texts, which is hardly surprising, for legal English is a professional language, and, as such, it gives its professional users an efficient code of communication. Hence, certain technical expressions are unavoidable, because the concepts they encode are difficult to translate succinctly into everyday language.

3. FOREIGN AND ARCHAIC WORDS

The English language, as used in the South African legal system, has inevitably been affected by other languages (notably Latin and Dutch) and legal cultures (Roman and common law). In addition, the development of the English lexicon has always relied on absorbing foreign words rather than compounding existing words.¹⁴ The many Latin and French terms occurring in legal texts testify to this phenomenon (*mutatis mutandis*, *estoppel*).

There is nothing unusual about these processes, but in legal texts foreign terms are used to preserve a particular legal style. The assumption is that an English alternative would not exactly express the same meaning. Hence terms such as *mutatis mutandis* must be retained, thus perpetuating traditional usage.

Connected with the use of foreign terms is retention of archaic English expressions. Some of them contribute to the formality and distancing effect of legal language, such as *forthwith* and the *here- and there-* words. Others are common words given unfamiliar meanings, for example *party*, *furnish*, *instrument*. Again, the use of archaisms contributes to the maintenance of a particular legal style.

¹² Delmonte and Dibattista (n11) 24.

¹³ The phrase *this* or any other, for example, is specific, because its aim is to limit loopholes and also because the back reference encoded in this obviously refers to a previous reference in the immediate text. When this phrase is used with a general term, such as *obligation*, the specific reference is undercut by the less precise meaning of the head referent, *obligation*. Furthermore, in legal texts the precise meaning may be unknown because of the specialised knowledge required to understand what is meant; for example, *novated* in *If any loan is novated in terms of the Usury Act*.

¹⁴ It is worth noting that extended compounding can be dysfunctional even in languages that favour compounding; for example, the Afrikaans word *vragskipveiligheidsradiotelefoniesertifikaat*, v197 s(2) of the *Handelskeepvaartwet 57 van 1951*.

4. COMMON WORDS WITH UNCOMMON MEANINGS

Legal language contains many common words with uncommon meanings (action, prayer, provision).¹⁵ Legal English freely appropriated words and expressions from standard English¹⁶ and gave them specific new meanings: a process of semantic appropriation. Knowledge of the more familiar meaning is of no advantage to the reader, because the semantic appropriation has excluded other interpretations.¹⁷ For example, words like motion and virtue have very different meanings in a legal context.

5. DOUBLETS AND REDUNDANCIES

Doublets repeat words in a syntactic pattern of coordination, as in act or omission, unless and until. The repetition has several functions. In some cases it ensures that any difference in meaning between apparently synonymous words derived from different languages is retained, as in devise (French) and bequeath (Old English). In other cases, important points are emphasised through repetition, as in null and void.

Extended multinominal expressions¹⁸ also work on the doublet principle. For example, in any sum of money or other consideration, because the two noun phrases are coordinated by or, their meaning is connected. As with doublets, binominal and multinominal repetition allows for explanation, as in or by any person other than the person claiming relief, but these constructions may introduce unnecessary words: for example, the original This Act shall have effect in relation to any timeshare agreement or timeshare credit agreement notwithstanding any agreement or notice can be more concisely rewritten as No agreement or notice can prevent this Act from applying.¹⁹

Repetition always tends to create redundancy,²⁰ and when doublets co-ordinate synonyms, they contribute to the unnecessary wordiness of legal language. If the second item in the unit presupposes the first, the second term is clearly unnecessary. In due and payable, the obligation of paying is already indicated by the coordinated reference to something being due.

Today these coordinated expressions are intended to give either precision or emphasis, and sometimes both, but their effect is frequently to confuse. First, the repetition of synonyms is redundant.

¹⁵ Mellinkoff (n5) 11; Danet (n5) 476-7.

¹⁶ The process of semantic appropriation is a feature of the High forms of language in a diglossic relationship. See Ch 1 n25 for discussion on how legal language exists in a relationship of diglossia with standard English.

¹⁷ Goodrich (1984) 11 *Journal of Law & Society* 174.

¹⁸ The term 'nominal' is used in some grammatical descriptions as a substitute for noun; for example 'nominal group' to refer to a noun phrase. The term may also be used for words which have some of the attributes of nouns, but not all; for example the poor where poor does not take a plural. Crystal (n1) 242. 'Extended multinominal expressions' are sequences of long (i.e. more than one word) noun phrases.

¹⁹ Cutts (1995) *English Today* 46.

²⁰ In semantics the problem always exists that what to one person or group might appear to be an unnecessary, and therefore redundant use of a word or phrase, may to others provide additional information, and thus be distinctive. Crystal (n1) 299.

Many of the doublet (and sometimes even triplet) terms are synonyms, drawing on different language sources to express the same concept. For instance, will and testament have respectively Old English and Latin origins. French terms were often retained simply as a legacy of the bilingual period in English history.²¹ These words were kept because they were believed to be legally more precise and their usage continues to imply a limited range of meaning. As a result, these terms may be less familiar than those in more common use. In the example above will is more familiar than its synonym testament.

Secondly, there is the difficulty of knowing whether coordinated doublets are synonyms used for emphasis or whether they are supposed to denote different concepts. If readers know that the doublet terms are synonyms, the more familiar term may aid their understanding of the less familiar, albeit at the cost of wordiness. Some doublets are synonyms (will and testament), but some are not (rights and remedies). Since the same syntactic structure appears, the reader may assume that synonyms are used in order to amplify or intensify meaning; but, where the coordinated words are in fact not synonyms, as in rights and remedies, such an assumption would be wrong.

Thirdly, doublets compound the problems engendered by the contradictory need in law for both specificity and generality. In sequences where two or more words belonging to the same grammatical category are joined by coordinators, such as and or or, writers often seek to express both precision and all-inclusiveness, as in due care and attention.²² The non-specific meaning of this phrase (a legal formula) makes it difficult to determine what actually constitutes due care and attention. The effect is apparent specificity, but actual generality.

Confusion is produced by both lexis and syntax: the syntactic pattern of co-ordination is used whether or not the coordinated terms are synonyms. In some cases the chances of confusion are small, as in annul and set aside. Unless the reader knows what the individual words or phrases mean, however, a structure which can co-ordinate similar forms (for example, noun+coordinator+noun), but not necessarily similar meanings, is potentially confusing. Since the syntax does not indicate whether the doublet repeats or develops the meaning of the phrase, readers have to rely on lexical knowledge to ascertain this, as in devise and bequeath. Without prior knowledge of the law, readers cannot know whether, for example, let or hindrance repeats or extends the meaning of the phrase.

Because the law is assumed to be certain and exact, readers often look for differences which may not be present. In authorise and direct, it can usually be safely assumed that the person directed to perform a duty or task has been authorised to do so. Yet, in a list of grounds for equal treatment, it

²¹ When the Normans took control of England in the eleventh century, they used Norman French in court and government and many French words were absorbed during the following two centuries. With the gradual reassertion of English as a national language, synonyms and overlapping terms proliferated; for example, holiday (from Old English) and vacation (from French). Sometimes distinctions in meaning were drawn, as in sheep and mutton. Sometimes one word was dropped; for example, the Old English word fulluht was replaced by the French baptism. In law, however, both terms were usually retained to ensure that any differences in meaning were contained; for example, will and testament.

²² Bhatia in Gibbons (ed) *Language and the Law* 143.

would be unclear whether gender, sex (the comma indicates the co-ordinate and) are synonyms in the following extract from South Africa's Interim Constitution: [discrimination is forbidden] on the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.²³

Even when it is clear that words in a group are not synonyms, meaning can still be obscure. The more detail offered in, for example, a multinominal noun chain, the more exclusion is possible. In assaults, obstructs, threatens, intimidates,²⁴ the similarity shared by threatens and intimidates can confuse for two reasons. First, readers do not expect to encounter superfluous words, and, secondly, the list excludes through specificity (if assaults and obstructs, why not attacks and abuses?). The specificity of the list excludes what has not been specified. The more lists include, the more, by default, they exclude. (Like pronouns, lists constitute a textual feature which cannot be classified as exclusively lexical or exclusively syntactic.)

6. COMPOUND AND COMPLEX WORDS

A compound linguistic unit is composed of elements, some which are dependent affixes (pre-, dis-) and some that function independently in other circumstances; i.e. consist of two or more free morphemes (court/room, here/in/after) and phrasal verbs such as take off). Linguistics generally distinguishes between 'compound' words (those made up of free morphemes) and 'complex' ones: words that have been extended with prefixes and suffixes (bound morphemes), such as pre/judge, judge/ment). Although compounding is a valid and productive way of increasing the vocabulary of a language, the meanings created can be difficult to understand, especially when many polysyllabic words are used in one text (precondition, indebtedness, notwithstanding), together with unfamiliar terms (debtor's indebtedness to the creditor and the surety's indebtedness to the creditor) and multi-word modifiers are created (terms and conditions as amended or substituted from time to time).

Polysyllabic words pose comprehension problems for several reasons. First, the meaning of prefixes and suffixes has to be worked out, particularly by readers who are not familiar with the language (second language users are an obvious example), as in dis/connect, inter/connect/ed/ness. Secondly, these additions may change the form class of the word, so that a once recognisable verb (pursue) could be less familiar in its noun form, as in pursuance.²⁵ Again, second language users are more likely to be bothered by the shift than English first language users. Finally, polysyllabic words, which are not derived from other words, are often less familiar (endeavour is less familiar than try).

²³ Section 8(2) of Act 200 of 1993. The specificity of this list arguably means that discrimination for what is not specified could be construed as not violating a fundamental right. Height, for example, is not mentioned, yet some jobs have minimum and maximum height regulations. In the new constitution, pregnancy, marital status and birth are added to s 9(3) of the Constitution of South Africa 1996. As the discussion shows, greater detail does not guarantee greater specificity: in fact, the example of the omitted criteria still holds.

²⁴ Section 112(3)(c) of the Mental Health Act of 1986 cited in the Law Reform Commission of Victoria *Plain English and the Law* Appendix 1 s100.

²⁵ Legal texts show a high incidence of these nominalisations (see Ch 4 V (2)(l)(b)).

When morphemes²⁶ are added to the base form (the base need not be always be a word; for example, -ceive in re/ceive, per/ceive), not only is word length increased but word meaning is altered. Every morpheme effects some change to the original word, and this changed meaning must be understood in itself and in its context. This is how English normally works, even simple conversational English. When, however, the words and concepts are less familiar, readers will find the compound terms more difficult to assimilate. For example, abovementioned as a single word requires the reader to understand how its component parts add up to its whole meaning; what above and mention mean singly; the back reference (anaphoric) function they have when combined, the past sense conveyed by the past participle form and the passive meaning (that which has been mentioned above).²⁷ This meaning then has to be understood contextually, i.e. to which earlier item abovementioned refers.

Compound words and structures oblige readers to do a great deal of decoding and encoding, processes that involve addition and deletion. In order to understand the meaning of the compound the reader may have to add on and subtract affixes and words. For example, in nondisclosure, non- and dis- are both negating prefixes and the reader has to work out whether they doubly negate closure, or not. Again, English second language users will be less comfortable with accepting that a non- + dis- sequence can rule out a negative reading of dis-.

As with words, when too much information is condensed into a syntactic structure, the distinctions between information units may be lost and the hierarchical relationship between syntactic structures may become very complicated. Multi-word clauses, such as the bank department title Estate and Trust Administration Will Drafting and Estate Planning Portfolio and Asset Management compress many different units of meaning, whose combined total must be understood in order to know what the whole unit means. When specialist terms occur in multi-word clusters, decoding problems are increased: pension pay-day exempt notional taxpayer amount²⁸ is extremely complicated because so much information is compressed into one noun phrase.²⁹

7. GENDER REFERENCE

Traditionally, legal language assumed that, unless otherwise stated, male terms included females; in other words, male terms were used as generics. This assumption was not reversible, i.e. a female term did not include a male reference. It followed that male nouns and pronouns used generically implicitly

²⁶ A 'morpheme' is the smallest functioning unit in the composition of words. Crystal (n1) 231.

²⁷ Finally, this complicated word is unnecessary because the connecting reference to previous information could have been more simply conveyed by above, or by repeating the item referred to with a demonstrative pronoun; this service.

²⁸ Section 24ABZB of the Income Tax Assessment Act 1936 (Commonwealth) cited in Balmford (1994) 111 III *South African Law Journal* 521.

²⁹ The premodification involved in pension pay-day exempt notional taxpayer amount operates hierarchically and the reader has to work towards the most important modification, that closest to the noun head (see Ch4 III). In addition, an absorb and delete process has to occur, because pension pay-day has to be understood, and then cancelled by exempt.

encoded male dominance,³⁰ because they rendered the female presence invisible.

Use of a noun with general meaning, such as *party*, followed by the male proforms *he* and *his* is common in legal texts. For example: *Where a party to an intended marriage does not for the purposes of proof of the net value of his estate at the commencement of his marriage...*, the pronoun attributes only masculine reference (*his*) to its antecedent noun, *party*. As in so many other texts and contexts, the 'male-as-norm'³¹ rule has been applied to the construction of this text. This preference for the male generic can impede comprehension because of the inherent ambiguity and indistinct reference. Without any linguistic indicator of female existence, the possibility of female referent is effectively removed. In legislation dealing with marriage the omission is, to put it mildly, remarkable.³²

8. PREPOSITIONAL PHRASES

Excessive use of prepositional phrases can cause difficulty for the reader of legal texts, not only because of the unfamiliarity of lexical items in them, but also because of their syntactic functions. (Although detailed discussion of the syntactic role of prepositional phrases will be given in Ch 4 IV (2)(ii), some comment on their lexical function is apposite here.) Prepositional phrases add information to the noun or verb phrases which they modify. They are used in syntactic compounding,³³ for they enable a writer to include more information within the boundaries of a single sentence. For example, in *Where a party to an intended marriage does not for the purpose of proof of the net value of his estate at the commencement of his marriage declare that value in the antenuptial contract concerned*,³⁴ the eight italicised prepositional phrases provide a great deal of extra information within one sentence. This benefit is lost to lay readers, because in order to understand the sentence they not only have to understand the meaning of individual prepositional phrases but also their relationship to each other; lay readers would have had little or no practice in decoding such relationships because they seldom occur in non-legal texts.

By adding information to another unit, prepositions modify, and modification is a hierarchical process.³⁵ In the adverbial clause quoted above, the first phrase, *to an intended marriage* is simple; it identifies exactly what the noun *party* refers to in this context. Yet, the meanings of the phrases following *party* are more complicated because of their dependency on one another. Each subsequent

³⁰ In the dominant ideology prior to 1994 sexism was a feature of legal texts. Post 1994, this sexism is legislated against. See s 9(3) of the Constitution of the Republic of South Africa 1996 and Ch1 on ideology.

³¹ Spender *Man Made Language* 3, 158-9. See also n48 below on confusion with use of a generic pronoun.

³² This is remarkable unless it is understood that language reflects perceptions of the world, particularly power relations in that world. Those with the power to make the symbols and their meanings have 'the potential to order the world to suit their own ends, to construct a language, a reality, a body of knowledge in which they are the central figures, the potential to legitimate their own primacy and to create a system of beliefs which is beyond challenge.' Spender (n33) 143.

³³ See Ch 4 IV (1).

³⁴ Section 6(1) of the Matrimonial Property Act 88 of 1984.

³⁵ Modifying words extend the meaning of another word. Generally the distinction between a modifier and what it modifies (the head word) is that the head word cannot be omitted from the phrase, whereas modifiers are optional. Leech, Deucher and Hoogenraad *English Grammar for Today* 35. Also see n29.

phrase refers to and modifies those prior to it: proof is the object of purpose; net value the object of proof; his estate the object of value; of his marriage of commencement, and the whole phrase at ... marriage binds all of these to a time.

9. PRONOUNS

Like prepositional phrases, low pronoun use is both a lexical and syntactic feature of legal language.³⁶ Legal texts favour other means of indicating gender and number,³⁷ and in so doing create problems. Usually, nouns are repeated instead of using proforms (he, she, it) of the nouns after a first reference to the noun concerned. For example, in The residential address given on the application will be the borrower's chosen *domicilium citandi et executandi* until the borrower notifies the bank in writing of any change of address (which the borrower shall be bound to do immediately such change occurs) in which event the address so notified shall be considered to be the borrower's chosen *domicilium citandi et executandi*.³⁸ No substitution, such as he/she or it, is made for the two main nouns, borrower and address.³⁹

Legal texts may also use nouns that have general rather than specific meaning (party, person). The obvious reason for this is to be as inclusive as possible; the disadvantage is that readers may not be able to identify the referent. More specifically, if a sentence does not make clear that two or more nouns refer to the same concept, readers are likely to assume that they refer to different concepts. The shift from the general person to the more specific defendant in the following example illustrates this point; In a prosecution of a person for failing to serve a notice on a securities exchange under this section, it is a defence if the defendant establishes...⁴⁰ Here, different terms refer to the same entity, i.e. person and defendant are one and the same, but the connection is not clear. When person is used collaboratively with a more specific noun, the referential meaning is always confused. The tendency in legal texts is for person to be referentially empty; i.e. to have no specific referent.

III. CONCLUSION

The vocabulary used in legal texts contributes to their complexity. This complexity is to a certain extent justifiable since it is the product of a professional discipline, and those qualified in the profession can generally work satisfactorily with legal lexis. Non-lawyers cannot, yet they may have to deal with legal texts. Even legal professionals do not always understand what a term or section of text means.⁴¹

³⁶ The syntactic problems caused by the low incidence of pronouns will be discussed in Ch 4 V(2) (iii).

³⁷ Semantically, the most significant effect of pronouns is to distinguish gender and number. Because legal texts do not make use of this feature, the chance of obscure or unclear meaning increases.

³⁸ Terms and Conditions of Revolving Credit Plan ("RCP") loans granted by the Standard Bank of South Africa Limited 13.1

³⁹ This example also illustrates the earlier point, that a combination of obscure lexical features increases confusion. Here archaic, Latin, polysyllabic words and prepositional phrases increase comprehension difficulties.

⁴⁰ Companies (Acquisition of Shares) (Victoria) Code 39(6), cited in Law Report of Victoria Appendix 1 (n25) s102.

⁴¹ 'I must say that rarely have I come across such a mass of obscurity, ... So deep is the thicket that ... both of the very experienced counsel lost their way.' Lord Denning Q.C. quoted in Cutts *Unspeakable Acts?* 9

Since the law is supposed to be about certainty, an unnecessary degree of uncertainty, confusion and ambiguity should be avoided.⁴² Writing legal texts in simpler words is both possible and necessary (see Ch 7). Texts whose meaning is clearer, because the words used are closer to those used in standard English discourse are easier to understand and to work with. This benefits both legal and non-legal users of legal texts.

University of Cape Town

⁴² See Kimble *Answering the Critics of Plain Language* 53-59.

CHAPTER 4

PROBLEMATIC SYNTACTIC FEATURES OF LEGAL TEXTS

I. INTRODUCTION

In English prose, unmarked sentence¹ types are simple; they follow the S-V-O pattern; they are in active not passive voice and they are positive not negative. Legal sentences, on the other hand, are usually marked, since they are complex and frequently in the passive and negative. Because of the amount and nature of modification, these sentences are also long. These four characteristics are briefly described in the introduction to this chapter and are then treated in more depth in subsequent sections.

This discussion begins with the largest syntactic unit (the sentence) and works down to the smallest (the constituents of a sentence). Inevitably, there will be overlap, because particular linguistic features may perform more than one function; for example, one word may modify another, together they may modify a head word and the combined result may form a subordinate or main clause. In each subsection of this chapter, the focal syntactic characteristic is defined, its effects are described and illustrated by means of examples from legal and other texts; its specific uses in legal texts are explained and its effects on reader comprehension are indicated. Although the various syntactic features will be identified and dealt with separately, a selection of extended examples will show how one legal text may incorporate several of these features.

A major reason for the length of sentences in legal texts is the belief that related ideas must be held together in a single sentence. The consequence, syntactically, is the addition of several modifiers to one head word and the embedding of numerous phrases. Although sentence length in itself is not necessarily an obstacle to comprehension,² many of the factors contributing to the wordiness of legal sentences increase the difficulties readers have in understanding their meaning. Subordinate modifying phrases, for instance, interrupt the S-V-O progression (see n3) and impede readers in getting to what they anticipate to be the main elements of the sentence, the subject, the verb and the object (S-V-O).

One of the traditionally accepted causes underlying the length and complexity of legal sentences is the need for them to regulate behaviour generally, not simply specific acts, and yet maintaining sufficient detail to guard against loose interpretation. Consequently, as we have seen, legal texts display tendencies to both generality and specificity (see Ch3 (X)) to achieve a balance between these two demands, modification is necessary. It occurs in two dimensions, horizontally (where modifying words are juxtaposed alongside the head of a phrase or other single words), and vertically (where dependent clauses are embedded). (See IV below). In English legal texts, long horizontal modifying phrases are common.³

¹ The term 'marked' refers to words and structures where the base form has been added to. This usage applies to both words and syntax. For example, plurality in nouns is marked by the addition of suffixes, such as -s and -en to the basic (unmarked) form (dog:dogs; child:children).

² Danet (1980) 14 *Law and Society Review* 486; Pinker *The Language Instinct* 86 cites a comprehensible sentence of 110 words.

³ Following Leech, Deuchar, Hoogenraad *English Grammar for Today* 75ff and Crystal *Rediscover Grammar* 20, in this thesis the term 'phrase' is used as a superordinate to cover simple as well as multi-word structures, with and without verbs.

Although all language works on both linear and hierarchical dimensions, in legal texts these are set against one another: the linear progression from one main element⁴ to the next is held back by the hierarchical insertions caused by subordination.

If, as a result of modification, the main elements of a sentence cannot always be clearly distinguished, and if the relationship between these elements is not apparent, readers have difficulty retaining them in short-term memory. The more frequently the linear progression from S to V to O is interrupted and the more often marked linguistic forms and structures are used, the more difficult readers find it to relate linguistic units to one another and thereby establish their joint meaning.⁵

II. APPROACH TO ANALYSIS OF SENTENCE STRUCTURE

The approach taken in this thesis to grammar is descriptive and functional. It is descriptive in the sense that it identifies and describes structures.⁶ It is functional in that it is concerned with the relationship between the functions and the form of the sentence.

Variants are chosen according to the perceived demands of the 'tenor' (the degree of formality adopted by speakers and writers), the 'mode' (the effects of the medium through which the language is transmitted), and the 'domain' (how the language varies according to the activity or field in which it plays a part).⁷ In other words, choice of variants is influenced by the functions language has to serve. These functions are in turn influenced by the social group in which language is to be used. Thus, additionally, language is affected by the values and boundaries set up by the group of language users involved. In the case of legal language, all of these factors privilege the legal professional and disadvantage the non-lawyer.

Halliday's⁸ approach to grammar focuses on language function. He uses terms such as 'participant', 'process' and 'circumstance',⁹ to indicate semantic as well as syntactic relationships. The participant, process and circumstance roles correspond, by and large, to noun, verb and adverb.¹⁰ Verb phrases convey process or state; noun phrases the participants in the process or state; and adverbial phrases the information which elaborates on the verb, for example by indicating time, manner and place.

In their analysis of sentence structure and related meaning, Kress and Hodge also emphasise

⁴ The elements are: Subject, Verb, Object, Complement, Adverbial, referred to by the abbreviations S.V.O.C.A. See Crystal and Leech, Deuchar and Hoogenraad (n3). Leech uses the term 'predicate' for the verb element.

⁵ Danet's article (n2) deals in detail with the syntactic complexity in legal texts.

⁶ 'Standard' is not used in any value-loaded sense. "'Standard languages/dialects/varieties" cut across regional differences, providing a unified means of communication, and thus an institutionalised norm.' Crystal *Cambridge Encyclopaedia of Language* 329. The standard provides a basis for comparison; it does not necessarily represent the optimum style, i.e. the style that most effectively communicates the writer's intention.

⁷ Leech et al. (n3) 9.

⁸ Halliday in Lyons (ed) *New Horizons in Linguistics* 143; Halliday *An Introduction to Functional Grammar* 101. In all cross reference below, these will be differentiated as "Halliday in Lyons" and "Halliday" respectively.

⁹ Halliday (n8) 149.

¹⁰ Halliday (n8) 149.

function. They identify 'transactive' and 'non-transactive' functions¹¹ to describe the agent, process and affected relationships in an utterance. Actions are either transactive (causal), with action moving from an actor to an affected (S+V+O), or non-transactive, in structures where the action is restricted to one entity as in the basic clause type S+V and S+V+C. Transactive relations involve an agent, a process and affected (the dog chased the cat); non-transactive relations involve only an agent and a process (the dog ran). Like Halliday's participant-process-circumstance, the pattern of agent-process-affected reflects a correspondence between form and function; i.e. the form class pattern of noun phrase (agent) + verb phrase (process) + noun/adverbial phrase (affected) aligns with the function class pattern of S+V+O/C.

Kress and Hodge's work has been valuable in this thesis for two reasons, and their terminology (agent, process, affected) will be used. First, their analysis of grammatical structures gives insight into the ideological implications of using certain structures. Secondly, the models they use to describe relations of meaning between units in a sentence focus on action as caused by someone (non-transactive) or caused by some agent affecting something (transactive) and on how this causality can be obscured and suppressed. Legal language often obscures agency and causality with the result that no accountable authority can be found.

Readers expect the different form classes to perform specific function roles. They assume that the agents of a process will be nouns, that their actions will be presented in the following verb phrase, and, if this action affects another, that the affected entity will be a noun functioning as an object. Expectations of this kind are so well established that any surface form which *seems* to present this pattern is assumed to be doing so, even though it may not be the case. A major complication with legal texts is their divergence from the standard English pattern of a form:function correlation. The analysis of sentence structure that follows focuses on both form and function.

III. MODIFICATION

Modification refers to the structural dependence of one word or syntactic unit upon another.¹² Because it affects sentence and phrase structure in very important ways, it will be dealt with prior to an analysis of the characteristic structure of sentences and phrases in legal texts. The two forms of modification evident in English sentences - horizontal and vertical - result in similar types of sentence complexity.¹³

Horizontal complexity denotes juxtaposition of constituents of equal rank in a sentence; for

¹¹ Kress and Hodge *Language as Ideology* 8-10 use two classifications in their syntagmatic modes: actionals (made up of transactives and non-transactives) and relationals (divisible into equatives and attributives). Transactive and non-transactive refer to the relations of meaning surrounding action. Transactive utterances make clear the causal effect of who is doing what to whom; for example The batsman struck the ball (agent-process-affected). The non-transactive does not make a distinction between the causer/agent and the affected; The batsman runs. There are also processes which do not involve action. Kress and Hodge call these 'relationals'. Relationals refer to the relation between entities and entities, or entities and qualities. The former (N+V+N) is 'equative' (the sports master is an ex-football international); the latter (N+V+Adj/Adv) is 'attributive'; (the sports master is superb).

¹² Crystal (n6) 229.

¹³ Leech et al. (n3) 137.

example, a series of adjectives before a noun.¹⁴ The greater the number of words, the greater the challenge to short-term memory. Studies of the psychology of reading indicate that readers can cope easily with single-word items in sentences, from which ideas and facts can be extracted and stored in long-term memory.¹⁵ None the less, our memory for words is limited, and lengthy sentences tend to overfill the short-term memory with the result that information is lost.¹⁶

Vertical complexity, which is caused by subordination, varies in structure depending on where subordinating units occur. The terms 'left-branching' and 'right-branching' are used to describe their position. Left-branching subordination interrupts the S+V pattern; right-branching interrupts the V+O pattern.¹⁷ In each case, the verb is the fulcrum around which the previous and subsequent clauses pivot. Subordination occurring at the beginning of a clause or between subject and verb (left-branching) tends to be more difficult to understand than subordination occurring after the main verb. In this left-branching example ...every person under the age of 18 years who by law has the status of a major, excluding any person who does not have the mental capacity to make rational choice, shall be competent...,¹⁸ the subordinating units separate the subject every person and the verb shall be competent. Left-branching clauses, which are common in legal English, defer comprehension of the main clause by interrupting the agent-process relationship.¹⁹ Right-branching clauses, such as those containing post-modifying phrases, disturb the S-V connection. These phrases are often non-finite, and therefore dependent, clauses, the meaning of which depends on the main clause.

The syntactic patterns of modification - Modifier+Head, Head+Modifier - allow writers to fill both positions with words from the open classes, i.e. nouns, adjectives, verbs and adverbs. The modifying terms are dependent on the head word for which they act as an attribute. In addition, modifying words must follow an established order.²⁰ Although adjectives and adverbs are the most common, words or phrases from all four form classes can function as modifiers.²¹ When words other than adjectives and adverbs modify, however, the form:function correlation is disrupted, because readers often find it difficult to understand sentences where the expected form does not perform the function most often associated with it. For example, in the headline²² Long suburban train delays not acceptable, it is not immediately clear whether delays is a verb following the noun phrase Long suburban train or whether delays is actually the head noun of that phrase in which the noun train is a modifier.

The coordinating modification involved in compound sentences involves the addition of words,

¹⁴ Leech et al. (n3) 137.

¹⁵ Turk and Kirkman *Effective Writing* 102.

¹⁶ Turk and Kirkman (n15) 103.

¹⁷ Leech et al. (n3) 137-8.

¹⁸ Section 1(1) of the Domicile Act 3 of 1992.

¹⁹ 'Prepositional phrases and most other types of adverbial clause do not usually appear between the subject and predicate of a sentence, as is apparently common in Legal English.' Danet (n2) 479.

²⁰ Leech et al. (n3) 204. See also n263 and V(2) (ii) below on determiners.

²¹ The full verb does not modify but the present and past participle forms do. See Leech et al. (n3) 68.

²² Headlines involve a special type of syntax and are generally more ambiguous than speech or 'ordinary' writing. Because of this, they clearly demonstrate the point that the order of modifiers does not necessarily elucidate meaning.

notably adjectives and adverbs, to a main referent. Modifiers may increase sentence length considerably (for example, the great, grey-green, greasy, Limpopo River)²³, and in so doing they establish word clusters that have to be understood before the reader can proceed to the next syntactic unit.

When subject, verb and object each occur in word clusters, their connected meaning is more difficult to understand. In the following example, the italicised phrases contain a great deal of information that has to be absorbed before a reader can understand what the whole sentence means: Whereas X either owns or has the right to license *certain proprietary software products* ... which entitles DEALER to grant sublicences to its End-Users to use *certain computer products, programs, services and related documentation* including *any modifications, corrections, improvements, enhancements, upgrades and updates thereto* as well as *any copies, parts, translations, alterations or derivations therefore therefrom*.²⁴

Because the additional words separate the main clause elements from each other, modification can have a detrimental effect on the comprehensibility of sentences. This proposition is as true of modification by means of single-word phrases as of modification by means of complex clauses,²⁵ although naturally the greater the number of modifying words, the greater amount of information has to be understood. Moreover, because modifying words are dependent on a base or head word, if the reading of any word in the modified unit is uncertain, comprehension of the whole unit is affected.

The greater the number and kind of modifiers, the greater the degree of control writers can be seen to exert on the text. Texts, such as legal ones, which contain many modifying phrases testify to a high degree of ordering prior to the final (written) version. In cases where writers are themselves constrained by a specialist classification system, that system exerts control on the form of the text. While the range of options from which attributes can be chosen is theoretically open, in legal texts this choice is in fact limited because writers must work with the professional classificatory system. Consequently, a tension is set up between the theoretically unlimited scope of open class words and the restrictions imposed on choice by legal texts. When the choice of modifiers is limited, the ways in which information can be conveyed is further restricted.

In the following example, the combination of abstract referents and modifiers of varying specificity both obstructs comprehension (and reinforces the asymmetrical power relation between bank and client). On a first reading of the italicised words in the Bank shall have a right...to declare *all or any part of the obligations* to be immediately due and payable,²⁶ one might conclude that either all or a portion of the obligated demands are referred to. The generality in any, however, allows for interpretation regarding how much of the obligation will be called upon. The nominalisation obligation, anyway, has abstract and

²³ Kipling *Just So Stories* 58.

²⁴ Extract from an End-User Software Acknowledgement Agreement. The quotation is an exact restatement of the incomplete clause with which this contract begins. The clause is incomplete because, despite its length, it is subordinate (indicated by *Whereas*). No main clause is supplied, however.

²⁵ Leech et al. (n3) 60.

²⁶ Extract from a Citibank Loan Form cited in Danet (n2) 476.

therefore less specific meaning than, for example, loan.²⁷ The articles a/an and the are respectively general and specific and the way in which these features are used supports the power distribution. The bank has the general advantage (*a* right), a vague and undefined attribute.²⁸ In contrast, the client has the more specific responsibility of *the* obligations, where the specificity of the modifies an abstract referent. Finally, the definition of what is meant in the circumstances by part and obligations will be supplied by the more powerful entity, the bank.

IV. SENTENCE TYPES

There are three main sentence types: simple, compound and complex. Simple sentences consist of only one clause, usually of the S-V-O type. In compound sentences, two or more clauses of equal rank and type are linked by coordinating words, such as and, or, but.²⁹ Although coordination makes a sentence more complex,³⁰ the complexity is linear rather than hierarchical. In complex sentences, however, the clauses are linked in a hierarchical relationship by subordinating conjunctions, such as because, when, although. These conjunctions introduce clauses that depend on other clauses, which may themselves depend on other clauses, and finally on a main (independent) clause.³¹ The more complex a sentence is, the more difficult it is to identify the S-V-O constituents and thus work out who is doing what to whom. Coordination and subordination may of course occur in the same sentence, producing a 'compound-complex' sentence.³²

Sentences cease to be simple as modification increases. In legal texts, simple sentences are uncommon because modification is so central to the need to strike a balance between generality and specificity. Modification achieves this balance in two ways: the extra information expands the meaning of a head word, but since, in legal texts, this expansion is restricted by the limited range of possible words and structures, this principle applies to head words with both specific and general meaning. For example, the modifier reasonable is not chosen simply because of the meaning of reasonable, but rather because its generality permits interpretation. This generality remains whether the head word is general (reasonable *man*) or more specific (reasonable *speed*).³³

The rest of this section on sentence types concentrates on modification by means of coordination

²⁷ This uncertainty is significant because it contributes to the unequal power relations in the contract between bank and client. The bank has the rights (shall have a right); the client has the responsibilities involved in meeting the bank's demands.

²⁸ See n26.

²⁹ A sentence may contain more than two coordinating clauses in a pattern known as multiple coordination. Crystal (n3) 178.

³⁰ Leech et al. (n3) 107.

³¹ Crystal (n3) 178.

³² Crystal (n3) 179.

³³ Although the concept of speed is relative, it can be quantified, which makes it more specific. For example, speed limits are set according to certain practical considerations. If the speed limit is 80 kph, speeds under this limit can be considered reasonable; those over the limit can be judged unreasonable and illegal.

and subordination, in compound and complex sentences.³⁴ It also deals with two specific types of marked sentences, namely passive and negative sentences.

1. COMPOUND SENTENCES

Coordination links units of the same grammatical status (i.e. word to word, phrase to phrase and clause to clause) by means of either punctuation or coordinating conjunctions.³⁵ When coordination links a series of nouns or verbs, it may do so in explicit or implicit relationships.³⁶ Explicit (syndetic) coordination occurs when the coordinating marker is continually present between all the units in the coordinated relationship; for example, good *and* clean *and* fresh. When the marker is omitted, the coordination is implicit (asyndetic), as in great, grey-green, greasy Limpopo River, where the *and* between the adjectives is understood.

Coordinated expressions can function as modifiers. Extensive use of coordinated structures contributes to sentence length, with possible difficulties in decoding. When explicit coordination is used, readers may be unable to distinguish between main and dependent units.³⁷ Implicit coordination, on the other hand, may cause ambiguity, a problem that is common to any structure where significant words are omitted. All these problems occur in this example. In No person shall conduct an investigation *or* render assistance with regard thereto in respect of a matter in which he *or* she has any pecuniary *or* any other interest which might preclude him *or* her from exercising *or* performing his *or* her powers, duties and functions in a fair, unbiased and proper manner,³⁸ the alternatives, indicated by *or*, impede comprehension. (This is even the case with the more formulaic *his or her* which is usually treated as a single lexical item; see discussion below). Because the coordinated units are apparently similar, they do not immediately make clear which are the main and dependent clauses of the sentence. The syntax also makes it difficult to establish which clauses include others. For example, does any other interest extend or include pecuniary...interest?

Further confusion is caused by inconsistency in the kinds of semantic relationships existing between coordinated units. Some coordinated phrases clearly refer to alternatives but others may not. In the previous example, while *conduct an investigation* obviously means something different to its coordinated *render assistance*, the similarly coordinated *exercising and performing* are not such clear

³⁴ Just as subordinate phrases and clauses depend on the main clause that they extend, so modifying noun, verb, adverbial and prepositional constructions depend on the head element that they modify. It is not tautologous to identify verb and adverbial modifiers in the same phrase, for, in addition to what the adverbial extension may offer the verb process, modifying functions are also performed by modal auxiliaries. In the discussion of tense which follows (V(1)(ii)) the significance of these auxiliaries will be made clear.

³⁵ Crystal (n3) 182

³⁶ Crystal (n3) 182.

³⁷ In cases where not all the nouns are modified, it may be unclear whether the coordination implies that the modifying term applies to all the nouns or only to its adjacent Head. For example, in written form, She had a new hat and coat, although both hat and coat are coordinated objects of *had*, it is not certain whether the coat was also new. When explicit coordination combines with implicit coordination, the ambiguity is extended: She had a new hat, [and] coat and handbag. This ambiguity is more likely to occur in writing because of the general property of written language to suppress nuances conveyed in speech by intonation, pauses, gestures and other devices available to speakers and listeners.

³⁸ Section 4(4) of the Human Rights Commission Bill [B 8F-94].

alternatives. Moreover, in the he or she phrase, the coordinator or does not separate alternatives into different syntactic units. The alternative pronoun forms he/she are actually part of one unit. (It would be a less cumbersome and a more accurate reflection of the real relationship in this phrase to write s/he where the slash marker is useful, not ambiguous.)

Different comprehension problems are created by the implicit (asyndetic) coordination involved in powers, duties and functions, and fair, unbiased and proper manner. Both an omitted and and a present and join syntactically equal units (nouns and adjectives respectively). The powers, duties and functions collection is unproblematic. (In fact, the omitted and here would have added unnecessary words to the sentence.) In the second asyndetic phrase, however, the difference in meaning between the words in the coordination is not as clear. To the non-lawyer fair and unbiased are nearly synonymous,³⁹ yet, because the purpose of coordination is to add and develop information, readers will assume that the words grouped together must have different meanings.⁴⁰ If these differences are not made clear, readers may assume an unintended difference in meaning.⁴¹

2. COMPLEX SENTENCES

Complex sentences are a direct result of subordination. Subordination is a versatile means of adding information, since it can be almost endlessly replicated. In theory, there is no end to the possibilities of subordination within subordination.⁴² None the less, this same versatility makes subordination one of the greatest obstacles to understanding. Reader energy can seldom be devoted equally to both structure and substance.⁴³ Complicated syntax therefore forces readers to attend to structure rather than substantive meaning.

Thus it is significant that the technical term for sentences expanded by subordination is 'complex',⁴⁴ because subordinated units are embedded⁴⁵ in the main unit, not in a linear relationship to this independent unit. The term 'embedded phrase/clause' is used to describe those units of language that are dependent semantically and syntactically on other units, whose meaning they extend. Embeddings 'are inversely related to comprehension'.⁴⁶ They interrupt the S+V and V+O process; they can refer to previous referents and ones that lie further ahead in the text;⁴⁷ they interrupt the main

³⁹ The dictionary definitions of fair as impartial; unbiased as without bias; and bias as an inclination to one side show that the meanings overlap: *Chambers's Twentieth Century Dictionary* (1966).

⁴⁰ Crystal (n3) 128 claims that in coordination there is no identity of meaning; i.e. the coordinated referents are syntactically rather than semantically connected: hence, the difference between I've ordered eggs, bacon, toast and coffee and phrases that expand the same referent, as in My friend, a lawyer. Crystal (n3) 180 refers to noun phrases, but the observation applies to the whole process of coordination, and holds, therefore, for units coordinated by adjectives, verbs and adverbs.

⁴¹ Ch3 II(5) discussed the problems associated with doublets that sometimes connect synonyms (will and testament) and sometimes do not (rights and remedies).

⁴² Leech et al. (n3) 105.

⁴³ Gopen (1987) 54 *The University of Chicago Law Review* 1185. See also Ch 2 II(1) and (2).

⁴⁴ See Leech et al. (n3) 93; Crystal (n3) 177. 'Subordination of phrases is one of the chief sources of complexity in grammar, particularly in noun phrases.' (Leech 59).

⁴⁵ This refers to constructions where one sentence is included in another or a relative clause is inserted within a noun phrase. Crystal (n6) 129.

⁴⁶ Danet (n2) 486.

⁴⁷ See III on left- and right-branching subordination.

element relationships within a sentence and, in so doing, constitute other hierarchical relationships.

Sentence length in itself is not necessarily an obstacle to comprehension, but the complicated syntax usually entailed may be.⁴⁸ A complex sentence is not easy to read if its length is such that it puts a strain on memory⁴⁹ and if the amount of embedding makes it difficult to perceive the relationships among the components of the sentence. Readers expect the information in dependent clauses to be less important than that in the main clause. If the arrangement of syntactic units does not make this clear, additional material simply confuses. Although many of the syntactic devices that extend sentences are used to clarify meaning, lengthy and complicated sentences may at one and the same time be very precise and well-nigh incomprehensible.

The constant endeavour to make the law as certain as possible favours long sentences. Maley quotes an excerpt from the Renton Report of 1975 where use of shorter sentences was criticised because of the difficulty of 'having to find the relationship between that sentence and another sentence two sentences away which, if you have it all in one sentence, is really done for you by the draftsman.' Legislation, thus, tends to condense all the elements of a rule into one sentence, a practice that has its roots in early English law, when a single sentence was supposed to express a single enactment.⁵⁰ The belief has remained that 'the semantic connections between elements of a single sentence are likely to be clearer than those between two or three separate sentences'.⁵¹ Nevertheless, too many ideas may be included by way of subordinate clauses, interrupting the linear flow from one main element to the next. Cumulatively, these subordinate phrases and clauses make up the total meaning of a sentence, but the complexity of the syntactic hierarchy, coupled with the sentence length, may impede comprehension.⁵²

For the reader of statutes, the main problem with subordination is that it delays comprehension: the full meaning of a subordinate clause can be understood only when the main clause which it expands is complete.⁵³ Similarly, the main clause can only be fully comprehended when all subordinate units are understood. Readers must therefore work out which clause the subordinate unit expands. With multiple subordination, the links may not be apparent.

Multiple subordination adds a number of dependent units, for each of which the reader must locate the appropriate head unit. Not only may these head units be separated from their dependent expressions, but interdependence can also occur.⁵⁴ If the function roles are not clear, readers will

⁴⁸ Danet (n2) 486.

⁴⁹ Law Reform Commission of Victoria *Plain English and the Law: Guidelines for Drafting in Plain English* Appendix 1 s70. See also Benson (1984/85) 13 *New York Review of Law and Social Change* 552: '...extremely long sentences do cause comprehension difficulty, probably because of memory overload.' In legal texts, sentences of 100-200 words are common and he cites a sentence of some 550 words in s341(e)(1) of the Internal Revenue Code.

⁵⁰ Maley *The Language of Legislation* 39.

⁵¹ Maley (n50) 39.

⁵² Because readers are forced to decode the syntactic hierarchy. Longacre in Givon (ed) *Syntax and Semantics* 115.

⁵³ Crystal (n3) 177.

⁵⁴ Subordination may be direct or indirect. In direct subordination, the dependent unit can be an element of another unit of the same rank; for example, an adverbial clause may be part of another clause. In indirect subordination, the dependent unit can be of a higher rank than the unit it modifies; for example, a clause may modify a phrase. Leech et al. (n3) 103.

certainly have more trouble identifying the form classes. In ...unless it is extended for a period of not longer than three months, or consecutive periods of not longer than three months at a time, by resolutions of the National Assembly adopted by a majority of at least two-thirds of all its members,⁵⁵ the initial clause it is extended is expanded by many dependent phrases. Some of these refer to it is extended and some are subordinate to other subordinate expressions. For example, members is subordinate to two-thirds, which is subordinate to majority, which is subordinate to adopted, which is subordinate to resolutions, as is National Assembly, the whole referring back it is extended. The entire multi-phrase unit is itself subordinate to a previous clause, as indicated by unless.

The hierarchy involved in subordination implies that items are ranked in order of importance. Inferior syntactic items (word and phrase) are dependent on superior larger units (clause and sentence) for full realisation of their meaning.⁵⁶ For example, In *Any person* while on active service with any of the land, air or naval forces of the Union or of any other country allied to or associated with the union in any war, *may make a will*,⁵⁷ the subordinate units depend on the italicised main clause, which they expand. The main clause is identifiable as such, because it can stand alone as a simple sentence (Any person ... may make a will) on which other clauses depend and because syntactically it conforms to full clause status.⁵⁸ In addition, main clauses lack any of the markers indicating dependency (for example adverbs and prepositions).

However, in legal texts, dependency relationships are not always clear. For example, phrases which are directly dependent on the main clause may themselves have other phrases dependent on them. In the following example, the intention (to advise the recipient about certain benefits offered by the bank) is obscured by multi-clause premodification: Bringing to your notice the fact that we are able to provide a professional, comprehensive and impartial estate planning service and inform you of any significant changes which have taken place in the legislation relating to Estate Duty.⁵⁹ The object of the sentence, service, is premodified by no less than five elements in a coordinate clause professional...planning, which is then part of another coordinate clause and...Duty. The second clause contains an explanatory subordinate clause, (which...Duty), extended by a prepositional phrase, (in the legislation), which itself is modified by relating to Estate Duty. Further confusion is caused by the lack of a finite verb and subject in the initial phrase (which occurs in the important first position), Bringing to your notice. The pronoun we has no previous referent: it is used only to create a false sense of unity.⁶⁰

Syntactic superiority is not defined solely in relation to words and phrases, however; because

⁵⁵ Section 34(2) of Act 200 of 1993.

⁵⁶ These divisions are not as distinct in language practice. See Crystal (n3) 16-9. Also, clauses may be dependent as well as main.

⁵⁷ Section 3(1) of the Wills Act 7 of 1953.

⁵⁸ See Crystal (n3) 20; Leech et al. (n3) 27 and 77-82.

⁵⁹ Extract from a letter from the Estate and Trust Administration of Standard Trust, 25 October 1993. This example also illustrates the problems caused when a sentence begins with a present participle: the omission of a valid subject (the present participle is not used as a gerund) and a full verb.

⁶⁰ Fowler, Hodge, Kress and Trew *Language and Control* 201-3 comment on the obscuring effect of we in official documents. 'The plural form "we" displays the added complexity that the source claims to speak of and for himself and on behalf of someone other than himself.' (201).

clauses and sentences may also be arranged in order of importance, they are defined by the very existence of such a hierarchy. Subordination, which operates through the hierarchy of syntactic forms - sentence-clause-phrase-word⁶¹ - involves both lexis and syntax.⁶² Subordinate expressions are usually introduced by a word or phrase linking the dependent unit to the main clause,⁶³ hence subordinating conjunctions denote both a semantic and a syntactic relationship. For example, while, as and although refer to time, similarity and concession, respectively, and they indicate syntactic status: phrases or clauses marked by them are subordinate to a main clause. In addition, because they mark subordinate material, these conjunctions indicate to readers what is main and what is elaborating material.

Any hierarchical structure is potentially complicated, since readers have to understand the ranking order in order to make sense of the whole sentence. Readers expect that understanding smaller linguistic units (phrases and clauses) will lead towards comprehension of the larger units (sentences and texts). When the syntactic ranking system is not clearly that of sentence-clause-phrase-word, however, they may have difficulty. For example, in *Any child born of parents who marry each other at any time after his birth shall....be in all respects the legitimate child of his parents*,⁶⁴ the ten word clause (who marry each other at any time after his birth) could be assumed to be more important than the preceding single word parents to which it is subordinate. Yet, because this clause is subordinate to this head word parents, this is the main unit. In addition to obscurity, absurdities often result, as in *...provided you were pregnant at the start of treatment, and for a year after your baby's birth*.⁶⁵

Readers also need to understand syntactic hierarchy because of another function of subordination: to indicate what is secondary or background information.⁶⁶ If the relationship between subordinate and main units is unclear, it is more difficult to work out what information is foregrounded (important) and what backgrounded (less important).

Lexical markers, such as relative pronouns who(m), whose, which, that, can help to determine syntactic hierarchy and indicate semantic backgrounding. When they are left out, the relationship between units in a clause and sentence is less obvious.⁶⁷ Unfortunately legal language usually omits relative pronouns, a so-called 'whiz' deletion,⁶⁸ resulting in what are known as zero clauses. For example, in *Any person aggrieved by an order made under subsection (4) of section five may, within such period and in such manner as may be prescribed, appeal against such order*,⁶⁹ the verb connected to the subject

⁶¹ Leech et al. (n3) 26.

⁶² Leech et al. (n3) 94-5.

⁶³ Crystal (n3) 184.

⁶⁴ Section 4 of the Children's Status Act 82 of 1987.

⁶⁵ Benefits Agency leaflet 'Babies and Benefits' (FB8) cited in *Plain English* December 1994 3.

⁶⁶ Hopper in Givón (n52) 81ff.

⁶⁷ 'Markers' in this sense refer to lexical evidence of subordination. See (n1). Leech et al. (n3) 95 identify three types of marker:

- (i) a subordinating conjunction, such as if, when, that, because;
- (ii) a wh- clause element, such as what, who, whoever, which, how;
- (iii) a non-finite verb form, such as the infinitive, present and past participles.

⁶⁸ Danet (n2) 479 uses this term because relative pronouns begin with wh- and occur in constructions with some form of be, hence the wh-is pattern. See also n68.

⁶⁹ Section 7(1) of the Maintenance Act 23 of 1963.

Any person is appeal. In the absence of the relative pronoun *who*, however, the more explicit verb form is also lost: the full clause would be *who has been aggrieved*. With the omission of the relative pronoun, the auxiliary that would have indicated any difference in verb form (such as third person singular and present or past tense) is also omitted.

(i) Conditionals

Conditional clauses are a special form of subordination and they too are a particular feature of legal language. Because the law needs to be both precise and flexible, and because every contingency cannot be mentioned, general rules must be qualified by conditionals. These phrases elaborate on the circumstances and exceptions under which a rule applies.

In order to convey the meaning that a rule is applicable under specified circumstances, both conditional conjunctions and dependent syntactic structures are used. Negative expressions, such as *unless*, *except* and *without*, are often involved. In the statement *In this Act, unless the context otherwise indicates-* the conditional sense is conveyed lexically by *unless* and syntactically through the subordinate clause which this lexical term introduces, *unless the context otherwise indicates*.

Conditional clauses are always subordinate to main clauses. If readers cannot identify them, they cannot distinguish main from subordinate information, and, when conditional meaning is not clearly indicated by conditional markers, such as either ...or, if and unless, it is more difficult to identify what the conditional (subordinate) units are. Implicit conditionals occur frequently in legal texts and their non-marked surface form is always potentially confusing. For instance, in *No person was to be admitted to be a candidate for any such certificate who had not passed the matriculation examination in the university*,⁷⁰ conditional meaning is expressed in *was to be admitted* which has a sense of *unless*.

(ii) Prepositional phrases

Prepositional phrases also involve a type of subordination. Prepositions express a semantic relationship between two parts of a sentence or clause, by showing how the parts are related in space, time, cause, manner, accompaniment, support and opposition, possession, concession, exception and addition.⁷¹ A prepositional phrase consists of a preposition followed by a noun or noun phrase (*in court*), which may itself be modified (*in the Supreme Court*).⁷² The construction following the preposition, usually a noun phrase, is known as its prepositional complement.⁷³ The head of a prepositional phrase is the preposition itself, although a prepositional phrase modifies another unit which need not be the head of the main clause.

The following example illustrates how difficult it can be to decode relationships in a long sentence containing many prepositional phrases. In *The validity of any decree or order made in any country in any case in which the husband is not domiciled in that country, under the provisions of any law which are*

⁷⁰ *Ex Parte Friedgut* 1983 (2) SA 336 (T) at 345A.

⁷¹ Crystal (n3) 164, 168.

⁷² Leech et al. (n3) 35.

⁷³ Crystal (n3) 164; Leech (n3) 64.

declared *by* the State President *by* proclamation *in* the *Gazette* to be provisions substantially corresponding *to* the relevant provisions *of* paragraph (a) *of* sub-section (1) *of* section one, or *of* section four or five, read *with* the said paragraph, shall be recognised by the courts of the Republic,⁷⁴ the subject (decree) is separated from the verb (shall be recognised) by seventeen prepositional phrases. Most readers would find it extremely difficult to identify the main (non-dependent) phrases and to establish the connections between the dependent structures.

Prepositional phrases occur frequently in legal texts⁷⁵ and they often cause difficulties for readers. First, because they are inserted between sentence elements, they interrupt the basic S+V+O progress. Secondly, because they add information, they must themselves be understood in relation to their head units. Thirdly, the additional information may misleadingly emphasise, through elaboration, the agent, the process referred to or the entity being affected. In such signature is made *by* the testator or *by* such other person *or* is acknowledged *by* the testator...,⁷⁶ for example, the conditions which validate the signing of a will are given prominence by the alternatives which the prepositional phrases introduce.

Further difficulty arises when, as often happens in legal texts, prepositions occur in set phrases (which may contain two prepositions), such as because of, due to, in accordance with, in terms of, with reference to.⁷⁷ Superficially, complex prepositional phrases resemble a sequence of two noun phrases, as in He acted *in* accordance *with* my instructions.⁷⁸ Whereas main phrases, such as noun phrases, however, are not dependent on other elements, prepositions *always* are. The surface similarity to noun phrases obscures the real relationship between the elements in the clause.

A further complication occurs when a preposition is separated from its complement, particularly when the separation is occasioned by other prepositional phrases. When a legal text tries to include a range of variables in a single sentence, it may use prepositional phrases to introduce conditions and exceptions in a list that is far removed from the initial phrase. The following example is a clear illustration. Subject *to* the provisions *of* subsection (3), a parent or guardian *of* any pupil *of* an institution *or of* any child who has *under* this Act *or under* section three hundred and forty-two *of* the Criminal Procedure Act, 1955 (Act No. 56 *of* 1955), been placed *in* any custody other than the custody *of* the parent *or* guardian, shall be divested *of* his right *of* control over and *of* his right *to* the custody *of* that pupil *or* child and those rights, including the right *to* punish and *to* exercise discipline, shall be vested- (i) *in*... (ii) *in*... (iii) *in*.⁷⁹

Here, the main obstacle to comprehension is the arrangement of dependent phrases. The number of phrases that add modifying information about whom a parent or guardian may control obscures the actual focus of the sentence, namely the removal of these rights from parents and guardians and where

⁷⁴ Section 6 *bis*(1) of the Matrimonial Causes Jurisdiction Act 22 of 1939, as inserted by s9 of Act 37 of 1953 and amended by s23 of Act 70 of 1968.

⁷⁵ Danet (n2) 479, 481.

⁷⁶ Section 2(b)(iii) of the Wills Act 7 of 1953.

⁷⁷ Crystal (n3) 166.

⁷⁸ Crystal (n3) 167.

⁷⁹ Section 59(1)(a) of the Children's Act 33 of 1960.

the rights are then to be assigned.⁸⁰

Sequences of prepositional phrases involve vertical subordination because of the hierarchical relationships between the phrases. Readers then have to understand the effect of both modification and subordination and cope with the interruptions in the progression from S to V. In the following example, The Employer shall, *in* accordance *with* the irrevocable instruction and *in* the circumstances contemplated *in* the Loan Agreement, *to* the extent that there would be an amount due and payable but unpaid *in* terms *of* the Loan Acknowledgement, pay over to X,⁸¹ the modifying words cause few problems (apart from the specific legal meaning of irrevocable instruction, Loan Agreement). The syntactic structure, however, does confuse. The subject, the Employer is separated from the final verb elements, pay over, by numerous prepositional phrases, all of which modify the verb auxiliary shall, but also modify each other. The first phrase, the complex prepositional phrase in accordance with, is modified by the irrevocable instruction. Coordinated by and to the multi-phrase in the circumstances...Loan Acknowledgement, the whole structure modifies shall. Within the second coordinated clause, however, in the Loan Agreement is modified by to the extent...unpaid; all these are modified by in the terms, which is modified by of the Loan Acknowledgement. In this example, while identifying the prepositional phrases is relatively easy, because a preposition introduces each phrase, the fact that most of the phrases perform more than one function is a sure source of confusion.

Sentences such as the above, which contain many prepositional phrases in a complicated hierarchy of meanings, are syntactic and semantic minefields for the reader. All the information added by prepositional phrases has to be understood in order to comprehend the meaning of the whole sentence. Most lay readers will find structures of this sort an insuperable obstacle to comprehension.

3. PASSIVE CONSTRUCTIONS

Passive constructions are often found in legal documents. They permit the impersonal style associated with an objective perspective. A particular difficulty occurs when the passive is used to express a performative utterance. Ordinarily an utterance performs an act only if the agent is the first person and only if the statement is cast in the present tense. In addition the agent has to be someone with the appropriate authority, and a performative verb must be used.⁸² Normally the verb is in the active voice (I now pronounce you man and wife), but in legal texts it can be in the passive, in which case the agent is usually deleted (The case is dismissed).⁸³

⁸⁰ The whole sentence is itself dependent on undisclosed information referred to in subsection (3) of the same Act. The section heading, Transfer of certain parental powers (s59), gives only a general indication of the content of this section.

⁸¹ Clause 10 of a General Purpose Loan Scheme Arrangements contract of a finance company.

⁸² See Ch1 n47.

⁸³ Delmonte and Dibattista (1995) 5 *Working Papers in Linguistics* 7. This performativity is emphasised when hereby precedes the passive verb phrase, because it indicates that the statement becomes the actual instrument of the action; for example, The application is dismissed; This Protocol is hereby ratified.

(i) Structure of the passive

The passive is a marked structure. The unmarked sentence form S+V+O is altered by the passive to O+V+(PP);⁸⁴ i.e. goal/affected+V+(agent),⁸⁵ where the affected or goal of the active sentence moves to the position usually occupied by the agent (The case was tried by a magistrate). In English, because the S+V+O pattern is recognised as basic, any alteration to it is significant. The passive refocuses the emphasis and therefore the meaning of a sentence. By doing so it complicates the relationship between syntactic and semantic structures. The correlation of S+V+O with agent+process+goal that occurs in unmarked clauses diverges in marked ones: the passive goal+process+by+actor correlates to an O+S+Adv pattern.⁸⁶ Whenever a difference exists between surface form and underlying semantic relationship, comprehension may become more difficult.

In even a simple S+V+O clause in active mood, there are three different subject functions.⁸⁷ The psychological subject provides the Theme of a sentence; the grammatical subject the Subject of the verb; and the logical subject the Actor.⁸⁸ These are three separate and distinct functions. They may be all combined in one element, as in the basic active S+V+O where the grammatical subject (Subject) is also the Theme or psychological subject of the clause and the logical subject or Actor of the process. These different functions affect the way in which meaning is understood, but are all related. Readers have to establish both the distinction between functions (if these are conveyed by more than one element) and how they relate to each other. In the passive, however, while the Theme and Subject functions may be conflated, those of Subject and Actor are separate, although not always apparently so. This is a central source of the comprehension problems associated with the passive.⁸⁹

In passives, the overall *meaning* of the O+S+PP pattern is actually the same as the original S+V+O, but with different emphasis. The syntactic rearrangement, however, suggests otherwise. What happens in the passive is that the object of the corresponding active clause, although it remains the object, appears in the position most frequently associated with the subject. In the cat was chased by the dog, for example, the grammatical object of the active clause, (the cat), fills the position associated with the Subject, and the subject of the active clause (the dog) functions adverbially and in a position normally occupied by the Object (in either direct or indirect form).⁹⁰ This is not the real meaning, however, since in both active and passive sentences, the dog is doing the chasing and the cat is the object of its pursuit.

⁸⁴ Here 'O' represents the 'active' object and 'passive' subject; see following discussion.

⁸⁵ S and O refer to syntactic relations not semantic functions (see n87). An inherent understanding of syntax patterns is acquired with language use.

⁸⁶ Halliday (n8) 35.

⁸⁷ Halliday (n8) 32-7. See also Halliday in Lyons (n8) 159. In structures which express mood (imperative, subjunctive, passive) the actual actor may not be the main agent, as in the judge ordered the clerk to make notes. Here the note making will be done by the clerk, who thus becomes the grammatical subject. The psychological subject is one which refers to something already mentioned in the text (see Ch2 II(1) on 'given' and 'new' as components of connected text. These notes were made by the clerk gives the notes psychological, because thematic, prominence.

⁸⁸ Halliday (n8) 159.

⁸⁹ The notion of subject conflates three distinct roles which, although they are typically combined into one element, are nevertheless independent of one another. Halliday (n8) 159.

⁹⁰ For example, in She ate in the car the car is not construed as an object.

Hence, the affected becomes the grammatical Subject and Theme by reason of its position, but semantically it remains the affected not the Actor.⁹¹

In The distinction drawn by the Legislature,⁹² the subject function slot, associated with the agent of the process, is occupied by the goal/affected (see n88), for the distinction will be drawn by another agent. However, because this affected, the distinction, is encountered in the first (subject) position it becomes the psychological subject; the Theme about which the process is concerned. The real agent, the Legislature, is supplied, but in a position associated with the object function. Emphasis is therefore given to the *result* (effect of the goal) of the process. Nevertheless, since the final section of a clause or sentence is a focal one (because it traditionally carries the new, significant information),⁹³ if the agent is placed in this position, it acquires prominence.

In The applicant is entitled to be admitted as an advocate,⁹⁴ the logical subject/agent (of entitled) is omitted. The rights of the applicant are emphasised by placing the applicant in the Subject and Thematic position. The admission is done by an unnamed agent (Actor), whose identity has been suppressed both syntactically (there is no adverbial phrase referring to this Actor), and semantically (there is no evidence as to whom this might be). In cases such as these, readers have to supply the agent from their understanding of the context. This may not always be possible, with the result that an interpretative field is opened up and each individual can supply a different understanding of the text.⁹⁵

In the sentence This involves the meaning of the words used by the Legislature,⁹⁶ the subject position is filled by this (a proform referring to an earlier referent), which has a transactive connection with the verb involves. Information on the affected can therefore be expected. The phrase, the meaning of the words, is the object of involves, but also of the passive verb used, so another subject is lacking (which is theoretically possible because the passive permits this, and the 'whiz deletion' of a relative clause). The passive can be used to adjust the information weighting and stress intended by the writer. This construction has both a shift in meaning of the words (the Legislature uses them) and a syntactic adjustment (the words, *which are* used by the Legislature, form an abbreviated clause). When the agent is finally identified (the Legislature), it is emphasised because it concludes the sentence and completes the syntactic structure.

Passive constructions may conceal agents by omitting them (judgment was handed down).

⁹¹ See Halliday (n8) 161; Leech et al. (n3) 121. They use the term 'grammatical' in slightly different ways. Halliday's terminology has already been discussed. Leech uses 'grammatical' to refer to positional status; 'logical' to indicate syntactic function. He means that a term in the subject position may appear to have subject function but not necessarily do so, and never in passive constructions.

⁹² *Ex parte Lynn and Others* 1987 (1) SA 797 (N) at 811H.

⁹³ Gopen (n43) 1186-8, 1191-2; Williams *Ten Lessons in Clarity and Grace* 40-59. See also discussion of this in Ch2 II (2).

⁹⁴ *Ex Parte Lynn and Others* above at 798A.

⁹⁵ Boyd White *Heracles' Bow* 92 finds common ground in understanding both legal and literary texts. If texts are, in fact, partly about the ways in which readers change when reading it (91), meaning can never be entirely objective.

⁹⁶ *Ex parte Friedgut* 1983 (2) SA 336 at 339E

Where it is unnecessary to know who the agent is or where the deleted agent is easily recoverable (the postman was bitten), the passive is not problematic. Additionally, if the passive phrase refers back to an action or event that has already been mentioned, the agentless passive may help facilitate the given-new-given shifts.⁹⁷ that make up connected and comprehensible text. In a shift from active to passive between consecutive clauses or sentences, the new of the first (active) sentence becomes the given of the second (passive). Because of the positional reversal (S+V+O to O+V+(Adv)), when information in the last (new) position of the active sentence is repeated in the first (given) position of the passive sentence, the two sentences are connected by syntax and meaning. For instance, the judge passed sentence. The sentence was heard by a packed courtroom.

The elimination of an agent, no matter how easily the agent may be recovered is, however, an economy with considerable effect on meaning. For example, the sentence The Admission of Advocates Amendment Act, 1987 (Act No. 17 of 1987), is hereby repealed⁹⁸ acquires a great deal of its authority from its impersonality. Because no agent is identified as responsible for repealing the Act, no one can be directly challenged on the action of repeal.⁹⁹ An agentless structure of this sort changes the illocutionary force of the sentence¹⁰⁰, because it puts the *effect* of the process in the position usually occupied by the agent. In this example the Act is in the subject position but it is not the agent in meaning (i.e. it is the grammatical Subject but not the Thematic one). The positional reshuffle emphasises the process of repeal. Since the real agents are not in the grammatical Subject position, the inference is that the forces responsible for the repeal do not have to be named. When the real agents of a process are concealed, they are beyond accountability.¹⁰¹

All passive constructions use some form of be¹⁰² as an auxiliary verb (the Bar Council was represented by counsel).¹⁰³ When the active becomes passive (was represented), the verb phrase changes from a full verb (represented), to a complex verb phrase of auxiliary+participle (was represented).¹⁰⁴ A complex verb phrase consists of one or more auxiliaries and the main verb in participle (i.e. non-finite) form, but the first word in the verb phrase is always finite.¹⁰⁵ Consequently, in the passive verb phrase (which is complex) the specificity of number, person, tense and mood encoded in be coexists

⁹⁷ Instruction manuals often use the passive in this function. For example The filter must be in place before use. If the filter is used when wet, the suction will be less effective.

⁹⁸ Admission of Advocates Amendment Bill 1990 [B/W 94-90].

⁹⁹ It is understood that Parliament is the ostensible agent, but even this noun is omitted, and it would not have provided an identifiable agent.

¹⁰⁰ Danet (n2) 458. The illocutionary force of an utterance is the work it accomplishes when uttered in a specific context. See Ch1 n47 and n48 for discussion of speech acts.

¹⁰¹ Boyd White (n95) 60ff. The passive is thus closely connected with Boyd-White's 'invisible discourse'

¹⁰² In present and simple past constructions (am, is, was and were) that are following by noun, adjectival or adverbial phrases, be is a finite verb. It may also, however, function as an auxiliary verb with non-finite verb forms: i.e. some form of be followed by present or past participles. A single word verb phrase must always be a finite verb.

¹⁰³ *Ex Parte Smith* 1982 (1) SA 601 (C) at 601H.

¹⁰⁴ The process by which one clause structure is changed into another is called 'transformation'. The passive is a transformed structure because it is derived from an original, active clause. See Leech (n3) 115 and Kress and Hodge (n11) 10.

¹⁰⁵ Leech et al. (n3) 66.

with the generality of the non-finite forms, which do not convey this information.¹⁰⁶ Both specificity and generality are thus made possible (see VI (1) (ii) (a) on tense and meaning).

When the original active clause was an 'actional',¹⁰⁷ in the passive it becomes a 'relational'; i.e. there is a shift from a process to a state.¹⁰⁸ For example, in the agentless passive, the case is dismissed, there is a syntactic shift from an actional (X dismissed the case) to a relational clause. The shift means that not only is the agent unknown (the dismitter may be assumed but is not named), but the action also becomes a state (the case remains dismissed), not a process moving towards an affected entity or outcome. Whereas actionals represent the relationships involved in processes, both physical and mental, relationals display the *results* of the activity. This transformation significantly affects readers' response to the transformed clause, because 'processes, being under the control of agents, imply the possibility of modification, decision; whereas states are perceived as unalterable and thus to be put up with'.¹⁰⁹ A state discourages further inquiry.¹¹⁰

In a somewhat contradictory manner, however, although relationals express results, they obscure causality. The copular verb¹¹¹ in a relational clause relates two items, either attributively (a noun and a quality, usually adjectival, as in the court is satisfied) or equatively (links two nouns; for example, the LLB is the qualification).¹¹² Although these two constructions seem parallel in syntax, they differ both syntactically and semantically. Whereas the form class composition of an attributive relational is N+be+Adj, that of an equative relational is N+be +N. They differ also in how their meaning is conveyed. While equatives relate two entities, and classification is involved in the word selection, the quality that attributives relate to an entity indicates a prior judgment of the nature of the entity. Attributives, therefore, express a subjective classification that may not be perceived as such, and, consequently, the two different types of relational elements present readers with different comprehension tasks.

Passive relational clauses are complex because they may conceal the basis on which a noun is linked to a quality or entity. In *The following persons shall...be deemed to be duly qualified*,¹¹³ the attributive duly qualified applies to referents of following persons, but whether they qualify or not depends on the judgment of an absent agent, since be deemed is an agentless passive.

¹⁰⁶ Leech et al. (n3) 66-68 discuss the number of auxiliaries that can come before the main verb. Although phrases like "could have been being loved" are rare, they are never the less grammatical and meaningful. Nelson Francis *The English Language* 51.

¹⁰⁷ Kress and Hodge (n11) 8-9.

¹⁰⁸ Kress and Hodge (n11) 8; Halliday (n8) 154.

¹⁰⁹ Fowler et al. (n60) 31. This analysis of the ideology of grammar in texts has been questioned by some media analysts, but the distinction between processes and states remains acceptable.

¹¹⁰ The discussion of ideology and power (see Ch1 III and IV) showed that this was a significant factor in how language functions in social and political practice.

¹¹¹ Copular verbs, such as be, appear, feel, seem, become, grow, turn, link the subject to a word or phrase which relates back to the subject as a complement. Complements differ from objects because they extend the meaning of a previous clause element, as opposed to referring to the affected or recipient of the process. As the italicised sections of the examples below show, complements can be noun phrases (he is *a lawyer*), adjectival phrases (the accused is *guilty*), pronouns (this is *him*) and some subordinate clauses (that is *what I said*).

¹¹² Kress and Hodge (n11) 8.

¹¹³ Section 3(2) of the Admission of Advocates Act 74 of 1964.

When a passive occurs in a subordinate clause the comprehension difficulties presented by subordination¹¹⁴ increase, because readers may have difficulty in establishing the semantic and syntactic functions of the referents. For example, in Any deletion, addition, alteration or interlineation made in a will *executed* after the said date shall for the purposes of sub-section (1) *be presumed*, unless the contrary *is proved, to have been made* after the will *was executed*,¹¹⁵ the five (italicised) passive verb phrases lack agents. Furthermore, these deleted agents must be different because the making, executing and proving cannot be done by the same agent. Readers, therefore, have to supply agents from their understanding of the text, an understanding that will inevitably be imperfect. The subject of shall...be presumed is a multi-nominal phrase, Any deletion.....interlineation, whose meaning is obscured by four nominalisations in a coordinated phrase. This complex subject is separated from the first indicator of the verb phrase, shall, by three subordinate units. The verb phrase itself is interrupted by two subordinate phrases and is finally an agentless passive, shall...be presumed.

4. NEGATIVE UTTERANCES

Negative constructions are used to contradict some or all of the meaning of a sentence.¹¹⁶ Because the aim of much legislation is to stop certain types of action, legal texts show a high incidence of negative terms,¹¹⁷ for example, No Bathing. Even laws stating what must or should be done are by implication defined against what should not be done; for example, Queue this side not only stipulates the side on which the queue has to form, but implicitly prohibits queuing in any other area.

Like all marked structures, negative clauses are potentially more difficult to understand than positive ones. Readers generally have to know the meaning of the positive before they can negate it. As a result they are forced constantly to contrast positive and negative; unmarked and marked. Knowing what No Trespassing means requires a reader to know what trespassing involves.

Negation may be expressed either overtly or covertly. Overt negation adds negative markers, such as not, none, no one, never, negative prefixes (un-, non-, in-) and negative coordinators (neither...nor) to positive base forms (usually the noun or verb phrase). Legal texts also use words with covert negative meaning, such as the verbs prohibit, preclude, lack, doubt, deny, control, ban, and the conjunctions that restrain action or put conditions upon it (unless, provided that, without, but for). The negating effect of these terms is covert: Bathing prohibited means the same as No Bathing; the latter is simply more directly expressed.

Syntactically, negative constructions are more complex than positive ones. Because negative markers are added to the unmarked positive form, they function as modifiers, and modification increases syntactic complexity. Moreover, the addition of negative markers, although governed by syntactic rules, does not guarantee a clear meaning. A marker must either be in the verb phrase or elsewhere in

¹¹⁴ See III above.

¹¹⁵ Section 2(2) of the Wills Act 7 of 1953.

¹¹⁶ Crystal (n6) 239

¹¹⁷ Mellinkoff *The Language of the Law* 11ff and Danet (n2). 476-481.

pronominal (nobody, no-one), adjectival (no) or adverbial (nowhere, never) forms. In other words, negation of the verb phrase should preclude any other negation in a clause. Wherever it is placed, a negative marker should occur only once in a sentence if the sentence is to be readily comprehensible. Sentences like the following are difficult to process: the essential nature of the sentence is a sentence of imprisonment and the subsequent order suspending its operation *cannot* affect its nature; see *Rex v. Jansen* (1949 (3), SALR 928); if the conditions attached to the sentence are *not* complied with, the sentence is automatically carried into execution *without* the intervention of a Court of law.¹¹⁸ This long, complex sentence has two negative verb markers (cannot, not), an implied negative (without) and the overall restrictive meaning of what is not allowed to occur. The scope of each negation has to be worked out by the reader before the import of the whole sentence is clear.

Too many negatives can appear to cancel each other. Since double negation is not a feature of standard English expression, it may confuse readers, as they cannot be sure whether the double negatives serve to emphasise negation or to cancel each other out. This difficulty increases in proportion to the number of negatives used.¹¹⁹ Extended negation is a typical feature of legal texts. In *This hardship results, however, not from the legislation in question but from a view of another Act now held to be incorrect*,¹²⁰ a contrastive stress is set up. (Contrastive stress implies a negation that may not be easily recoverable.)¹²¹ The legislation is described in terms of what it is not: it is not responsible for the hardships referred to. A responsible agent is identified, but only in negative terms (an incorrect Act), which makes identification of the agent difficult. Extensive negation such as this requires readers to work in a different referential mode: that of dealing with what is *not* rather than with what *is*.¹²²

In some cases, negative marking of both the verb and other terms can be effective. Limited use of the negative particle not in the verb phrase and a negative prefix, such as un-, attached to another term is grammatically acceptable and does not necessarily complicate meaning; for example, he was not unknown to her. Used extensively, however, double or multiple negation does confuse readers, because the structure does not make clear whether the meaning is still restrictive or whether it has become positive. An example is he has *no* knowledge that the signature of the maker or drawer is *un*authorized, except that this warranty is *not* given by a holder in due course acting in good faith.¹²³

In order to recover the original base of sentences with multiple negatives, readers have to work out the sequence in which the negation was applied.¹²⁴ The process becomes more complex when

¹¹⁸ *Jaga v Donges NO and Another; Bhana v Donges NO and Another* 1950 653 (A) at 655B.

¹¹⁹ Danet (n2) 46 cites psycholinguistic evidence to support the argument that 'negative sentences are more difficult to understand than positive ones, and that difficulty increases with the number of negatives'.

¹²⁰ *Ex Parte Lynn and Others* 1987 (1) SA 797 (N) at 801H.

¹²¹ Kress and Hodge (n11) 149.

¹²² Danet (n2) 46.

¹²³ The Universal Commercial Code s3-417 cited in Gopen (n43) 1196.

¹²⁴ With negation of negation it is possible that the whole negation cancels back into a positive (he didn't do nothing;) alternatively the duplicated negative may add emphasis (he didn't never do nothing). Although these are extreme cases, found more often in colloquial speech, they sometimes occur in more formal writing; It cannot be said that such a course, included as a requirement for these degrees, was not a course prescribed or recognized by the University for such degrees: *Ex Parte Friedgut* 1983 (2) SA 336 (T) at 341E.

conditional concepts are introduced. The following sentence is an example of a sentence containing multiple negation and conditionals. *No person was to be admitted to be a candidate for any such certificate who had not passed the matriculation examination in the university or had not passed in any other university such an examination as in the opinion of Council was equivalent to the matriculation examination or was not the holder of a third class certificate in literature and science granted by the Board of Public Examiners.*¹²⁵ Uncovering the positive version involves several steps. Readers have to recast negative phrases whose positive meaning is more important; for example, since candidates had to have passed particular examinations, this information should be expressed positively, as something the candidates ought to have achieved, not as what they ought not to not have. A possible rewording could be along the lines of Candidates must have: (i) passed their matriculation examination; *or* (ii) passed another examination which Council accepts as equivalent to matriculation; *or* (iii) hold a third class certificate in literature and science granted by the Board of Public Examiners.

When modality and negation are combined in the verb phrase, the difficulties of recovering an exact meaning are also compounded. Modal negatives not only involve readers in the double-think effect of negation, but also undermine any certainty about what is negatively described. For example, in *He does not suggest that either the course's syllabus or its regular content has been altered materially...nor does he explain why his experience leads him to believe the standard has fallen*, the writer casts doubt on the validity of the cited views by implying something dubious about the opinion of the other referent, *He* (because he did not suggest or explain). The implication is that better (because positive) views exist, but what these views are has to be deduced from context.

A final problem caused by negative expressions is uncertainty. Negatives are often both specific and vague. In the negative *Do not walk on the grass* the writer has specified what must not be done. At the same time, the specificity is imprecise, since other forbidden activity is not stated; i.e. it might be inferred that cycling, for instance, was permitted. The positive version, *Keep off the grass*, is more general, but paradoxically more specific, because the general reference of *Keep off* means that *any* form of being on the grass is prohibited.

(i) Adversatives

The positive:negative contrast invoked by negatives can also be achieved by adversative conjunctions, such as *but*, *yet*, *however*, *nevertheless*. An adversative conjunction indicates that information in a following clause contradicts or qualifies that of a preceding clause.¹²⁶

Like other negatives, adversatives operate in a double-think manner; they concede a concept, while at the same time negating either it or another.¹²⁷ For example, *but* acknowledges the meaning of previous text in order to contradict or modify it. The judgment *It is true that there has in recent years been a lowering of the standard of Latin courses required by Universities for a bachelor of laws degree*,

¹²⁵ *Ex Parte Friedgut* above at 345A.

¹²⁶ Williams (n93) 50.

¹²⁷ Kress and Hodge (n11) 149.

but this fact cannot justify the view that "one course in the Latin language"...may be any course which a university chooses to prescribe, no matter what its standard may be,¹²⁸ acknowledges that standards have dropped but grants this fact no weight. The adversative conjunction *but* introduces information that will contrast with earlier statements (*but* indicates that what was the case no longer holds fully, or at all). A similar effect is accomplished by *It is true*, where the implications of the concession here have adversative function: although the validity of the referent is apparently conceded, it is in fact denied, because the concession implies comparison with other information. Readers have learnt to expect that *It is true that X* will be followed by, or has been preceded by, an adversative.

Adversative constructions act as pivots between old, contradicted topics and new ones.¹²⁹ As the proposition that will be contradicted usually occurs before the new topic, the position of an adversative emphasises its semantic function. The overlap of lexical and syntactic features in the creation of adversatives should mean that adversatives assist readers to understand a text, but this is not usually the case with legal texts. These statistics are, *however*, of little or no relevance to the task of interpreting the relevant provisions of the Act¹³⁰ begins with a positive concept connected to previous text (These statistics), but the connection is immediately invalidated. The combination of the adversative *however* and negative little or no relevance discounts the value of the earlier text in which these statistics were discussed. Only a negated referential world remains.

Like agentless passives, adversatives can create a comprehension void. Because adversatives cancel the meaning of earlier text, unless the following text then supplies new information, the reader is left with only negated reference, as in the example above.¹³¹ Whereas the agentless passive allows writers to conceal the real agents and focus on the effects of a process, adversatives permit writers to impose selected, and not necessarily connected, views.

Due to their more oblique meaning, adversatives sometimes present what is actually new information as previous facts negated; and, because the subjectivity involved is not obvious, writers can express opinions in an indirect, and therefore less contestable, form. Adversatives make it possible for writers both to express an opinion under the guise of negated information and to rank these opinions. The adversative structure of *rather...than* uses contrastive stress to establish which view the writer wishes to give prominence. In *As I read his remarks, however, they had largely to do with structural levels and formal standards rather than any evaluated qualitatively, with rank or status in other words*,¹³² the clause introduced by the adversative *however* implies that what remarks in the previous clause referred to is not

¹²⁸ *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A) at 915C.

¹²⁹ Kress and Hodge (n11) 149.

¹³⁰ *Ex Parte Lynn and Others* 1987 (1) SA 797 at 802D.

¹³¹ If the text that follows an adversative does not supply new information to fill this gap, the adversative clause functions with modal inference. By contradicting previous text the adversative clause reflects a negative opinion on that text.

¹³² *Ex Parte Lynn and Others* 1987 (1) SA 797 (N) at 807G.

of value. By contrast, the referents introduced by the rather than phrase acquire preference.¹³³

V. SENTENCE ELEMENTS

The ordering of sentence elements in legal sentences often differs markedly from everyday usage and, as the earlier discussion of modification indicated, the elements themselves are often structurally complex. This section deals with those features of sentence elements in legal texts which, especially when they occur together, cause difficulties for lay readers. The focus is on the components, structure and functions of: the verb phrase (including indication of modality, tense, aspect and mood), and the noun phrase, particularly the types which incorporate nominalisation and pronouns. The description and discussion attempts to explain the nature of the intra- and inter- phrase structural relationships and their expression of semantic relationships. These relationships are considered within the larger context of discourse structure and meaning.

1. THE VERB PHRASE

A verb is the most important element in a sentence. Not only is it obligatory for all structures larger than a phrase,¹³⁴ but, because of its position in the sentence, it also plays a significant semantic role.¹³⁵ In transactive structures, the verb provides the semantic connection between agent and affected; in non-transactive structures the verb's semantic information locates the agent in the process.¹³⁶ 'Because verbs have the power to dictate how a sentence conveys who did what to whom, one cannot sort out the roles in a sentence without looking up the verb.'¹³⁷

In English, the verb phrase consists of a main verb with up to four optional auxiliaries preceding it. Each auxiliary has a specific function and occurs in a specific order to convey modality, perfect aspect, progressive aspect and voice.¹³⁸ Verb meanings can be grouped into stative and dynamic. Stative meanings identify processes or states of being in which no obvious action occurs (be, have, hear, know); dynamic verbs involve the agent in the action the verb specifies.¹³⁹ In addition, verb phrases express a range of other information including time, duration, person, likelihood and negation. The broad tense categories are past, present and future,¹⁴⁰ within which subsets exist. Some of these are discussed below.

The nature of a verb phrase reflects the role its information will play in the larger text. Verbs of

¹³³ Much of this meaning is inferred, and the inference is extended by other syntactic features, such as the past tense of the verb had...to do. The implication is whatever value that his remarks had is distant, and therefore debatable.

¹³⁴ Crystal (n3) 32.

¹³⁵ Hopper (n66) 240. Verbs are the location of new narrative-advancing information and may also occupy one of the two most important positions in S-V constructions.

¹³⁶ The semantic properties of words are not entirely independent of each other and these properties determine what other words they can be combined with. Fromkin and Rodman *An Introduction to Language* 165, 182. Given the structural importance of verbs, their semantic properties must have a significant effect on the other words in the clause or sentence.

¹³⁷ Pinker *The Language Instinct* 114.

¹³⁸ Leech et al. (n3) 66ff; Crystal (n3) 52.

¹³⁹ Crystal (n3) (83).

¹⁴⁰ Basically English has only two tense forms; past and present. The future is constructed from an auxiliary and main verb, as are all the other structures used to express variations of time and duration.

durative, stative, iterative and imperfective type¹⁴¹ usually occur in backgrounded or elaborating clauses.¹⁴² All these types are expressed in aspectual constructions, i.e. verb phrases based on the auxiliary+participle pattern.

The structure of the verb phrase can be very complex, since the simple verb phrase may be extended through the use of auxiliary verbs combined with participial forms. Variations, such as passives, increase the range of possible meanings even further.

Verbs in legal texts not only enact processes and control the actions of others (You are guilty as charged), but also have a constitutive effect: the pronouncement The case is dismissed acquires actual existence through the verb phrase (See Ch1 (n48) on performatives). Because sentences in law have illocutionary force, verbs give reality to the process they describe: what a law instructs must be obeyed. For example, in the correct context the single verb pronounce in I now pronounce you man and wife enforces what it describes; the couple are legally bound as husband and wife.

The rest of the section will deal with modality, tense, aspect, the verbs be and have, the subjunctive and directives.

(i) Modality

In English, contrasts in mood, i.e. the sense of permission, likelihood, possibility, necessity, volition and prediction about the verb process,¹⁴³ are primarily expressed by modal auxiliaries (may, can, shall, will and their corresponding past forms).¹⁴⁴ Because legal texts lay down obligations or give permission, verbs in legal texts are frequently written in the present tense using modal auxiliaries or other devices with modal inference;¹⁴⁵ for example, This Act *shall* come into operation (mandatory) and the Minister *may* grant consent (discretionary).¹⁴⁶

The truth or falsity of modal utterances (aletheutic modality)¹⁴⁷ can be assessed in terms of probability (epistemic modality) and authority (deontic modality).¹⁴⁸ There is an apparent semantic connection between epistemic modality and permissive statements on the one hand - they deal with possibility - and between deontic modality and mandatory statements on the other hand - they deal with authority and obligation.¹⁴⁹ However, the distinction is not always clear, because of the ambiguity surrounding the modal auxiliary may, which is used to express both epistemic and deontic modality (see below). This ambiguity increases the complexity of modal meaning in legal texts.

¹⁴¹ Hopper (n66) 215.

¹⁴² See III above on subordination and n283 below on background and foreground clauses.

¹⁴³ Crystal (n3) 53, 86. These meanings can be expressed by more than one modal; for example, can and may both express possibility and permission.

¹⁴⁴ Crystal (n6) 227.

¹⁴⁵ Adverbials can also express modality but this section concentrates on modal auxiliaries and their use.

¹⁴⁶ Maley (n50) 29.

¹⁴⁷ Lyons *Language, Meaning and Context* 236.

¹⁴⁸ Lyons (n147) 237; Maley (n50) 30.

¹⁴⁹ For example, He may not come can be understood epistemically to mean that, relative to what is known, someone's coming is unlikely. Deontic modality denotes the action of the speaker in giving permission or laying an obligation. The deontic interpretation of He may not come is that he is not permitted to come.

The modals will, shall, should, ought to and must are used in directives, but they entail a high degree of ambiguity. Shall and will, for example, may denote futurity *and* obligation. Traditionally, the rules governing the choice of the future auxiliary stipulated shall after the first person forms I and we, and will after the second and third person (you, he, she, it and they). To express obligation the patterns were reversed; shall followed the third person and will the first and second persons: I will sue; he shall give it back.¹⁵⁰ Although this distinction is no longer seen as valid, futurity and obligation are connected in meaning and may be expressed through one modal. Hence, it may be unclear which meaning was intended. To make matters worse, both future and obligation must simultaneously be intended for the obligatory nature of many legal texts is allied with the belief that contracts and statutes apply indefinitely (or at least until they are repealed or abrogated).

The modal verb shall is inherently ambiguous. The claim that 'I'm afraid that *shall* has lost its modal meaning - for drafters and for courts', is based on whether shall expresses mandatory/directory or permissive obligation.¹⁵¹ Historically, it was used to express obligation.¹⁵² Even after shall became an auxiliary in verb phrases indicating future time, with additional modal function, it continued to be associated with mandatory provisions.¹⁵³ Confusion arises when it is unclear whether futurity and obligation are both in fact intended, which is a significant problem in statutes.¹⁵⁴ The ambiguity may not be resolvable, despite the rules governing statutory interpretation.¹⁵⁵

Readers must therefore attribute whatever meaning they assume the legislature to have intended (see Ch2 I(2) and II(3) on assumptions). In order to do this, they sometimes have to ignore the grammatical rules distinguishing futurity from obligation. For example, although shall used after a third person form implies obligation, in shall be presumed the reader could easily assume that it is the future that is being referred to. If writers do not follow the grammatical rules for distinguishing futurity from obligation, readers may have to rely on co-textual evidence¹⁵⁶ to decide what is permissive or mandatory, but in some cases this is of no help.

In This Act shall be called, for example, the modal shall follows a third person agent, in this instance with obligatory meaning. In the expression The Bank shall from time to time, however, confusion is possible, because it is not clear whether shall has future or obligatory meaning. And, even when shall follows a third person agent, its meaning may be closer to futurity than obligation, as in No amendment of sections 126 and 144 *shall be* of any force and effect unless passed separately by both Houses.¹⁵⁷ In A

¹⁵⁰ Crystal (n3) 85.

¹⁵¹ Kimble (1992) 3 *The Scribes Journal of Legal Writing* 70-3. See also Maley (n50) 29-30.

¹⁵² The Old English infinitive *sculan* rendered *sceal*, *scealt*, *sceal* in the present tense (*Chambers Twentieth Century Dictionary*). The meaning was command rather than direction.

¹⁵³ Kimble (n151).

¹⁵⁴ '[T]he binding force of the statute is now attached to a verbal formulation which, once enacted, exists indefinitely or until repealed'. Maley (n50) 28.

¹⁵⁵ These rules seek to resolve ambiguity. See *University of Cape Town v Cape Bar Council* 1986 (4) SA 903(A) at 905 F.

¹⁵⁶ See Ch2 I(3) and (4) on context and co-text respectively.

¹⁵⁷ Section 62(2) of Act 200 of 1994.

senator *shall vacate* his or her seat if he or she-¹⁵⁸ on the other hand, the grammatical rule accords with the meaning of obligation.

Associated with uncertainty over modality and future time, are problems of correctly allocating obligation.¹⁵⁹ The meaning in All children over the age of six shall attend school is that all children are obliged to attend school, but this construction suggests that the obligation rests on the children to arrange their schooling, which is absurd. Further confusion arises when potentially complicated structures such as the passive are used, for example All children shall be inoculated. Again the person on whom the obligation rests is obscure. A possible implication is that children have to arrange their own inoculations and the agent on whom the duty rests is omitted, together with the agent who will do the inoculating.

(a) Modality: subjective and objective

Modal utterances have a dependent relationship with their context, because they reflect the speaker or writer's views on the context of the utterance.¹⁶⁰ This affects their objectivity and thus their reliability. Modality is classified as objective or subjective. Objective modality implies that the meaning of an utterance is valid and external to the writer's personal interests; for example statutory directives, such as no will executed on or after the first day of January, 1954, shall be valid unless -¹⁶¹ Subjective modality suggests that the modality is the writer's own.¹⁶² for example, I cannot accept. Since legal texts are written in an impersonal style, readers might reasonably expect the modal verb operations to express objective modality, but this is not always so. The modality of judicial pronouncements, for instance, is often subjective, although it is presented as objective to show that a decision was reached impartially and not as a result of the judge's personal inclinations; for example, The argument advanced on behalf of the applicants must accordingly fail.¹⁶³

Subjectivity does not necessarily undermine the truth of an utterance. In simple structures, subjective modality enables writers to indicate to what extent the truth of their utterances is tentative, provisional or conditional. The difference between They may be away for a week and They have gone away for a week illustrates this point.¹⁶⁴ The problem is when objective and subjective modality are confused. In legal texts, a modality may superficially seem to be objective, for neutrality is implicit in the nature of law and it is endorsed by the style in which legislation is written. However, in everyday use '[S]ubjective modality is much more common than objective modality'¹⁶⁵ and legal texts are part of the everyday uses of language.¹⁶⁶ Legal writing is therefore bound to be subjective to some extent.

¹⁵⁸ Section 51 (1) of Act 200 of 1994.

¹⁵⁹ Kimble (n151) 70-3. See also Maley (n49) 29-30.

¹⁶⁰ Lyons (n147) 237-40. Crystal (n3) 86. 'Subjective epistemic modality is nothing other than this: the locutionary agent's qualification of his epistemic commitment.' Lyons 238.

¹⁶¹ Section 2(1)(a) of the Wills Act 7 of 1953.

¹⁶² Lyons (n147) 239.

¹⁶³ *Ex Parte Lynn and Others* 1987 (1) SA 797 (N) at 812A.

¹⁶⁴ In any event, all language involves a degree of subjectivity because of the classificatory process which precedes an utterance.

¹⁶⁵ Lyons (n147) 237.

¹⁶⁶ Lyons (n147) 237-40.

Moreover, in order to cater for contingencies which could not be listed nor anticipated, legal language uses terms and structures that permit flexible interpretation. The tentative sense (the as-far-as-it-is-known sense) of epistemic modals may be used deliberately to allow for future interpretation; for example, should such a situation arise. Epistemic modality also supports the conditional sense of utterances in conditional clauses, as in *Provided that if consensus cannot be achieved on...The President's decision shall prevail.*¹⁶⁷ On the other hand, because the purpose of legal texts is often to oblige people to do something, deontic modality may also be used; for example, the shall+verb/auxiliary verb structures of statutes, as in *Every person who is of or over the age of 18 years...shall be competent to acquire a domicile of choice.*¹⁶⁸

Both forms of modality are represented as something that holds in some epistemic or deontic world external to whoever utters the sentence.¹⁶⁹ In this sense, the modality is objectified. With both epistemic and deontic interpretations, however, the modality may actually be subjective, not objective; in other words, the writer may be expressing personal values rather than reporting as a neutral observer. The objective deontic interpretation of *He may not come*, as it is not permitted that he come, could subjectively mean *I forbid him to come.*¹⁷⁰ This indistinctness between objectively and subjectively modal structures affects the certainty with which statements like *The state may not unfairly discriminate directly or indirectly against anyone*¹⁷¹ can be understood.

Context is especially important with deontic modals, because it gives an author the right to demand dutiful action and to impose obligations. In a legally valid context, such as legislation, the deontic modals in the enacting verb of legal utterances can command and empower. Sometimes this command is elliptically expressed. *Trespassers may be prosecuted*, for instance, implies *Do Not Trespass*; i.e. *I command passersby not to trespass; if they do so, I will prosecute.*

This uncertainty about modality may confuse readers who are unaware of subjectively set limits on information and non-neutral sources of obligation. Thus the apparent objectivity of statements such as *The President may appoint any other Deputy Minister*¹⁷² can actually conceal a subjective bias: if the President is not clearly empowered to appoint another Deputy Minister, the meaning of the clause becomes less specific because less certain.

(ii) Tense

Tense refers primarily to the way grammar marks the time at which the action or state denoted by the verb occurred. A distinction is made between past, present and future time forms, with further

¹⁶⁷ Section 84(5) of Act 200 of 1993.

¹⁶⁸ Section 1(1) of the Domicile Act 3 of 1992.

¹⁶⁹ Lyons (n147) 237.

¹⁷⁰ Lyons (n147) 238.

¹⁷¹ Section 9(3) of Constitution of the Republic of South Africa of 1996.

¹⁷² Section 94(5) of Act 200 of 1993.

divisions, such as perfect and pluperfect.¹⁷³ These distinctions are achieved by changing the basic verb in a process of verbal inflection.

(a) Tense and meaning

In addition to describing actions and states, through tense, verbs may indicate the time at which the process or states occurred. Verb forms are not always, however, a reliable guide as to when something happened, for a past tense form may not always refer to past action, nor a present one to present activity.

The past tense generally defines the scope of action or state as something that is now over, but it may also denote present or future action, and the 'attitudinal past' is used to express courteous and tentative meaning. *Had* this been the case is less peremptory than *The present is* not such a case.¹⁷⁴ In addition, the hypothetical past expresses what are contrary facts. It is often called 'counterfactual', and is commonly found in conditional clauses. *If you had worked hard* implies that the subject did not.¹⁷⁵ Past tense forms after the verb *say* allow the verb in the subordinate clause to be cast in past tense too, even though it refers to present time. *Did you say you had no money?* implies that the addressee had none at the time of the statement.

Verbs in the present tense may refer to actions or states in the present, instant or habitual.¹⁷⁶ Yet, present tense verbs can also describe past action which still has currency (the historic present). For example, in *The court considers the defendant has erred*, the use of the present tense for a necessarily past action (the court has done the considering) gives the pronouncement a sense of immediacy.

The time information encoded by verbs is therefore much more complex than the surface form indicates. Meaning is further complicated by the effect tense has on modality.¹⁷⁷ Activities which occurred in the past are distant from the present. As a result they are at a remove from the certain and knowable. In the example the legislature intends to treat,¹⁷⁸ the intention of the Legislature can be more confidently asserted, because of its present tense form (the Legislature intends), whereas what the Legislature intended to fix¹⁷⁹ is more open to debate: did it succeed in fixing what it intended? Although the meaning of intend is inherently imprecise,¹⁸⁰ the past tense form emphasises this more than the present tense.

An event described in the past is not only distanced from the present experience of those encountering the text, but the applicability of the meaning is also affected. The past tense marks events as particular ones, the case *was* dismissed, not general truths as in *Parliament sits* in Cape Town.¹⁸¹ The implications for meaning are that a particular event that is over is less verifiable than one the effect of

¹⁷³ Crystal (n6) 352.

¹⁷⁴ Crystal (n3) 79.

¹⁷⁵ Crystal (n3) 79.

¹⁷⁶ Crystal (n3) 78.

¹⁷⁷ Kress and Hodge (n11) 90.

¹⁷⁸ *University of Cape Town v Cape Bar Council* 1986 (4) SA 903.

¹⁷⁹ *University of Cape Town v Cape Bar Council* above at 907E.

¹⁸⁰ Kress and Hodge (n11) 46 and 126 on mental process and patientive verbs.

¹⁸¹ Kress and Hodge (n11) 91.

which is still felt. The meaning of such a past event may therefore be more difficult to establish.

A verb phrase consisting of auxiliaries and participles is syntactically more complex and is therefore more difficult to understand than simple verb phrases, because information on time and action is spread amongst the auxiliaries and participles. Auxiliaries provide information on likelihood, time and person. Participles describe the activity. The specificity of the information conveyed varies according to the auxiliary and tense forms used.¹⁸² The simple past tense form of *The Court adjourned* expresses the process and the definite time of its occurrence in a single word *adjourned*. By contrast, in *The Court has upheld the ruling*, information is spread amongst the words in the verb phrase. The past participle *upheld* describes a process that is over, but the auxiliary *has* conveys tense less clearly: in this usage *has* ostensibly appears present, but actually also has past reference as an auxiliary. The action is not necessarily complete.

As verb phrases become more complicated, the division of functions amongst the components generates greater obstacles to reading comprehension. The phrase *had to have been registered*¹⁸³ juxtaposes absolute past (*had...registered*) with progressive past (*to have been*) in the same syntactic unit (see (iii) below for further discussion of verb aspect). This complexity is compounded by the use of a passive (with a deleted agent). The meanings of verb structures of this sort are difficult to work out, especially when they occur with other complicating features.

Not only does the present tense imply greater certainty, since the activity can be more easily verified, but it can also exert a control over the future, because a continuous state is involved in present activity. The statement *The jury finds the defendant guilty of the offence*, for example, is both certain (because it is happening now) and has long-term applicability (because it will continue).

Verbs in the present tense may also hold good for the future relationship between agents and affected entities. In the example above, the jury's decision has a binding effect on the defendant, which is very different from the effect of the narrative present in *the boy finds the test difficult*. In the latter case, the verb refers to an episode that can be considered complete as the narrative progresses; for example, *The boy finds the test difficult. He sighs and starts to write*. Verbs in narratives do not have enacting power, so their effect is limited to the narrative development. Verbs in legal texts, however, describe processes or states that continue unless countermanded.

Thus the certainty of the present tense¹⁸⁴ commends its use to establish the illocutionary force¹⁸⁵ of texts, such as statutes, that enact rules. Just as the singular number of a noun has a precision that the plural lacks, so the present tense of the verb implies greater authority.

¹⁸² Only in the present perfective does *have* make distinctions between third person singular and all the other persons: *he has ordered* as opposed to *I/you/we/they have ordered*. The past perfective does not mark this, or any person difference, focusing only on time; *I/you/he, she, it/we they had ordered*. *Be* is highly differentiated in both the present and present perfective forms. In the past perfective, it distinguishes only between singular and plural person: *I was; we were*.

¹⁸³ *Ex Parte Smith* 1982 (1) SA 601 (C) at 605F.

¹⁸⁴ Kress and Hodge (n11) 90.

¹⁸⁵ See Danet (n2) 457ff.

In legal language, a combination of present tense and modal auxiliary can have a performative function. When a statement containing this type of verb occurs in the correct context, it effects a change in social reality; for example, I must regard the evidence as inadmissible.¹⁸⁶ The function of formulaic phrases, such as Know all men by these presents, is typically directive (and in this sense performative even though it is not in the first person) rather than informative. The performative function of present tense verbs is extended in formulaic and general expressions by their directive meaning, what Maley refers to as 'global' illocutionary force. A verb phrase, such as be it enacted by X that Y..., enacts the entire statute, with X as the sovereign power and Y the set of commands.¹⁸⁷

The functions of present tense verbs contribute to the requirements of both specificity and generality. The present tense is simultaneously more precise (because the action is happening now), yet more general (because it has less particular reference).¹⁸⁸ The judge's decision is final is a declaration with commanding and future-orientated effect. Its meaning is definitive (the decision is final), but it also has wider applicability, as the action is binding in future time. Such present tense structures are generally found in the conclusions of judgments precisely because they are certain, not tentative, and because their effectiveness exists beyond the time of their utterance. By agreement between the parties no order is made as to costs.¹⁸⁹

(b) Tense and modality

Tense conveys more information than the time of the action, for tense markers are also connected with modality. Tense contributes to the objectivity, or otherwise, expressed in modal structures. The italicised verb phrase in the following example, for instance, expresses both future action and the subjective modality of conjecture: In deciding on this issue the court takes into consideration the fact that if he is sent to gaol *he will come* into contact with hardened criminals who may corrupt him.¹⁹⁰

In compound verb phrases the conflation of tense and modal function in verbs is particularly pronounced. Modal auxiliaries do not use the -s ending, which in full verbs marks present tense, third person. A verb phrase containing modal auxiliaries, therefore, indicates time and person less precisely. It may be obscure, for instance, whether a directive has present or future reference. In legal texts, the future reference of some modals combines with the rule that the provisions in a statute are valid from promulgation until they are repealed (in a present and future time sense). For example, This Act shall be called the Domicile Act, 1992¹⁹¹ has present reference, because the statement brings the Act into existence, but it also has future reference, because the effect of the Act continues beyond the Bill being passed.

Obviously in the example above, the time ambiguity is used to advantage. This is because the

¹⁸⁶ Maley (n49) 30.

¹⁸⁷ Maley (n49) 30.

¹⁸⁸ Kress and Hodge (n11) 90-1.

¹⁸⁹ *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A) at 917D.

¹⁹⁰ *Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another* 1950 (4) SA 653 (A) at 659H.

¹⁹¹ Domicile Act 3 of 1992.

modality encoded by past and present tenses serves to emphasise the modality conveyed by auxiliaries: i.e. a modal verb conveys a degree of uncertainty or probability; one in the past tense conveys a greater sense of uncertainty or probability. The judgment if regard were had only to what would seem to be the ordinary meaning of the words used in the section, one would be obliged to hold...that a course would be a course within the meaning of the section,¹⁹² combines the conditional structure and past verb form to express uncertainty.

(iii) Aspect

Uncertainty about the time when an action occurs is connected to another feature of verbs: their aspect. Aspect is not the same as tense, although both are concerned with time and action.¹⁹³ It refers rather to the way grammar marks the duration or type of activity denoted by the verb.¹⁹⁴ Whereas tense markers in the verb indicate when an action occurred, aspect denotes the duration of an action by differentiating between what is completed and what is still in progress.¹⁹⁵ In other words, while tense is about time: aspect relates the time of the action to other actions. As will be shown later, aspect is important in the discourse structure of legal texts.

Aspect is encoded in verb phrases by combining the primary verbs have and be with participle forms. In these constructions have and be function as auxiliaries, and are therefore likely to have modal implications.¹⁹⁶ Choice of an auxiliary (be or have) is crucial, because it indicates either perfective or progressive aspect and therefore the time of the action expressed in the participle.

Progressive aspect (be+present participle), implies that the activity is taking place over a limited period and is not necessarily complete, as in I am considering; the case is continuing.¹⁹⁷ Progressive aspect is used to express an event in progress at a given time. Also known as continuous aspect,¹⁹⁸ the progressive aspect implies that the action in the present participle, marked by -ing, preceded and succeeded other actions. He is studying implies that this is a continuous and repeated process, during which other actions take place; for example, and he works in an office during the day. Thus aspectual phrases encode the order in which events occur, as in I was talking as he left.

Perfective aspect (the auxiliary have+past participle), indicates whether the effect of the action described is still of relevance. For example, I have considered; the case has ended describes non-present

¹⁹² *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (A) at 913F. or *Ex Parte Friedgut* 1983 (2) SA 336 (T) at 343C.

¹⁹³ Another semantic difference between tense and aspect is that tense has deictic function.

¹⁹⁴ Crystal (n6) 34.

¹⁹⁵ Crystal (n3) 80. Aspect concerns 'different ways of viewing the internal temporal constituency of a situation'. Comrie *Aspect* 3.

¹⁹⁶ Crystal (n3) 53; Leech et al. (n3) 53. Tense, in any case, also conveys modality.

¹⁹⁷ The terms perfective and progressive aspect distinguish between verb phrases that use have and those that use be. Within these divisions there are other options, such as the past perfective (past form of have+past participle), the past progressive (past form of be+present participle), and combinations that use both these auxiliaries with or without modal auxiliaries. In these complex expressions, the forms and order of the auxiliaries and participles is strictly governed. The first auxiliary conveys the information on tense and person, and the modal auxiliaries come before have which comes before be. See Leech et al. (n3).

¹⁹⁸ Crystal (n3) 82.

action, the effect of which is not over.¹⁹⁹

All the words in an aspectual phrase function as premodifiers of the main verb, which occurs in participle form. Although not all aspectual premodifiers need be present, if they are, they must be in a fixed order: perfective aspect, progressive aspect.²⁰⁰ These auxiliaries in turn follow the modal auxiliary and are followed by the passive auxiliary. The sequence of the verb phrase is thus: modal auxiliary, perfective auxiliary, progressive auxiliary, passive auxiliary and main verb.²⁰¹

Because aspectual verb phrases are more complex structures than single word verbs, they are necessarily more difficult to understand. The same is true, of course, for any structure using auxiliaries, which convey a considerable amount of information on tense, aspect and mood. Main verbs can only indicate present (-s) and perfected past (-ed). Future time, continuous past, present conditional and all other features of tense and mood are expressed by combinations of an operator auxiliary verb (the first auxiliary in the verb phrase), additional auxiliaries, participles and inflected verb forms.

(a) Aspect and discourse

Aspect operates in discourse as a 'flow-control' mechanism that guides readers through a text, 'permitting the storage of actual events of discourse as a linear group, while simultaneously processing accumulated commentary/supportive information which adds texture, not substance, to discourse'.²⁰² Through aspect writers can mark different forms of past and present time, distinctions that are more specific than those signified by simple tense verbs. These distinctions are implicit, however, because the meaning conveyed by auxiliaries and participle verb forms is more complex. The simple verb in *he chased* has a clearer time reference and is easier to understand than *he has chased* with its (implied) incomplete past meaning. The complexity of aspectual verb phrases increases when they occur in texts with multiple embeddings. The following is an example.

In *If in any legal proceedings at which it **has been placed** in issue whether any particular person is the father of an extra-marital child it is proved by way of a judicial admission or otherwise that he had sexual intercourse with the mother of that child at any time when that child **could have been conceived**, it shall...be presumed that he is the father of the child,*²⁰³ the aspectual verb phrases extend the scope of the referents because time is not fixed in the past. *Has been placed* refers to a question of paternity that arose before the present time; but paternity is not a concluded issue: the possibility of determining the father remains open. Consequently, the ruling has wider application, and the process of establishing paternity (and associated duties) can continue. The phrase *could have been conceived* is additionally

¹⁹⁹ Advertisements often use the aspectual meaning of a verb to imply a prior activity that enhances the quality of the product. For example, *we have improved the petrol consumption* implies that the effect of this improvement will be felt by the purchaser. Leech et al. (n3) 152.

²⁰⁰ Leech et al. (n3) 65; Nelson Francis (n106) 51.

²⁰¹ Leech et al. (n3) 67.

²⁰² Hopper (n66) 219, 220. Because backgrounded clauses are contingent on foregrounded clauses, it is Hopper's contention that backgrounded clauses display the forms of the foregrounded clauses but with a lower degree of assertiveness (216). This principle indicates that aspectual clauses have a modal effect, because they increase the uncertainty, ambiguity or imperative meaning associated with the particular modal construction.

²⁰³ Section 1 of the Children's Status Act 82 of 1987.

complicated, since it contains two past participles, *been* and *conceived*, with the modal auxiliary *could*. This modal extends the sense of possibility, implied by perfective aspect, that the effect of the action is still influential even though it happened in the past. Paternity cases that are instituted long after the birth of a child draw on this time flexibility. Syntactic form is thus linked to discourse function.

Aspect is a useful connecting device and it allows for flexible meaning, as can be seen in the following example from the Matrimonial Affairs Act. In *A wife shall, on prima facie proof that her husband has deserted her and is not residing with her...*,²⁰⁴ the two italicised aspectual phrases connect the meaning of the sentence and extend its application. The husband's desertion is a past action (*has deserted*), but, because of the consequences, with continuing relevance. By implication these consequences are connected to the desertion by means of the second aspectual phrase: the husband's action (*is not residing*) is presented as a result of his desertion. Both these phrases describe circumstances that exist, rather than processes which may be over: the aspectual *has deserted* connects the action to a present continuous state, *is not residing*. The outcome is a wider field of meaning than could have been achieved by phrases expressing completed process. For example, the husband deserted her is finite, and connection to other events would have to be explicitly stated. The generality of a wife, extended by the progressive meaning of *is residing*, and combined with the present and future sense *shall*, outlines a provisional scenario, unbounded by finite time constraints. The long-term effect of this enactment is exactly what was intended by the drafter.

(iv) Be and have

The verbs *be* and *have* need special treatment. Although *be* and *have* are primary verbs (as distinct from modal auxiliaries),²⁰⁵ when used as auxiliaries they have modal meaning. Both verbs have present and past tense forms, with the associated distinctions of certainty and uncertainty (see (iii) (a) above). The auxiliary forms of *have* and *be* must be followed by a present or past participle; and the combination of the tense of the auxiliary with the participle forms (*-ing* or *-en/ed*) conveys aspect. In aspectual verb phrases, these two auxiliaries relate differently to the noun phrase for which they supply the verb. *Be* asserts existence, identity and attribution.²⁰⁶ *Have* conveys past time and possession.

In straightforward relational clauses, *be* acts as a copular verb, linking the complement to the subject, as in the provision *is absolute; the applicant is a student*.²⁰⁷ The focus in relationals is not on process but on a state that reflects back on the agent. In progressive aspect phrases (*be+ing*), *be* still has relational function, as it links the agent to the process; for example, *the lawyer is speaking*. In these phrases, however, *be* introduces the sense that this process is taking place over a limited time (*the lawyer is speaking now, not in the past or future*), which is not necessarily complete (*the lawyer has not stopped speaking*).²⁰⁸ For example, *the assessors are deciding* implies that the agents are possibly still engaged in

²⁰⁴ Section (4)(a) of the Matrimonial Affairs Act 37 of 1953.

²⁰⁵ Crystal (n3) 53; Leech et al. (n3) 53.

²⁰⁶ Kress and Hodge (n11) 130.

²⁰⁷ *Ex parte Friedgut* 1983 (2) SA 336 (T) at 337H and 336E, respectively.

²⁰⁸ Crystal (n3) 82.

the process. With the assessors decide, this implication no longer exists.

It follows that be in progressive aspect phrases links the agent more closely with the process than the same verb does in copular function in full verb structures. Relational clauses do not involve the agent in the time of the action as clearly as aspectual verb phrases. Nor do relational clauses link the agent and action meaning of a particular clause with surrounding text. In both the lawyer is a conveyancer (equative) and the lawyer is confident (attributive), the verb relates some quality in the complement back to the subject. Tense information is simply that these associations apply in present time (is). In the lawyer is considering the connection between the agent and the time of the process is more complex. Here, instead of connecting the subject to a quality, the verb phrase involves the subject in a continuous process.

The meaning of the full verb have has to do with possession, while in aspectual phrases, have refers to past time. When have occurs as an auxiliary in an aspectual phrase, it not only denotes a past (though not necessarily completed) action but also conveys a sense of possession while possession can be expressed by of, and 's.²⁰⁹ For example, in the clause students who have matriculation Latin²¹⁰, the process of having passed the course suggests a sense of the agent's ownership of that course (and by implication the result of the process is still relevant). This possessive sense does not apply to simple past tense forms, as can be seen in the difference between I have won versus I won.

The implicit possession conveyed by have aspectual phrases has a significant effect on the meaning of legal texts. When the process implies possession, the agent acquires rights. In Since the court has arrived at this conclusion,²¹¹ the court has possession of the conclusion, with the implication that no other party can appropriate the decision. Have is, however, potentially ambiguous. The man has taken a chair could mean actual possession (the man owns or holds a chair) or ownership by proximity (the man is seated on a chair).²¹²

When aspectual verb phrases are combined with the possessive meaning connoted by have the resulting structure is potentially complex and ambiguous. In the example It is this kind of Afrikaans course which the Legislature *must have had* in mind when it enacted s 3(2)(a), the modal must functions as a directive to enforce the judge's opinion. The perfective aspect (have had) implies that this state is unchanged, and the possessive sense of have had in mind attributes the intention to the subject, Legislature. Because this subject is a nominalisation, possession is thus attributed to an abstract and imprecise referent. All these features contribute to the authority of the legal text. Power is attached to agents who are difficult to identify and therefore to challenge.

²⁰⁹ These devices convey more than straightforward possession. Crystal (n3) 109 lists: origin (the girl's story); description (a summer's day); measurement (ten day's leave); and function roles, such as subject (the boy's application) and object (the boy's release). See also Kress and Hodge (n11) 116-17 and 132.

²¹⁰ University of Cape Town v Cape Bar Council 1986 (4) 903E.

²¹¹ *Ex parte Friedgut* 1983 (2) SA 336 (T) at 350A.

²¹² Kress and Hodge (n11) 117-19. Although the possessive model establishes a relation with a nominal entity, it also interprets that relation through the model of possession rather than through attribution or equation. For example, in the novel has conviction, the noun novel is classified as the possessor of the quality, not the bearer of an attribute as in the novel is convincing.

(v) The subjunctive mood

The subjunctive mood is frequently used in law but less so in everyday utterances. Therefore, even if correctly used, the subjunctive can cause problems for readers of legal texts. Subjunctive verb forms are used in subordinate clauses to express a range of attitudes, such as tentativeness, vagueness and uncertainty,²¹³ wishes, conditions and other hypothetical situations.²¹⁴ The subjunctive nearly always occurs with an auxiliary, usually *may* or *were*. These auxiliaries do not inflect for concord, and are therefore less specific than other auxiliaries and full verbs. The diminished syntactic specificity corresponds to the less specific, because hypothetical, meaning of subjunctive structures.

Laws can be either mandatory (*Dogs must be on a lead*) or permissive (*Identification may be required*).²¹⁵ While the latter are typically expressed by subjunctive verb constructions using *may* and *might* or *were* with a participle, the subjunctive mood can also express a sense of uncertainty about mandatory laws. In that - clauses after expressions like *demand*, *require*, *insist*, *suggest*, *be necessary*, *obligatory* the subjunctive can occur without an auxiliary in the third person present tense only, as the 'mandative' subjunctive.²¹⁶ This type of the subjunctive consists of a base form of the verb and marks only the third person singular of the present tense; for example *It is necessary that every member {should} inform himself of the rules*. In this form the subjunctive does not show the usual concord between subject and finite verb in the third person singular present.²¹⁷

The mandative subjunctive occurs frequently in legal texts to denote proposals, resolutions, demands and other commanded behaviour.²¹⁸ As its name suggests, the form implies a degree of coercion, albeit more obliquely expressed than a straight directive. Hence, constructions using mandative subjunctives are not clearly obligatory; for example, *I request that the witness answer the question*.

Subjunctives expressed by *were* can be complicated by conditional structures. These 'were-subjunctives'²¹⁹ are used when a conditional clause deals with a hypothetical or unreal meaning, as in *if this were the case*. Hypotheses of this sort are difficult to understand, because the referents do not exist.

(vi) Directives

Given the aim of legislation (to regulate), the predominant sentence form in statutes is directive. Directives are future-oriented; they seek to change behaviour by obliging someone to do something.²²⁰ A range of directives - commands, invitations, warnings, pleas, advice, requests and exhortations²²¹ - is made possible by the flexibility of directive structures.

²¹³ Crystal (n6) 338.

²¹⁴ Crystal (n3) 68.

²¹⁵ Maley (n50) 29.

²¹⁶ Crystal (n3) 69.

²¹⁷ Leech and Svartvik *A Communicative Grammar of English* 294.

²¹⁸ Crystal (n3) 69.

²¹⁹ Crystal (n3) 69.

²²⁰ Danet (n2) 458.

²²¹ Crystal (n3) 28. He favours the term 'directive' as opposed to 'command', because not all directives are commands. Leech (n3) 79 opts for the looser differentiation of mood between declaratives, interrogatives and imperatives.

The extent to which directives are aspectual or modal depends on how much authority lies behind the instruction. Go home is a straight imperative; Passengers may now board, while still directive, advises rather than commands. The directness of instructions such as these depends on the relative power of the source of an instruction vis-à-vis the recipient. Generally, the greater the power differential, the more direct the syntactic form. Thus, in situations where the commander is unquestionably more powerful than the commanded, the imperative form is often preferred.²²² Go home is used when the commander does not need to be deferential. Although the authority of legal texts would suggest a high incidence of direct imperatives, this is not always the case and directives are frequently expressed by passives (Section 1 of the Munitions Production Act 1964 *is hereby amended*) or modals (This Act *shall be called* the Domicile Act).

The flexibility of directives may be useful for drafting laws. When directives are constructed using aspectual and modal terms, the reference, and thus scope of application, of an instruction is greatly expanded. In statutes, for example, a rule or instruction may be mandatory or permissive and will be applicable in present and future time frames. There shall be a Human Rights Commission²²³ is a command,²²⁴ which comes into effect now and extends into the future.

An interactive relationship therefore exists between source and recipient of legal regulations, a relationship that is true of all directives. Legal directives differ not only in their high degree of authority but also in their capacity to reify by giving abstract referents some form of social existence. What is more, legal language has the illocutionary power to enact the processes described in verb phrases. Both the reifying and enacting powers are realised in the response of the addressee. Hence, the recipients of legal texts play an essential role in matching written directives to the world. In Such a will, hereinafter called a soldier's will, shall be valid if the maker thereof dies while he is, or within one year after he has ceased to be, on active service with such forces,²²⁵ the existence and behaviour of the audience for whom this directive is intended give the instructions force.

Because it is assumed that the reader of an enactment will respond to its content, legal directives establish an implicit dialogue with their recipients.²²⁶ This dialogic relationship between source and recipient is reflected in the syntax. Directives are structured around verbs and subjects;²²⁷ verbs deal with action and states and these must have agents. Even though the agent nominal is usually omitted in directives,²²⁸ the agent is none the less present, because the verbal action has to be performed by the recipient (not the source) of the directive. Answer the question commands a recipient to do the

²²² Fowler et al. (n60) 29. Conversely the smaller the difference, the greater the amount of linguistic effort has to occur. Circumlocutory expressions illustrate this, when declarative forms, particularly the passive, are used. Declaratives convey information without apparently establishing a power relationship between sender and receiver.

²²³ Section 115(1) of Act 200 of 1993.

²²⁴ This command is somewhat ambiguous, however, because of the misuse of shall. See Kimble (n151) 61ff.

²²⁵ Section 3(2) of the Wills Act 7 of 1953.

²²⁶ In this sense legal directives invite the same active participation by the addressee that questions, imperatives and second person pronouns do. Leech et al. (n3) 139.

²²⁷ See Leech et al. (n3) 81.

²²⁸ Crystal (n3) 28; Leech et al. (n3) 81.

answering, i.e. to function as agent. An interactive relationship exists here in spite of the possible omission of a referent for the recipient/agent, since an agent must still be present in meaning.

This relationship would seem to connect an agent with the affected recipient through a process, and frequently this is the case; for example, *Write only on the right side of the exam book*, the subject is omitted (*[You] write only on the right side of the exam book*). In directives, however, such connections are not as straightforward as in simple declarative sentences. The social power balance may alter an apparent transactional pattern, a possibility that is evident in the syntax. Agents who perform the action in directives do so because of the authority vested in the source of the command. Although, in a directive, there is an agent (the you) who is intended to perform the process and thus connects the affected in this process, the real source of the action is not the you in subject position. In directive structures, the apparent agent is actually the person affected by an unmentioned commander; *Answer the question*. The identity of the source of power and command can be concealed grammatically,²²⁹ although not semantically.

The degree to which this concealment operates is often in inverse proportion to the force of the directive. Commands are the most forceful directives. While the source of a command may be easy to recover, this is not always the case. The source of *Do not enter*, for example, may be uncertain, only to be deduced from the context. Ultimately, obedience to any command depends on the authority of the agent in context and the coercive force it exerts on the recipient. A police officer is more likely to be obeyed than a person who has no authority to enforce the law.

Connection between context and authority becomes more important when a command is not clearly linked to its source. Whereas in imperatives, such as *Sit down*, the authority clearly emanates from the power of the commander, in other directive structures, the authoritative source is less evident. The third person non-transactive form (Subject+Verb) gives an impersonal, unspecified authority which is difficult to challenge,²³⁰ as in *...which the Court must reject*. In this construction, the authority behind the directive is omitted and the modal increases the obscurity, because modal auxiliaries 'contain a systematic ambiguity about the nature of authority - whether it is based primarily on knowledge or power'.²³¹ Naturally a shared knowledge frequently operates in text interpretation, and repeating the 'commander' each time would be cumbersome. The point remains, however, that the high incidence in legal texts of structures which make it possible to conceal the source of a directive can confuse because information is withheld.

In written directives, such as statutes and judgments, identifying the source of a command is even more difficult than when speakers are involved. The authority behind *Every person shall have the right-* comes from its context (Constitution of the Republic of South Africa); neither the source of or the enforcer responsible for the command is known. The result is distanced control. The same may also be true of

²²⁹ Crystal (n3) 28.

²³⁰ Kress and Hodge (n11) 124.

²³¹ Kress and Hodge (n11) 122.

direct commands. Be it enacted that binds its audience (in this case South African society) to what the Bill brings into effect: again the command source remains anonymous. This effect is enhanced when directives are structured around other complicating features. In No person shall be unfairly discriminated against, not only is the enforcing agent not identified, but the agentless passive also conceals the offending agent.

Since the choice of these constructions is deliberate, this language must be intended to produce a specific effect. As already indicated, directives involve an asymmetrical power relationship between the commander (+power) and the commanded (-power). The balance is weighted ever more heavily in favour of the commander if the source of power is unknown or impersonal. Hence, grammatical structures that conceal or depersonalise the commander, such as the third person non-transactive, have 'clear advantages for an ideologue who wishes to mystify the basis of his authority, and the fact that authority rather than reason is being appealed to'.²³²

In legal texts, the imbalance in power between commander and subjects is particularly pronounced.²³³ The source of directives is usually concealed by omitting the commanding subject pronoun and by using a third person non-transactive. The effect is to identify only the commanded and to emphasise their obligations.

2 THE NOUN PHRASE

In English, a noun phrase - unless it is a pronoun - will typically consist of the head, the determiner, premodifiers and postmodifiers.²³⁴ The head is the obligatory item around which other constituents cluster; the determiner appears before the noun and nearly all nouns can take determiners; premodifiers are any other words appearing before the noun, such as adjectives; postmodifiers occur after the head, such as prepositional phrases, adverbs, some adjectives and other clauses.

(i) Nominalisations

One of the marked forms of the noun is nominalisation, and because nominalisations are characteristic of legal texts, with a significant effect on syntax and comprehension, they will be examined in detail.

Nominalisations are created through derivation, a process by which another form class word, often marked by an affix, becomes a new noun. Verbs are most commonly the original form class. For example, the original verb administer supplies the nominalised administration. Derivation is a perfectly acceptable means of word formation in English, but it may occur to the detriment of clear meaning. The change in form class (and in many cases also in form) alters the meaning of the word because of the change in function class.

²³² Kress and Hodge (n11) 124. Of course, these structures can also be used in very positive ways too.

²³³ Of course, those who issue directives are also bound by them; legislators are not above the laws they conceive. Legal language becomes an even more significant factor in legal commands because lawyers can understand what is meant; non-lawyers cannot.

²³⁴ Crystal (n3) 89

This shift in meaning is particularly significant when the origin of the nominalised word is a verb, for the functions of the verb become associated with the noun, and these functions do not correspond.²³⁵ Nouns provide agents, verbs provide processes or states: a nominalisation draws on both in a blend which is perforce less explicit in meaning. The nominalised administration implies agents who are involved in the process of administering (because of the verb source administer), but it does not clearly identify them.

The normal associations between form, function and syntax position are also affected. Verbs and nouns belong to different form classes that are associated with different functions. When the form divisions are breached (as with derivation), function identity is blurred and the distinctness of meaning is diminished. For example, administration is a verb-derived word (and therefore associated with (V) function), but as a nominalisation it functions as either agent (S) or affected (O).

Kress and Hodge call the end product of derivation a 'transformation',²³⁶ implying a systematic deviation from the basic (expected) order.²³⁷ They see derivation as a movement away from some original, which may or may not be easily identified and 'recovered'. Recovery is the process of working out what omitted words are.²³⁸ If readers have difficulty in recovering the base form, their understanding is correspondingly affected. According to Kress and Hodge; 'Transformations serve two functions, economy and distortion, often so inextricably linked that even the speaker cannot separate them.'²³⁹

Nominalisations are economical, but they have the potential to distort by altering the relationship between surface language forms and underlying meaning. These noun forms occur frequently in legal language because they allow precise and inclusive statements of rules,²⁴⁰ and possibly also because they can conceal certain meanings. 'Nominalisation certainly helps a legal draftsman to make his provisions more compact and yet precise and all-inclusive; however, it also has the adverse effect of making it more dense and hence difficult to interpret.'²⁴¹

Many nominalisations are so established in English that their meaning has become stable (i.e. accepted and clear). Nevertheless four significant features of nominalisation may impede ready comprehension:

- (a) they generally have abstract referents;
- (b) they conflate form class characteristics;
- (c) they disrupt the position:function relationship (i.e. the nominalised word occupies a position usually associated with another form class);

²³⁵ Delmonte and Dibattista (n83) 6.

²³⁶ Kress and Hodge (n11) 10. Their use of 'transformation' is similar to the term Chomsky used in his earliest transformational grammar studies. Kress and Hodge refer to transformations as 'a set of operations on basic forms, deleting, substituting, combining or re-ordering a syntagm or its elements'. See also n103. above.

²³⁷ Leech et al. (n3) 114.

²³⁸ Crystal (n3) 174ff. There are three forms of recovery: textual recovery relies on the rest of the text; situational recovery relies on a knowledge of grammar to supply the missing elements (which readers have to do when dealing with newspaper headlines).

²³⁹ Kress and Hodge (n11) 10.

²⁴⁰ Bhatia in Gibbons (ed) *Language and the Law* 141.

²⁴¹ Bhatia (n225) 142.

- (d) they affect the causal relationship of agent-process-affected because their referents (whether agent of affected) are not clearly nominal. This is the most significant effect of nominalisation.

(a) Abstract reference

Nouns can be formed (derived) from other parts of speech with the addition of a suffix.²⁴² For example, -ity and -ness change adjectives into nouns, such as rapid-ity and kind-ness. Derivation from a verb is particularly significant, however, because these nominalisations denote abstract concepts, for example judgment, admission.²⁴³

Because abstract nouns have non-tangible referents,²⁴⁴ referring to events, states, activities, processes, times and occasions,²⁴⁵ they allow rules to be framed in general terms. An unobservable referent is not accountable for its actions, for it is remote and ultimately unrecoverable. Nominalisations therefore contribute to 'the tendency of legislative discourse to do away with the temporal perspective and to achieve generality and abstractedness'.²⁴⁶ This distancing effect will be further discussed in the sections that deal with deixis at (8) (ii) and (iii) below. Words, such as negligence, justice, reasonableness, on the one hand permit greater scope for interpretation and, on the other depend for their meaning on a collective 'agreement' in a linguistic community.²⁴⁷ Agreement establishes a degree of certainty, but the meaning of abstract nouns is more likely to be affected by individual experience and understanding than by observable and measurable referents.

Texts which use many of these abstractions have a profound effect on their readers' understanding of the world. 'Here language determines perception in two ways, by creating an alternative world which can only be "seen" in language, and by imposing this alternative world, with its apparent solid reality, on the material world.'²⁴⁸

In other words, an abstract noun gives a sense of reality to what does not observably exist.²⁴⁹ Judgment is a process; it is not an entity which can be observed and measured.²⁵⁰ The effect of a

²⁴² Crystal (n3) 93.

²⁴³ Delmonte and Dibattista (n83) 6. In fact, there is always an abstract element in language reference, because the connection between a concept and its language code is arbitrary. The letters and sound arrangement of dog has no real connection with the concept.

²⁴⁴ Crystal (n3) 96.

²⁴⁵ Leech et al. (n3) 45.

²⁴⁶ Delmonte and Dibattista (n83) 7.

²⁴⁷ This is true of the way all language signs relate to concepts. Because the link between a sign and a concept is arbitrary, any consistent connection occurs only because the linguistic community 'agrees' to attach a specific signified to a specific signifier. The agreement is not explicitly sought, of course; it is merely manifested. See Belsey *Critical Practice* 41 and Ch3 n2.

²⁴⁸ Kress and Hodge (n11) 24.

²⁴⁹ Lyons (147) 225. 'Reference is intrinsically connected with existence; one cannot refer to something that does not exist. One can, of course, refer to fictional and hypothetical entities; but in doing so, one presupposes that they exist in a fictional or hypothetical world.'

²⁵⁰ It is arguable that concepts like judgment have observable form when, for example they are recorded in print. The printed record, however, is only a medium. The ideas which making up the judgment, because they manifest the process of judging, remain abstract. The fact that writing can encode ideas in permanent form gives the book, not the judgment, tangible form.

judgment is the *result* of a process, not of an agent performing a process (comparison between the noun judge and the nominalised judgment shows this). The nominalisation in judgment is expected tomorrow emphasises the process of judging, not who will do it. Hence, nominalisation becomes a device to conceal the agent by emphasising the process; (see (c) and (d) below).²⁵¹ Although there are many contexts in which knowing the process is more important to readers than knowing the agent, the facility that nominalisations have to conceal agents is one that writers should be aware of.

(b) Blurring of form class characteristics

Derivation can change the form class of the derived word (a noun may be created from an adjective or a verb). When this happens, some characteristics of the form classes concerned (both the derived and new class) may become less distinct or redundant. Nominalisations can function as nouns; their suffixes are used only on nouns. Nonetheless, they do not display all the features of nouns, and those derived from verbs do not function fully as verbs. Readers, however, expect words to conform to their form class characteristics and may be confused when words do not.

In English, nouns are marked to indicate plurality and possession. They can also distinguish animate from inanimate, personal from impersonal and male from female. These distinctions affect the selection of modifiers, determiners and relative pronouns. Verbs, however, are marked for tense, aspect and mode. Obviously, there are significant, and discrete, differences in the information conveyed by the two form classes.²⁵² An especially important distinction between nouns and verbs is the number-informing feature of nouns, a feature which nominalisations blur or suppress.²⁵³ Once number is lost or uncertain, the obligatory concord between nouns and verbs is also affected.²⁵⁴ Abstract nouns do not have plural forms. Nominalisations, however, are abstract nouns whose number is semantically uncertain: i.e. they do not make clear whether there is one or more entity included in the abstract referent.

Even though the verb is 'the most obligatory of all the clause elements',²⁵⁵ the noun determines whether a singular or plural form of verb is correct. The obligations of concord, in combination with the linear ordering of the English sentence, highlights the number significance of nouns. If the singular/plural

²⁵¹ Fowler et al. (n60) 208.

²⁵² Both nouns and verbs show number but in different ways and for different reasons. Verbs indicate number less specifically than tense and aspect. Some verbs, while showing a difference between third person present singular and all other plural persons, do not differentiate between first and second person; for example the present tense form of run. Nevertheless, if a verb form does reflect number, this feature will be dictated by the preceding noun form.

²⁵³ Although abstract nouns do occur as count nouns, (difficulty, remark), their non-observable reference can blur singular/plural distinction (faith). It depends on the item and the degree of lexicalisation whether a nominalisation has plural form or not. For example, judgment can take a plural, negligence cannot.

²⁵⁴ Concord is the agreement which shows that 'two grammatical units have a certain feature in common' (Crystal (n3) 50). Concord in nouns has to do with number; with verbs it has to do with person and tense.

²⁵⁵ Crystal (n3) 32.

distinction is not clear in the noun, this uncertainty is carried on to the verb.

In addition to its effect on concord, number has further significance for meaning. Singular forms are more specific than plural ones, because the plural opens up a compound field of reference.²⁵⁶ The referent in the *dog* barks is more specific than the *dogs* bark. Nominalisations obscure the focusing and limiting effect of the singular, because they conceal plurality and produce a surface singular form that must be reflected in the verb.

(c) Disruption of position:function relationship

Nominalisations also affect comprehension by disrupting the correspondence between form class and function position with a consequent effect on causality (see (iv)). A word which derives from a verb, for example, can function as a noun and fill the Subject and Object positions. However, while nominalisations take on noun function, they do not function exactly as nouns. A noun-type element in a sentence may be moved more freely than a verb, and it can be placed in subject position. But the meaning of nominalised words is affected by the function of their *source* word. If derived from a verb, the meaning still focuses on process rather than an agent, which means that the word in subject or object position has more to do with process than with agents or affected entities. Furthermore, this process-derived nominal then acts as the agent or affected of another process, the full verb of the clause. As a result meaning is confused.

In the agreement is binding on the two parties, for example, the nominalisation agreement (derived from the verb to agree) occupies the subject position usually filled by a noun. Its meaning, however, is more closely associated with process. Here it refers to those involved in agreeing, but it does not identify or number them. The result is potential confusion, because the nominalised word does not provide information associated with the form class:function class correspondence. In fact, while this correlation appears to exist, in this sentence it actually does not.

Nominalisations do not function as full verbs either. Those derived from verbs 'turn processes and activities into states and objects, and concretes into abstracts'.²⁵⁷ These new referents are associated with the meaning of the original verb, but they have the inherent properties of a state or abstraction. In consequence, they do not convey the tense and modality information of verbs.²⁵⁸ The meaning of an abstract nominalisation, such as *provision*, is to a certain extent continuous (those who provide go on doing so), unlike the more temporary condition of the verb source, which has a time limit on it (*provide/s* (present), *provided* (past)).²⁵⁹

The emphasis which nominalisations give to process is not merely to distinguish it from agency, but also to emphasise the ongoing nature of the process. Since legislation refers to those who legislate, for example, the meaning focuses on a process of legislation (not on the agents) that is not bound by

²⁵⁶ Kress and Hodge (n11) 88-90.

²⁵⁷ Fairclough *Discourse and Social Change* 182.

²⁵⁸ Fowler et al. (n60) 208.

²⁵⁹ This is true both of the present and future continuous tense forms. See discussion of aspect V (1) (iii) below.

time.

(d) Effect on causal relations

Nominalisations in the subject position add another element of confusion because of their effect on the understanding of causality. In a language like English, the sequence of S+V+O is expected to reflect an agent causing the act which affects an entity. The reason is temporal priority: what occurs first in a sentence is understood to be responsible for what happens later in an *ordo naturalis*.²⁶⁰ Hence, '...that which is temporally prior is perhaps not unnaturally seen as causally prior to that which is temporally subsequent'.²⁶¹

Readers therefore expect the agent to be responsible for the process and to be positioned before that process. When this position is occupied by a nominalisation, a paradoxical set of meanings is generated. The subject position is filled by a noun that appears to refer to an agent, but the information about this agent is unclear and the word actually has more to do with verbal than with nominal meaning. For example, in *The Legislature indeed introduced the language qualifications*,²⁶² the S+V+O pattern is followed: Legislature is the agent, introduced the process and qualifications the affected. The nominalised process of legislation conceals the identity of the legislators, however, emphasising what they do, not who they are. In the case of a stable noun, i.e. one with accepted meaning like legislation, this is not that detrimental to comprehension, but the process of nominalisation potentially can confuse: the real plurality of those who legislate is concealed. (The sentence later uses *was* to indicate a singular noun form).

The significant advantage of nominalisations for writers is that they increase authoritativeness. In legal texts they do so through inexplicit referents (unobservable and obscured agents are less accountable); they focus on process, and therefore emphasise behaviour (permitted or otherwise). They also provide scope for interpretation. In the example *the Legislature indeed introduced the language qualifications*, the actual nature of the required qualifications may, from time to time, be reinterpreted (as in this particular case) because qualifications is an abstract term, a nominalisation derived from the verb to qualify.

(ii) Determiners²⁶³

The syntax of a complex noun phrase combines words whose functions and meaning can conflict: the specificity of determiners can be linked to an almost boundless range of adjectives and nouns, thereby allowing the writer to achieve both specificity and generality at the same time.

(a) Types of determiner

There are three kinds of determiner: central, pre- and post-.²⁶⁴ They all occur before the head noun. Definite and indefinite articles, and a few other words that can take their place, such as *this*, *that*,

²⁶⁰ Brown and Yule *Discourse Analysis* 125.

²⁶¹ Kress and Hodge (n11) 39.

²⁶² *Ex Parte Friedgut* 1983 (2) SA 336 (T) at H341.

²⁶³ Determiners occur with nouns to express semantic contrasts such as number and quantity. Crystal (n6) 108.

²⁶⁴ Crystal (n3) 112-18.

each, every, some and any, are central determiners. Predeterminers come before the central determiner and nearly all express notions of quantity. Examples are all, both, half, multipliers (double), fractions (one third, a quarter) and such and what used as exclamations. Postdeterminers are words within the noun phrase which follow central determiners but precede adjectives. They include the cardinal and ordinal numerals, a limited set of quantifiers (much, many, a few, several) and a set of informal quantifiers consisting of a noun plus of. Examples are lot of, great deal of.

The order in which premodifiers occur is regulated both by syntax²⁶⁵ and by a semantic hierarchy. Meaning dictates that those modifiers referring to the more intrinsic qualities of the noun come closer to it.²⁶⁶ Syntax dictates that, whether the noun is singular or plural, the order of any premodifying words (and in English the noun phrase can have six different types of premodifier)²⁶⁷ is controlled by the position a determiner would occupy even if one is not used. Thus, in all black dogs bark, the predeterminer all precedes the unfilled position which could have been occupied by a central determiner, such as the. Predeterminers must precede central determiners, like the. Because it is an adjective, black has to follow whatever other determiners are present (see n250).

According to a clear ordering system, if there are other premodifiers to a noun, the determiner must come first.²⁶⁸ One of its functions is to indicate the number of the noun, i.e. whether it is singular or plural. In many instances, this information is unproblematic. (Plurality may in addition be indicated by the optional omission of a determiner with plural nouns, as in dogs bark.) Even if determiners, such as the or a/n, are omitted, their presence is felt: by inference a noun without a determiner is likely to be plural, because plural nouns may dispense with determiners (although abstract nouns can also dispense with a determiner).

Information contained in modifying phrases emphasises particular features of the head referent and thereby limits the referential scope of the head word. Determiners are a particularly effective, although often less evident, form of modification. Because they are a closed form class, the range of determiners is limited. It follows that they exert a high degree of control over the meaning of the nouns they qualify.

Determiners indicate the number and definiteness of the noun phrase; for example, whether it is

²⁶⁵ Leech et al. (n3) 204 gives as a paradigm for pre-modification in the Noun Phrase the following:

Adv - Det - Det or genitive phrase - Enumerator - Adv - Adj - Noun - Head noun.

This is supported by Nelson Francis (n106) 41, whose terminology differs occasionally, but maintains the same categories. Within the category 'Adjective', Swan *Practical English Usage* 8 uses meaning as a factor in ordering: opinion, size, length, height, colour, origin, material and purpose. The existence of an ordering system obliges writers to fill the syntactic positions appropriately; syntax thus has a classificatory function.

²⁶⁶ Whorf cited in Kress and Hodge (n11) 111.

²⁶⁷ The term 'premodification' refers to information which adds to the meaning of the head noun and occurs between the determiner and the head. Any words appearing after the head noun within the noun phrase postmodify the noun. Crystal (n3) 120-22.

²⁶⁸ The ordering of premodifiers is given in n265 above. The prepositional phrase postmodifies a noun phrase, but in itself may contain premodified nouns (Leech et al. (n3) 62), so the rules which govern word order in main phrases and clauses are maintained in subordinate ones.

definite, indefinite, proper or common.²⁶⁹ Determiners also provide information on the generality, number and meaning of their nouns. The scope of the noun is thus restricted to a greater (with the definite and demonstrative articles) or lesser degree (with the indefinite article).²⁷⁰

Because the purpose of determiners is to add specifying information to a noun or noun phrase, they can reasonably be expected to contribute to the precision of legal language. Many do so; for example *the, this, that, all*. In legal texts, however, the options available in an otherwise closed list are extended by the use of other words, notably *such* and *said*.²⁷¹

The modifying function of determiners inevitably obstructs comprehension if the meaning of a determiner is obscure (and modification of words that already have general or unclear meaning compounds the obscurity). When *such, said* and other unusual words or word groups²⁷² act as determiners, an important slot in the syntactic pattern, usually filled from a limited range of words, is occupied by a word whose meaning is unclear.²⁷³ For example, *said*, in *said notice*, is an unusual determiner, for it appears in this function where other terms would ordinarily be used. This particular usage can confuse a lay reader because *said* is ordinarily used as a verb (even though *said* has some deictic function, indicating the notice already referred to). Although there is no confusion in this example with other antecedents, the unfamiliarity of the expression detracts from any emphasis intended. An informative premodifying term would be more effective, for example, *official notice*.

This typically legal use of unusual determiners also affects the ordering system of premodification. Such is a predeterminer, and, in the case of a single noun, should be followed by a central determiner. In legal language, however, *such* occurs as a determiner. In the phrase *such institution*, for example, both the predeterminer and determiner functions are subsumed under this predeterminer, a process made possible by the number ambiguity of the nominalisation.

Nouns that occur without determiners may be taken to be plural (or abstract), even if plurality is not made explicit. Nominalisations in particular blur the singular/plural boundary. For example, in all authorisation must carry the official stamp, the unfilled central determiner slot could imply that authorisation is plural, merely occurring without a central determiner. Authorisation, however, is a nominalisation with abstract reference, and it is a noncount noun, which therefore lacks a plural form.²⁷⁴ In this case, the verb form would be the same for both singular and plural subjects, so the verb does not help to distinguish the number of the noun. The effect is obscure meaning, since *who* or *what* constitutes

²⁶⁹ Crystal (n3) 89, 112.

²⁷⁰ '...the fact [is] that there are a fixed number of determiners, and these are used to express a very small range of meanings. By contrast, the number of items which can appear as the other constituents is theoretically unlimited.' Crystal (n3) 91. The syntactic positioning of determiners, before the head noun, is significant. Occupying the all-important initial position, determiner information provides the first component of the noun phrase encountered by a reader, i.e. whether the phrase is simple or complex.

²⁷¹ Danet (n2) 481 calls these 'unique determiners', because their use as determiners is virtually unique to legal texts.

²⁷² Mellinkoff (n117) 13 categorises these determiners as archaic; see also Danet (n2) 481.

²⁷³ Further, these determiners may specify entities whose own reference is obscure. In *Such institution* an unusual determiner specifies an abstract nominalised noun.

²⁷⁴ It is also significant that the modal verb *must* does not conform to the regular verb pattern indicating the third person singular. *Must*, therefore, does not help to determine whether a noun is plural or not.

the authorising process is not clear.

Use of a definite article 'assures the addressee that the descriptive part of the expression will contain all the information that is required, in context, to identify the referent'.²⁷⁵ This function is inevitably undermined, if the noun form following the article is a nominalisation and therefore abstract. When legal language combines an abstract term from an open form class with the specificity of the definite article, meaning is simultaneously made general and specific.

As indicated above, the selection of an appropriate determiner is affected by the number content of the noun.²⁷⁶ Because the relationship between nouns and central determiners (the, a(n), this, that, each, every, some, any) is based on number concord, determiners should indicate the singularity or plurality of the noun. With nominalisations the function of the determiner is less clear. For example, in A provincial legislature may ...provide for the establishment, appointment, powers and functions of a provincial public protector,²⁷⁷ the indefinite article, A, should indicate that provincial legislature is a singular noun. In reality, of course, this is not so; a legislature is composed of many agents.²⁷⁸ Associated with this imprecision is the necessity for legal texts to use indefinite article noun phrases when referring to classes of referents or generic entities, rather than individuals.²⁷⁹ In A member of a provincial legislature shall not be liable to any civil or criminal proceedings,²⁸⁰ both indefinite noun phrases, a member, a provincial legislature refer to general not individual entities. The uncertain meaning of legislature combined with the generality of a member makes for less precise meaning. Even though common sense would probably prevail in this instance, a text with these syntactic features is less specific than the non-legal reader expects.

(b) Determiners as attributives

Determiners modify by expressing some feature or quality of a noun. They differ from true attributives, such as adjectives, which can function in both attributive and predicative positions.²⁸¹ Determiners and attributives may appear to be similar, but they can be distinguished. Whenever a modified phrase cannot be restored to an underlying relational structure (N+is+N or N+is+Adj), the modifying term is functioning as a determiner, not as an attributive.²⁸² For example, A competent court can be restored to the relational a court is competent (Noun+is+Adj).

²⁷⁵ Lyons (n146) 226.

²⁷⁶ Crystal (n3) 113.

²⁷⁷ Section 114(1) of Act 200 of 1993.

²⁷⁸ The verb form is similarly indistinct about number: may can be used with both singular and plural subjects.

²⁷⁹ Delmonte and Dibattista (n83) 23.

²⁸⁰ Section 135(3) of Act 200 of 1993.

²⁸¹ Crystal (n3) 143. An adjective occurring alone as a complement does so in predicative function. Crystal (n3) 142.

²⁸² Kress and Hodge (n11) 103-5. Kress and Hodge contend that those attributives which do not derive from underlying relationals act like determiners. Once again comprehension is affected by a blurring of form and function boundaries.

The issue whether a modifier is being used attributively or as a determiner is significant in legal texts. Generally, legal texts should not express value judgements, and they have an unusually low incidence of explicitly evaluative terms. None the less, evaluative judgments can be made by the less obvious strategy of using determiners attributively. The result is hidden subjectivity. Determiners are syntactically unavoidable in many expressions and their modifying function therefore assumes importance. If a word used as a determiner is actually from one of the form classes providing attributive words (adjectives and nouns), but it appears to function as a determiner, the meaning of the determiner is evaluative, and therefore subjective. In the phrase *reasonable doubt*, for example, an adjective occupies the empty determiner position. In so doing, it produces an evaluative meaning (the doubt is considered reasonable).

Because determiners precede the heads of noun phrases (and other modifiers), they make an early impression on readers and thus play a significant role in foregrounding information; for example *The first and final demand* contributes to the emphasis given to the importance of this demand.

The modifying function of determiners differs in another significant way from the relational clauses created by attributives. In a relational clause,²⁸³ the noun is modified either by another noun (equative) or by an adjective (attributive), both chosen from word classes in which the choice is wide. As a result, word selection is more likely to be subjective, because the modifying words specify the qualities of whatever is being judged or commented upon.²⁸⁴ The choice of *competent* in the phrase *competent court*, for example, reflects the writer's preference for the quality of competence over any other possible features the court might have.

By contrast, the choice of determiners is limited. The information which they provide is connected with definite description,²⁸⁵ but can also involve judgment. Words that premodify a noun (determiners, adjectives) effect an 'act of judgment'.²⁸⁶

(c) Determiners and propositional truth²⁸⁷

Determiners have a fixed relationship to the truth of a proposition. Definite descriptions (those using the definite article and precise determiners, such as *this*, *that*), suggest that what is referred to actually exists; for example, *the court*. The indefinite article suggests existence more generally: *a court*. Thus a noun preceded by either the definite or indefinite article is understood to refer, with varying specificity, to something that exists; either *the* accused or *an* accused. Additional modifying and

²⁸³ Kress and Hodge (n11) 8-9.

²⁸⁴ Kress and Hodge (n11) 103.

²⁸⁵ Lyons (n147) 223 uses this term for expressions that refer to some definite entity and identify it, in part, by means of the descriptive content. For example, in *the man*, the word *man* is descriptive; the definite article is referential because it specifies which of the class of *man* is being referred to.

²⁸⁶ Kress and Hodge (n11) 104. This act of judgment is expressed in the attributive model [which] thus becomes a part of the actor/nominal in the transactive model'. They use the term 'model' to describe fundamental categories of language which describe the interrelation of objects and events. 'These models are basic schemata which derive in their turn from the visual perceptual processes of human beings'. (8).

²⁸⁷ In linguistics the philosophic term 'proposition' refers to the 'unit of meaning which constitutes the subject-matter of a statement in the form of a simple declarative sentence.' Crystal (n6) 288. The truth of a proposition refers to how the proposition makes a true statement in relation to conditions in the real world.

subordinate clauses are expected to support, not contradict this reference.²⁸⁸ Non-existence of the entity described would obviously violate the propositional content of the expression.²⁸⁹

Many nouns in legal language are nominalised abstractions. They occur in conjunction with determiners, thereby implying that their referents exist. Law is 'literally and deliberately constitutive... it makes a real social world',²⁹⁰ and much of this reality is created through the language in which laws are encoded, judgments recorded and legal text books written. The constitutive effect of language is therefore of the greatest significance for law. Many legal referents, for example the abstract notions of justice and reasonableness, operate as if they have observable reference, but in fact they do so only at an abstract level. Determiners before abstract nouns may give specificity to what is unspecified as, for example, *a differentiation* in academic levels and *the distinction* drawn by the Legislature.²⁹¹ Consequently, the determiners are reifying what does not observably exist.

(iii) Pronouns

A noun phrase may consist of a pronoun. The main pronoun types are personal, reflexive and possessive; other types are reciprocal, relative, interrogative and demonstrative.²⁹² The use of the personal pronoun, however, is the most frequent form of pronominal confusion in legal texts.

(a) Pronouns and text cohesion

Pronouns have an effect on meaning 'which arguably is more basic than that of standing for an antecedent noun or noun-phrase. This is their indexical or deictic function.'²⁹³ Deixis, a feature of both spoken and written language, reflects the time and place of an utterance and the roles of speaker and addressee; the deictic information in an utterance situates the speaker and addressee temporally and spatially in relation to the context of the utterance.²⁹⁴

Pronoun usage also has a significant effect on the cohesion of texts, i.e. the use of well-connected language. 'Connectedness' may be a casualty when pronouns are omitted,²⁹⁵ because pronouns not only provide lexical variety but also connect the information in a subordinate clause that refers to the main one. They therefore have a valuable role in backward reference or anaphora,²⁹⁶ whereby an earlier referent is connected to a later by means of a different lexical form. Anaphora both binds a text and distinguishes

²⁸⁸ The sentence 'The present King of France is dead' is grammatically correct, but the classification that produced the referents is incorrect because the proposition is untrue. In this example, the determiner 'the' has been misused. Its function is to relate its referent to reality; here it purports to represent what does not exist.

²⁸⁹ Lyons (n147) 225.

²⁹⁰ Boyd White (n95) 96.

²⁹¹ *Ex parte Lynn and Others* 1987 (1) SA 797 (N) at 811 C and H respectively

²⁹² Crystal (n3) 132.

²⁹³ Crystal (n6) 103. See also Lyons (n147) 228.

²⁹⁴ Lyons (n147) 230 explains deixis as how close to the 'here-and-now' an utterance is. 'Every act or utterance - every locutionary act - occurs in a spatio-temporal context whose centre, or zero-point, can be referred to as here-and-now.'

²⁹⁵ Lyons (n146) 199.

²⁹⁶ 'Anaphora' describes the process or result of a linguistic unit referring back to some previously expressed unit or meaning. Crystal (n6) 25.

significant from less important information.²⁹⁷ In this way, pronouns identify background clauses²⁹⁸ and amplify information in foreground clauses. In *When the judge came into the court he wore a robe and wig*, the pronoun *he* refers back to the judge, thus connecting the two clauses, and introduces a clause with more information about the judge.

The back-referring (anaphoric) function of pronouns in texts is similar to discourse or text deixis.²⁹⁹ Spoken utterances have the advantage of gestural deixis, i.e. actions and observable guides as to the time, place and speaker/addressee roles, written texts do not. In written texts, however, gestural deixis has to be expressed through lexical distinctions; *this* versus *that*; the speaker *I* and reader *you* (meaning not *I*). Any phrase, clause or sentence that refers to another part of the text is deictic.

The text deixis function of pronouns is not limited to adding new information, since pronouns may also indicate a topic change (by introducing new information in the preverbal position).³⁰⁰ For example, in a student has to pass a course in Afrikaans, English and Latin before *he can obtain a bachelor of laws degree*,³⁰¹ while the pronoun *he* refers back to a student, it also advances the meaning of the sentence by introducing new and connected information. Pronouns thus do more than merely amplify previous information; they play an important role in ordering the presentation of information in terms of 'given' and 'new' (see Ch2 II(1)).

A low incidence of deictic markers may adversely affect the expression of time. All texts are written before they are read. With legal texts, the time lapse can vary from a matter of hours to centuries. The result is the loss of a distinction between the spatio-temporal context³⁰² in which a text was composed and its effect on the reader. Meaning is affected, because 'in time-delayed utterances, e.g. letter writing, the deictic centre may move from the speaker and Coded Time and be projected on the addressee and Received Time'.³⁰³

Omitting pronouns generally makes texts less easy to read. Limited pronoun usage, however, is a deliberate feature of legal writing, indicating that legal language exists as a High register. Instead of using a pronoun, writers show a marked preference for repeating a full noun. Repetition of the noun avoids the need to refer back to an earlier noun and allows the writer to be neutral about gender (by avoiding the generic masculine (see Ch 3 (7))). These advantages are won at the cost of connected text; some effective markers of primary and secondary information are lost and so, too, are markers of topic change.

In English, the forms taken by personal pronouns indicate their syntactic function more clearly

²⁹⁷ Hopper (n66) 215.

²⁹⁸ Hopper (n66) 213-42. In foregrounded clauses, events succeed each other in the narrative in the same order as in the real world (an iconic order). The events narrated in backgrounded clauses, however, are not in sequence to the foregrounded events, but concurrent with them, amplifying them.

²⁹⁹ Text deixis is the use of expressions in an utterance such as 'as mentioned above' that refer to some part of the text containing that utterance. Levinson *Pragmatics* 85.

³⁰⁰ Hopper (n66) 215. He considers it unusual for completely new information to be introduced in the highly presuppositional subject form.

³⁰¹ *University of Cape Town v Cape Bar Council* 1986 (4) SA 903 (C).

³⁰² Lyons (n147) 230.

³⁰³ Levinson (n284) 73.

than nouns. Unlike nouns, they have a range of forms that distinguish function. For example, *he* indicates a subject function; *him* is used for object roles; and *his* is found in genitive expressions.³⁰⁴ Texts which avoid pronouns cannot make use of the delineation of function offered by the morphology of the pronoun. As a result, legal texts do not indicate clearly whether the noun phrase refers to the agent or to the affected. The difference in clarity when a text uses pronouns as opposed to nouns can be seen in the following two examples. In the rewritten version of the following passages, more effective use of pronouns makes the text easier to understand.

The original:

Where in proceedings against a person for such an offence the defence provided by subsection (1) above involves an allegation that the commission of the offence was due:

- (a) to the act or default of another, or
- (b) to reliance on information given by another,

that person shall not, without leave of the court, be entitled to rely on the defence unless *he* has served a notice under subsection (3) below on the person bringing the proceedings.

The rewritten version:

In proceedings against a seller under section 3, it is a defence for the seller to show that *he or she* took all reasonable steps and used all due diligence to avoid committing the offence. *This* might involve alleging that the seller committed the offence because of;

- (a) the act or default of another; or
- (b) reliance on information given by another.

If so, the seller may rely on the defence only if *he or she* obtains leave of the court to rely on *it* or serves a notice complying with section 5.2.³⁰⁵

Once again a paradoxical feature of legal texts emerges. Although a low incidence of pronouns limits the possibility for ambiguity and obscurity (which occurs when proforms are not clearly connected to their antecedents),³⁰⁶ meaning is more precisely communicated when pronouns are used. Personal pronouns are more specific than many nouns are about number, gender and case. Avoidance of pronouns reduces deictic markers with resultant loss of the information about time and place of the text relative to the writer and reader. Effectively used, pronouns aid comprehension, because they connect referents within the text, they indicate the relationship of clauses to each other (i.e. which are foregrounded and which backgrounded),³⁰⁷ and they specify syntactic functions. In texts where pronouns are not used effectively, texts are less cohesive and readers are denied a significant aid to comprehension.

³⁰⁴ Crystal (n3) 138.

³⁰⁵ Cutts *Unspeakable Acts*? 6.

³⁰⁶ Leech et al. (n3) 193.

³⁰⁷ The potential for confusion caused by another form of pronominal omission, that of the relative pronoun before a subordinate clause, has already been discussed (see IV (2) above).

VI. CONCLUSION

This chapter shows that the syntactic structures of legal English differ from everyday language patterns in ways that obstruct comprehension. When non-legal readers encounter complex syntactic structures in which the relationships between parts of the sentence are not clear, where agency is not made explicit and extensive negation occurs, they are unlikely to understand the content. Hence knowledge of how legal syntax works is initially more important than knowledge of the lexical content.

More seriously, syntactic obscurity works against the very function of law: to communicate the rules binding on members of a society. Although ignorance of the law does not excuse non-compliance, comprehension of written law is unnecessarily complicated by the ways in which laws have been written. Linguistic obscurity is the product of a tradition that has trained and encouraged lawyers to use a particular style. Lawyers are 'continuously exposed to law books, the largest body of poorly written literature ever created by the human race.'³⁰⁸

Lawyers, at least, are trained to understand these texts: lay people, particularly those who are semi-literate, cannot. Perpetuating this style of language denies people the right to understand their law.

³⁰⁸ Lindsey cited in Kimble (1992) 9 *Thomas M. Cooley Law Review* 9.

CHAPTER 5

PLAIN LEGAL LANGUAGE AS A FUNDAMENTAL RIGHT AND A NATIONAL POLICY

As is evident in Chapter 4, many of the features that are characteristic of legal texts create comprehension difficulties for lay readers. In many countries the public is powerless in the face of a legal system which both substantively and procedurally enforces the values and interests of a dominant group. Chapters 1 and 2 explored the ways in which law and language can create and maintain a power imbalance. The former South African legal and social system conformed to all that has been said in this thesis about power, ideology and legal language. Prior to its new political dispensation, South Africa's institutional and social order preserved the dominant position of a white minority; the laws issued by this group substantively and linguistically ensured subordination of the black majority.

Laws are designed to prohibit anti-social behaviour and to structure social relations according to approved norms of conduct. From this proposition it would follow that those who are to be governed must know the rules so that they can adjust their conduct accordingly. Knowing the rules would in turn suggest that the law-giver is obliged to publicise them in a manner that would allow subjects of the law to discover what the rules are. Indeed, the efficacy of a legal system rests on compliance with the rules,¹ and, if laws are to be observed, they must be understood by those who at whom they are directed.

The validity and efficacy of law is closely linked to its legitimacy, a concept that was explored by Weber in his classic work *Economy and Society* (1922 and 1925). Here Weber sought to explain the role that law had played in the emergence of the modern, capitalist societies of western Europe.² He acknowledged that most organised societies had 'law', and he attributed the basis of the legitimacy of law in pre-capitalist societies to the 'charisma' of the law-giver or to the tradition of primordial custom. The legitimacy of law in European legal systems (with the partial exception of English law), however rested on its 'rationality'.³

According to Weber, this epithet denoted not so much the content of legal rules but the *forms* of their organisation and application. Hence, the legitimacy of the judicial process lay in the application of the notionally universal rules and freedom from political intervention.⁴ The hallmark of a legal system, such as South Africa's, is also its 'rationality': that generalised (or universal rules)

¹ An argument that the validity of law depends on social efficacy would suggest that knowing the law becomes a test for its validity. See Schiller (1979) *Acta Juridica* 347 at 371.

² See Trubek (1972) *Wisconsin Law Review* 720 at 721.

³ See Rheinstein (ed) *Max Weber on Law in Economy and Society* xviii.

⁴ Morris (1958) 107 *University of Pennsylvania Law Review* 147. See also Trubek (n2) 724.

provide the criteria for making and applying law and that the particular features of individual cases do not determine these processes.⁵

I. THE DUTY OF THE STATE TO MAKE LAWS KNOWN

It follows from Weber's work that the sense of legitimacy underlying our law depends heavily on the application of clear, known rules. In spite of this emphasis, however, it is difficult to find any explicit normative basis for what seems a common-sense proposition: that the state should acquaint its subjects with what the rules are. Certain well-established legal principles might suggest that the state must communicate with its subjects in clear and unambiguous language. But, as will be demonstrated below, this duty is at best implicit, and it is unlikely to be the main purpose behind the principle in question.

A state's duty to make rules known can perhaps be inferred from the principle *nullum crimen sine lege*, which means that conduct may not be punished unless a law has already declared that it is criminal. This principle forms part of nearly all systems of law⁶ and its main purpose is to remove subjectivity from the legal process by ensuring that a court or judge may not declare something punishable when it was previously considered legal. The *nullum crimen* principle, however, has not been interpreted to mean that a government must acquaint its citizens with what is legal or illegal.

The requirement that laws be published only in a state's official languages might also imply that the state make its laws available to its citizens in readable form. In South Africa, this concern is reflected in the recent change to the list of official national languages. English and Afrikaans used to be the country's official languages,⁷ significantly at a time when government was unconcerned with views of the majority of the population. Now, since the enfranchisement of the black population, the list of official languages has been expanded to eleven.⁸ No doubt this change indicates that the government is determined to reach a wider range of South Africans, but it does not necessarily imply that the government must communicate in a way that is fully comprehensible to the entire citizen body. For instance, although there are a significant number of native speakers of Urdu and Portuguese in South Africa, they are not accommodated under s 6 of the Constitution, the provision containing language rights. Furthermore, to date, no law has taken into account people who cannot read or write. On this issue the Constitution is silent. Hence, while a people has the right to pursue

⁵ Either generically determined facts or legal concepts provide cues for the application of the general rules.

⁶ And is contained in certain human rights conventions, Article 7 of the European Convention on Human Rights, 1950, for example.

⁷ Section 137 of the South Africa Act of 1909 entrenched English and Dutch. This provision was later amended by Act 8 of 1925 to define Dutch as including Afrikaans. None of the official language provisions include Latin, a frequently baffling feature of legal texts.

⁸ S 6 of the Constitution of South Africa 1996.

its own language and culture, such a right is not linked to the state's obligation to make laws comprehensible.⁹

It could be that the responsibility to become acquainted with the law rests not on the state, but on the individual subject. This view derives from an earlier time when citizens were thought to have no enforceable rights against the state.¹⁰ It rests, too, on purely pragmatic reasons: that to allow individuals to escape their obligations on the ground that they did not know or understand the law would be to invite widespread evasion. Hence variations of the maxim *ignoranti iuris haud excusat* (ignorance of the law is no excuse) are found in all systems of criminal law.¹¹

Indeed, the absence of any obligation on the state to make its laws known can be attributed to the political philosophy of nineteenth-century liberalism: the state had no duty towards its citizens other than to refrain from interfering in their lives.¹² This conception of the proper role of the state, however, has been steadily eroded by changes in the nature of state functions. The modern social welfare state, for instance, is considered to be obliged to improve the lot of all citizens, a goal that entails redistribution of wealth and an empowering of the disadvantaged. These are policies that obviously imply duties for the state and correlative rights for its subjects.

The main ground for arguing that governments are now obliged to take active steps to acquaint members of society with new rules exists in the doctrine of the rule of law. While this doctrine is of cardinal importance in modern constitutional democracy, it has no readily definable content.¹³ It probably originated in the medieval belief that law, whether emanating from God or man, ought to be the foundation of all government. Today, it is usually taken to mean that governmental authorities - legislative, judicial and executive - are obliged to comply with a predetermined code of rules. The purpose is to secure respect for individual rights and freedoms and to protect citizens from overbearing rule.

One development of this purpose, which is closely linked to theories of natural law explored below, was an argument that certain basic rules were unalterable, even by the state. In England, as a result of seventeenth-century struggles between the monarch and Parliament, however, the supremacy of law came to be associated with the supremacy of Parliament. By implication

⁹ S 6(4) of the Constitution of the Republic of South Africa 1996 is concerned to guarantee equal rights for the various language groups: 'Without detracting from the provisions of subsection (2), all official languages must enjoy parity of esteem and must be treated equally.' Ss 30 and 31 protect the freedom to pursue language and culture of choice.

¹⁰ The idea that the state bore no duties towards its citizens was expressed in the feudal doctrine that the king could not be sued in his own courts.

¹¹ As far as private contracts are concerned, the same principle - *caveat subscriptor* - ensures that those who agree to written and standard-form contracts will be bound, regardless of whether they understood what the transaction entailed.

¹² See Wiechers (1993) *Acta Juridica* 248-263 on the change in the role and function of the state.

¹³ See Turpin *British Government and the Constitution* 54ff for a history of this concept.

Parliament could at any time, and even retrospectively, change the law to suit its purpose. Thus Parliament was above the law.¹⁴ The Union of South Africa inherited the British idea of parliamentary sovereignty,¹⁵ but the promulgation of a justiciable bill of rights in the new Constitution has radically changed our constitutional system. Parliament is now subordinate to the constitution.¹⁶ In consequence, South African courts are now required to defer to the Bill of Rights as the nation's supreme value system.¹⁷

Another development of the purpose behind the rule of law was to argue that government can be relied upon to ensure that all its agents and authorities will constantly respect the law. Hence a state can only be said 'to uphold the rule of law if it provides effective means for the prevention and redress of illegal action by those who wield public powers'.¹⁸ In the normal course of events, this proposition obliges the state to maintain a free and impartial judiciary in which the state and its organs can be brought to book for any breach of the law. In the context of a progressive democracy the same proposition could be taken to imply that the state has a duty to empower its citizens with knowledge of the law so that they can determine breaches for themselves. This responsibility would be in harmony with the emphasis now given to accountability and transparency.

It is still quite possible to conjecture a constitution that demands subjection of government to known and fixed rules, while at the same time tolerating an ignorant citizen body.¹⁹ Much of the work done by Althusser and others demonstrated how social structures are orchestrated to achieve ignorance of the masses; and critical legal theory has shown how the legal profession retains its pre-eminent position by maintaining a monopoly of knowledge.²⁰ But the primary emphasis of the South African Constitution is now not only to protect individual rights and freedoms but also to empower the disadvantaged.

¹⁴ Dicey in his *Introduction to the Study of the Law of the Constitution* (1885) concluded that the rule of law had three meanings in the England of his day: that no one could be penalised for conduct that was not forbidden by the law; that everyone's right and duties were to be determined by the ordinary courts of the realm; that individual rights are less the result of the constitution than the basis on which the constitution is founded.

¹⁵ *Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Another* 1994 (4) SA 592 (SE) at 597.

¹⁶ See Du Plessis (1993) 4 *Stellenbosch LR* 63 at 77.

¹⁷ *ANC (Border Branch) & Another v Chairman, Council of State of the Republic of Ciskei, & Another* 1992 (4) SA 434 (Ck) at 447, cited by *Matinkinca & Another v Council of State, Republic of Ciskei, & Another* 1994 (4) SA 472 (Ck) at 481.

¹⁸ Turpin (n13) 65. See also Beinart (1962) *Acta Juridica* 110ff.

¹⁹ Beinart's seminal discussion of the rule of law in South Africa (n18), for instance, assumes that only the courts and legal profession were capable of and willing to protect the citizen from abuse of state power.

²⁰ See discussion in Ch 1.

II. PROCESSES OF PUBLICISING THE LAW

1. PROMULGATION

The South African Constitution has always required promulgation of legislation. 'Promulgation' is a somewhat ambiguous term that denotes two things. In a broad sense, it means the act of making a law known to the general public; in a narrower technical sense, it means the legal procedure to be followed before a bill emerges as valid law. Not all legal systems demand promulgation in the broad sense; the validity of British statutes, for instance, does not depend on promulgation at all.²¹ By contrast, South African law has always required promulgation in at least its narrow sense.

According to Roman Dutch common-law rule, 'legislation must be ... formally made publicly known, before it comes into operation even in respect of those aware of it'.²² While the Cape was under Dutch rule, the Dutch system was followed, and promulgation was effected by special officers. Later, during the period of British control of South Africa, British colonial procedures were followed. The Governor-General was required to sign a copy of a bill certified by the Speaker of the Parliament and the President.²³ This copy had then to be sent to the clerk of the House of Assembly, who in turn sent it to the registrar of the Appellate Division for enrolment. (The term 'enrolment' means to enter a document in an official record.)²⁴ To become valid law, the enactment had then to be published in the government gazette.²⁵

Our new Constitution has not changed the procedure outlined above.²⁶ Once a bill has been assented to by the President,²⁷ s 65(1) provides that it must be enrolled in the office of the Registrar of the Appellate Division 'in such official South African languages' as are required under s 6. The purpose of enrolment is to give 'conclusive evidence of the provisions of the Act'.

In spite of the expanded list of official languages, enrolment has little to do with making the law more widely known to society. Section 65(3) provides that the public may have access to copies of acts enrolled with the Appellate Division in Bloemfontein, subject to such rules 'as may be passed by Parliament to protect the safety and durability of the said copies and with due regard to the

²¹ Bennion in *Halsbury's* vol 44(1) (1995) para 1279. By contrast, in early times, acts of the Scottish Parliament had to be proclaimed in all country towns and later by publication at the market cross in Edinburgh.

²² Hahlo and Kahn *The South African Legal System and its Background* 168. They cite various authorities, including Grotius 1.2.1 and Voet 1.3.9.10.

²³ Under s 67 of the South Africa Act of 1909.

²⁴ See Bennion (n21) vol 44(1) para 1248. Beinart (1954) *SA Law Review* 165 notes that the effect of enrolment is to allow the courts to take judicial notice of an act in the sense that they can accept the enrolled document as an authentic, valid version of the legislation.

²⁵ Section 14 of the then Interpretation Act of 1910.

²⁶ Described by Du Plessis (1990) vol 25 *Law of South Africa* 197-9.

²⁷ Section 64 of the Interim Constitution; s 79 of the Constitution of the Republic of South Africa 1996.

convenience of the Registrar's staff. Hence, although public access to material copies of new acts is guaranteed, in reality access is extremely limited.

Publication in the gazette is stipulated under the Interpretation Act,²⁸ but this formality is designed principally to determine the exact date at which an act enters into force. Otherwise, certain other official acts of the executive must be announced in the gazette to give the public due notice.²⁹ The latter rule comes closest to suggesting that the government must publicise laws, but the enrolment and gazetting procedures contain no general duty to make the law universally known, accessible and comprehensible.

2. CODIFICATION

Throughout history, governments have been subjected to powerful forces calling for codification of the entire legal system.³⁰ The demand for publication of law in a new and accessible form is a variation on the demand for rule of law. It is at least as old as the Twelve Tables, when the plebeians successfully achieved publication of the laws so that patrician magistrates would be bound by them in the exercise of judicial powers.³¹

The reasons for and the sources of the demand for codification were various. Professionals might want laws codified 'to rejuvenate a legal system, which has become clogged up with the accumulated silt of centuries of jurisprudence and doctrine'.³² The citizen body, on the other hand, might want to be released from arbitrary or tyrannical application of the law. In this case, fundamental change in government provided political momentum for codification.

'The ordinary man with his book of published rules, even though he realises that some of them are of unclear expression, feels infinitely more secure than when he exists under a law that is unpublished, that can be found only by the lawyer and the judge.'³³

Although the 'ordinary man' will not be able to understand the law fully, given its 'hidden discourse',³⁴ if it has been codified he 'can find and read the law that governs him. He need not rely solely upon professional advice'.³⁵

Modern codification movements drew their moral basis from an Enlightenment version of the natural law. Perceived as eternal and universal, natural law was a plan and a norm as well as an ideal which actual legal systems should implement. It was the standard against which the laws of

²⁸ Section 13 of Act 33 of 1957.

²⁹ Section 15 of the Interpretation Act 33 of 1957.

³⁰ This can be defined as the reduction of the entire *corpus iuris* into the form of an enacted law.

³¹ Jolowicz *Historical Introduction to the Study of Roman Law* 11-12.

³² Hahlo (1967) 30 *Modern Law Review* 244.

³³ Stone (1955) *Tulane Law Review* 307.

³⁴ Boyd Whyte *Heracles' Bow* 60-76.

men could be tested 'not only for substantial justice, but also for internal consistency and formal adequacy'.³⁶ While the existence of natural law is usually accepted, what its rules actually prescribe has always been controversial. For purposes of the present argument, however, one component of the natural law is the 'formal adequacy' or the 'internal morality' of law,³⁷ namely the 'ways in which a system of rules for governing human conduct must be constructed and administered if it is to be efficacious and at the same time remain what it purports to be'.³⁸

If law is to be administered effectively, then its subjects must have a right to know what the laws are. A secret rule, one that had not been made public, would not qualify as a valid rule, at least according to the natural-law criteria. Thus it is argued that certain laws issued during the period of the Third Reich in Germany should be considered invalid. Under the National Socialist system of 'justice', an order given by the Führer was deemed binding law immediately it was spoken, since the Führer's will was the source of all law. Whether the rule was made public or not was irrelevant.³⁹

In a legal system such as South Africa's, where law has sources in custom, precedent and legislation, we must probably accept that the state has no obligation to reveal the body of common law to the people it governs. Common-law rules derive from complex origins in the Roman and the Dutch authorities, from decisions of the courts and from local customs. All these sources are obscured by lapse of time. Not only are these laws constantly changing, but they are also buried under an accretion of interpretation, the work of generations of legal scholars. The time, the will and the expertise to codify South African common law simply do not exist.

III. PLAIN LANGUAGE

South Africa has achieved a political revolution. The government is committed to creating 'a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state ... so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'.⁴⁰ Full participation in government and full enjoyment of human rights implies, if not a legal, then a strong moral duty on the state to make its laws known to the people.

We cannot realistically expect the new government to undertake a codification of common law, but we can expect new laws to be rendered in language that is comprehensible to the citizen body. So far, the language provisions in the Constitution have concentrated on securing better

³⁵ Stone (n33) 307.

³⁶ Hahlo and Kahn (n22) 21.

³⁷ Fuller *The Morality of the Law*, especially 95-151.

³⁸ Fuller (n37) 97.

³⁹ Werle and Wandres *Auschwitz vor Gericht* 35.

representation of the major linguistic groups in South Africa. The argument of this thesis is that in a democratic state, such as ours is now, the state must go further to make laws accessible and comprehensible.

English is still being used as the language of record, but it is only one of the official languages. Hence, translations of legal texts will have to be made from the English texts to the other ten official languages. At present English is being used in legal texts in such a form that it is often incomprehensible even to native English speakers. If it is to remain the preferred language of government and law, it should now be written in a style that revitalises the meaning of the rule of law: readily available and comprehensible laws.

As established in previous chapters, not only is traditional legalese inaccessible to lay readers but the communication of the message is further obstructed by the power imbalance implicit in the law maker/law reader roles since the actual drafter may have very little power. We tend to assume that there are only two participants in legislative communication: the law-giver and the subject. This model is an over-simplification, for, in reality, there are four participant roles. The original source of a legal text is the legislature, whose intentions are encoded by drafters. The resultant text is communicated to a general audience, but usually mediated through an interpreter, most often a lawyer.⁴¹ To change the traditional style of legal texts will therefore require the cooperation of the legislature, drafters and the legal profession.

It would be in the interests of the legal profession itself to abandon legalese because the complexity of this language causes problems even for trained lawyers.

'I must say that rarely have I come across such a mass of obscurity, even in a statute. I cannot conceive how any ordinary person can be expected to understand it. So deep is the thicket that...both of the very experienced counsel lost their way. Each of them missed the last 20 words of subsection 8 of section 9 of the Act of 1959. So did this expert tribunal itself.

I do not blame them for this. It might happen to anyone in this jungle.⁴²

The cost of such confusion to individuals and to taxpaying society, in financial and personal terms, is high.⁴³

⁴⁰ Preamble to the Interim Constitution.

⁴¹ Maley *The Language of Legislation* 31.

⁴² Lord Denning Q.C. quoted in Cutts *Unspeakable Acts?* 9.

⁴³ The Plain English Campaign Report (December 1994 3) cites a study that estimated a cost to British industry of 5 billion pounds annually due to poor use of English. In the United States Redish in Greenbaum (ed) *The English Language Today* 129 cites the Commission on Federal Paperwork, established by an act of Congress in 1974, which, two and a half years and 36 reports later, put the cost of federal paperwork at more than 100 billion dollars per annum. The Commission also found that a substantial portion of this cost was unnecessary.

In order to prune this linguistic jungle two related areas must be considered: the application of clear writing principles to legal documents and the inclusion of courses on effective writing in the training of legal practitioners, including drafters. In the first regard, the work of the Plain English Campaign⁴⁴ and related plain language organisations⁴⁵ has won considerable success.⁴⁶ Plain language is best defined by what it achieves.⁴⁷ It is language that is clear and readily understandable by the intended readers. Texts that are simply written communicate their meaning effectively and their authors' intentions accurately. When documents are written in plain language, readers can find the information they seek more easily and understand what they are reading the first time they read it.⁴⁸

Plain language is not a simplified or basic form of a standard language. It is not limited to a small and unsophisticated vocabulary set in simple grammatical structures.

'Plain language is not anti-literary, anti-intellectual, unsophisticated, drab, ugly, babyish or base. Plain language has to do with clear and effective communication - nothing more or less.'⁴⁹

Plain language does not restrict writers to an inflexible and unsubtle style. This is particularly true of a language like English, where '[T]he scope for using plain words - and the opposite - is rich in English because so many words have the same or similar meanings'.⁵⁰

⁴⁴ Established in 1979, the Plain English Campaign is an independent organisation based in Stockport, England. The Campaign takes up the grievances of victims of the 'gobbledygook' found in poorly written forms. It also acts proactively by lobbying for changes to official documents and encouraging businesses to write their documents more clearly. To this end, the Campaign offers training courses and annual awards for both effective and ineffective English. The success of their campaign is illustrated in a European Commission Directive on Unfair Terms in Consumer Contracts, January 1995, that requires consumer contracts to be written in plain and intelligible language. See the *Plain English Report* December 1994 3.

⁴⁵ Among these are the Plain Language Commission in Stockport, England; the Plain Language Committee of the New South Wales Law Society; the Centre for Plain Language at the University of Sydney; the Plain Language Institute of British Columbia; the Plain English Committee of the State Bar of Michigan; Plain English Plus, Melbourne. See also Kimble (1992) 1 *Thomas M Cooley Law Review* 31-58. The global spread of plain language organisations indicates widespread recognition of the need to write official documents more simply.

⁴⁶ See Balmford (1993) 111 *South African Law Journal* 528-532; Law Reform Commission of Victoria Report *Plain English and the Law* ss100-107; Danet (1980) 14 *Law and Society Review* 451-2. A progress report from the Office of the Minister for the Civil Service, UK, cites department savings of some fifteen million pounds since 1982, when a conscientious review of government forms began.

⁴⁷ Cutts *Plain English Guide* 3 defines plain English thus: 'The writing and setting out of essential information in a way that gives a co-operative, motivated person a good chance of understanding the document at first reading, and in the same sense that the writer meant it to be understood.'

⁴⁸ Redish (n43) 126.

⁴⁹ Kimble (1995) 5 *The Scribes Journal of Legal Writing* 3; See also Cutts (n47) 25-30.

⁵⁰ Cutts (n47) 22.

IV. COUNTERING OBJECTIONS TO PLAIN LANGUAGE

Any move to simplify a style entrenched by centuries of use is bound to encounter opposition, and the move to plain legal English has indeed been hampered by professional objectives and ideological factors. First, changing legal style challenges a long-held ideology that, as an instrument of control, the law must be shrouded in mystique. This will render it inaccessible to those controlled and manipulable only by a professional elite (issues explored in Ch1).

Secondly, and linked to ideology, are reservations held by many legal professionals about the consequences of change. Their objections reveal anxieties that their special skills will become redundant and that simplification will affect the original meaning of legal texts (and therefore the intended certainty).⁵¹ These anxieties are exaggerated. The position of legal professionals is firmly entrenched, and plain language movements elsewhere have shown no signs that legal authority was usurped.⁵² Law remains a professional subject and only those with the required qualifications may administer and interpret it. Plain language may in fact help to build the prestige of the legal profession. Where legalese has created a contempt for lawyers and the law,⁵³ plain language may help restore a more positive image. 'If lawyers would improve their image, increase their proficiency, and sharpen their competitive edge, they must get rid of gobbledegook from legal language.'⁵⁴

The third concern is that all legal concepts will be reduced to such a basic level (see n115 below) that the valued certainty and precision of law will be undermined. This fear has been shown to be groundless, for it was based on two false assumptions: that meaning in language can be unalterably fixed and that writers can define words ever more precisely. Because authors of legal texts cannot include every possibility or envisage every contingency, laws cannot be absolutely precise, nor can meaning ever be totally fixed.⁵⁵ Legal language may strive to the goals of certain and precise meaning, but texts constantly give occasion for disputes about correct interpretation.⁵⁶

⁵¹ See Balmford (n46) 524-33; Law Reform Commission of Victoria Law Report (n46) ss57-92; Hofman in Prinsloo, Peeters, Turi and van Rensburg *Language, Law and Equality* 90, 97-8. Redish (n43) 134 makes the point that when people speak as consumers they want to be able to understand legal documents such as leases, notices and warranties. When, however, they are not thinking of themselves as consumers, they may show other attitudes that are negative to plain English: for example, fears that standards of English will drop, that legal documents will be invalid, that plain language costs a lot for little return.

⁵² See Ch1 IV for an explanation of what is included in the term 'legal profession/als'.

⁵³ See Kimble (n45) 27; Benson (1994-5) 13 *New York Review of Law and Social Change* 520-1, 529, 570.

⁵⁴ Eagleson cited in Kimble (n45) 27.

⁵⁵ See Ch3 (n2) on how language and meaning operate.

⁵⁶ Because meaning is not fixed, interpretation is necessary. The intention of the legislature is not always accessible and case law affects subsequent understandings of a statutory provision.

Finally, and perhaps most significantly, the traditional legal style has never succeeded in its goal.⁵⁷ Although a simpler style is unable to guarantee total precision (because it is not in the nature of language to be exact), it can reveal ambiguities that a more complex version obscured. These uncertainties may be found to exist not in language but in the policy preceding legislation.

Most of the objections to plain legal language stem from prejudice, incorrect assumptions and an incomplete knowledge of alternative ways of expressing information. The main areas of concern are:

- (a) that complicated context necessitates complicated style (with the converse view that stylistic simplicity robs ideas of their seriousness);
- (b) that simplified language leads to loss of certainty and precision;
- (c) that the certainty arrived at through interpretation will be undermined;⁵⁸ and
- (d) that rewriting in plain language is too time-consuming.

A complex subject does not have to be expressed in a complex style. The attribution of value to style, such as the distinctions made between speech styles (for instance, U and Non-U), and the connection commonly made between accent and intelligence, are usually based on prejudice.⁵⁹ Somewhat perversely, people may admire texts they cannot understand, for they assume that obscurity indicates an important content. These perceptions are based on culturally determined prejudice, not fact.⁶⁰

⁵⁷ '[Mellinkoff] discredited for all time, through careful scholarship, the notion that traditional legal writing is precise. He showed that the argument for precision is, for the most part, an excuse for mindless repetition.' Kimble (n45) 8.

⁵⁸ This apparent contradiction refers to the practice of interpretation, which the flexibility of many traditional legal expressions allows, and of precedent, which limits the range of possible interpretations.

⁵⁹ Even language forms that differ markedly from what is considered to be standard grammar are not inferior if they serve their communicative function. For example, even when two or more languages are used in one sentence, the meaning is clear to those familiar with this form of language mixing; *Ons het gegaan groceries haal* (We went to fetch groceries). Cited in McCormick in Mesthrie (ed) *Language and Social History* 195.

⁶⁰ Linguists term these assumptions 'attitudes' and attribute them to either 'mentalist' or 'behaviourist' sources. 'According to the mentalist view, an attitude is an intervening variable between a stimulus and a response; behaviourists consider attitudes to be a behavioural response in themselves.' Fasold *The Sociolinguistics of Society* 176. In neither case is the attitude based on factual evidence.

Because one of the main functions of legal texts is referential,⁶¹ they are particularly suited to language revision. Unlike literary texts, where the words and expressions used by an author are inextricably part of the meaning,⁶² legal texts are written primarily to communicate information about the law. Since 'the verbal structure of a message depends primarily on the predominant function',⁶³ and the predominant function of legal texts is to inform, a simple style is vital to their communicative function. It follows that texts can be changed, as long as the content is not distorted. The proponents of plain language acknowledge that not all language can be simplified and that legal language is concerned with highly complex concepts. But they would argue that content and style⁶⁴ should operate in converse ratio of formality: i.e. the more complicated the content, the simpler the syntax should be.

The following example illustrates these propositions. The original:

- 4(2) A notice under section 2 or 3 must be accompanied by a blank notice of cancellation and any notice under section 2 or 3 of this Act or blank notice of cancellation must -
- (a) be in such forms as may be prescribed, and
 - (b) comply with such requirements (whether as to type, size, colour or disposition of lettering, quality or colour of paper, or otherwise) as may be prescribed for securing that the notice is prominent and easily legible.

The reworked version is less complicated and so it communicates the same information more effectively:

⁶¹ Jakobson *Closing Statement: Linguistics and Poetics* 353 schematized the communication process thus:

CONTEXT
ADDRESSER..... MESSAGE.....ADDRESSEE
CONTACT
CODE

In his view, an orientation toward the CONTEXT factor characterised a communication as predominantly REFERENTIAL in function, as opposed to the other functions of language presented in a corresponding scheme (357).

REFERENTIAL
EMOTIVE.....POETIC.....CONATIVE
PHATIC
METALINGUAL

⁶² Any alteration to a line of poetry would affect what the poet intended to convey.

⁶³ Jakobson (n61) 353.

⁶⁴ Style is the visible effect that language features have on discourse. Lexis and syntax are most pertinent to written discourse, because from word and structure choice the discourse register is plotted on a continuum of informal to formal. See also Danet (n46) 471-3.

- 10.1 A right-to-cancel notice sent to a customer must be accompanied by a blank notice of cancellation. Both kinds of notice must be in the prescribed form and comply with any prescribed requirements about prominence and legibility.⁶⁵

In the revised version, the writer has exchanged a formal, distant style for a more accessible one. The information from the original clause 4(2)(b) reads more easily in the reworked clause 10.3, because the most important information is presented first⁶⁶ and unnecessary detail has been replaced with general provisions. The words and expressions used are more familiar.

Interpretation is a process necessitated by the open-ended meaning of words and the need for flexibility in legal texts. Opponents of plain language fear that simplifying language will affect this process.⁶⁷

'[J]udges, in particular, will fail to appreciate the significance of a change to plain English drafting. They will continue to interpret legislation and other legal documents on the basis that they have been drafted to cover the finest of detail; if gaps appear to have been left, they must have been intended.'⁶⁸

Far from obstructing the process of interpretation, texts written more simply should assist it in two important areas.⁶⁹ First, more comprehensible texts make lawyers' work easier. The number of disputes over meaning in legislation, the conflicting opinions of counsel and the volumes of writing on interpretation testify to the time-consuming and costly litigation caused by uncertain meaning. Secondly, when simpler expression still does not make clear an underlying intention, the language acts as a signal of confused policy (see (2) above).

'Nearly every rewrite of a document discloses a defect that, once revealed by the rewriting process, can be removed. Some of the defects are fundamental. However, until the document is rewritten, the defects are concealed, like Michelangelo's figures in the stone, in the fog of obscure language and structure created by the traditional drafting style.'⁷⁰

⁶⁵ Cutts (n42) 8.

⁶⁶ The order in which information is presented is a critical element of effective communication.

⁶⁷ 'To keep the law predictable, courts are reluctant to change the interpretation that an earlier court has given to an expression in a statute. Courts try to freeze the meaning of statutory language so that people can rely on the original interpretation.' Hofman (n51) 92.

⁶⁸ Law Reform Commission of Victoria Report (n46) s84. See also Balmford (n46) 527-533.

⁶⁹ Law Reform Commission of Victoria Report (n46) s89; Benson (n53) 561-2.

⁷⁰ Balmford (n46) 527. See also Cutts (n42) para 11.5.37 where, in his rewrite of the Timeshare Act, he uncovered an important obscurity.

The concern that plainer expression will cause a revolution in statutory interpretation seems unfounded.⁷¹ When texts are written more clearly, not all ambiguity is removed: ⁷² interpretation merely becomes easier.

Rewriting in plain language is not so time-consuming as to be impractical. Although opponents of plain language movements contend that simplifying legal texts takes too long,⁷³ their objection begets its own solution. Certainly, it is time-consuming to rewrite a text, but rewriting would not be necessary if the text was clearly written in the first place. The real problem is not the time required to rewrite, but the time that was wasted by drafting the text in complicated language.

Because of the conditions under which legislation is produced, time is always a problem in the drafting process. During Parliamentary sessions, the drafters of new laws work under considerable pressure.⁷⁴ It may be impossible to redesign a Bill, given the time limits of a sitting and the amendments made to an original policy.⁷⁵ Not all legal texts, however, are produced in Parliament. Provincial and municipal regulations, contracts, wills and legal letters are written in more relaxed situations. In any case, concern about the drafters' time raises again the issue of the training they receive. The answer is not to reject the possibility of plainer language, but to consider the cost of retraining drafters against the longer-term benefits of clearer texts. If courses on writing were a part of every law student's curriculum, then the time and cost factors involved in retraining drafters and rewriting legislation would be diminished.

V. THE CASE FOR PLAIN ENGLISH

Although lawyers may work efficiently with one another by using their professional language, they also have an obligation to communicate with non-lawyers. In so doing, they need to acknowledge the right of the ordinary person to understand a legal relationship. Legal documents should therefore be written in a style that is closer to what a person with a reasonable education

⁷¹ Law Reform Commission of Victoria Report (n46) ss84-92; Balmford (n46) 530.

⁷² Balmford (n46) 530.

⁷³ Law Report Commission of Victoria Report (n46) ss73-79; Redish (n43) 133-4.

⁷⁴ Cutts (n42) 13.3.44 quotes a letter from the first parliamentary counsel's office on the pressures that drafters have to deal with. 'I cannot tell you exactly how long I had to draft the timeshare Bill, because I was also engaged on a much larger Bill at the same time, but it was not more than a few days.'

⁷⁵ Drafters also work in the dark to some extent as they do not have the complete text before them before they start to draft.

could be expected to understand.⁷⁶ This level of understanding involves appreciating, in broad terms at least, the rights and obligations stipulated in a legal text; it cannot entail a complete professional understanding. When the Law Reform Commission of Victoria rewrote a division of the Income Assessment Act,⁷⁷ for example, the resultant version would not equip a reader to give expert tax advice, but it did become more comprehensible to more readers.⁷⁸

It should be appreciated that plain language does not entail a wholesale rejection of traditional legal style. Any campaign to simplify legal language must recognise that not all legislation can be simplified⁷⁹, nor need every piece of legislation be entirely comprehensible to every citizen.⁸⁰ Some words and expressions in legal English are so precise and certain that substitution would be ineffective. The phrase *in camera*, even though it is Latin, conveys more accurately the meaning of restricted access to a discussion than the more suspect inference raised by the words behind closed doors.

An obvious saving in time and money follows from the reduction in the length of legal documents. Plain language versions are generally, although not invariably, shorter than the complex originals. More important, however, are the money-saving benefits that flow from a simpler text. '[W]hen a company simplifies its language "it builds business...streamlines procedures, eliminates unnecessary forms and reduces customer complaints"'.⁸¹ Simplifying legal language therefore makes economic sense. When people do not understand the law, they are less likely to comply with its regulations. The result of misunderstanding is often unnecessary litigation, which costs taxpayers time and money.

Dissatisfaction with legal style is not new⁸², for instance, Jeremy Bentham⁸³ in the 19th century.

⁷⁶ 'Reasonable education' is obviously non-specific and can only be used as a guide. However, readability tests such as the cloze test (Benson (n53) 538ff) can be done to indicate the level of education required to read a text. Computer programs such as RightWriter, Styleguide and Grammatik can measure the intelligibility of documents. The assessment is based on average sentence and word length, counting in some grammatical and lexical factors. The resultant 'scores' can be linked to the number of years of education required to understand the document. Balmford (n46) 532 cites the Law Reform Commission of Victoria test of Division 16E of Part III of the Income Tax Assessment Act 1936 (Commonwealth). The original required 27 years of formal education. After it had been rewritten, a person with 11 years of education could understand the text.

Bridging documentation, such as paralegal manuals (which are supplied at some Legal Advice offices), can help people with inadequate education to understand documents when they are written more simply. See Fine *How to Use Plain Language*.

⁷⁷ Division 16E of Part III of the Income Tax Assessment Act 1936 (Commonwealth) cited in Balmford (n46) 532.

⁷⁸ The formal education needed to understand the text dropped from 27 to 11 years. Balmford (n46) 530-2.

⁷⁹

⁸⁰ Law Reform Commission of Victoria Report (n46) s90.

⁸¹ US Department of Commerce *How Plain English Works for Business* (1994) 4-5 cited in Kimble (n45) 25.

⁸² 'The first thing we do, let's kill all the lawyers.' Shakespeare *The Second Part of King Henry VI* Act IV scene II.

declared that laws should be drafted 'so that at every moment in which they ought to influence the conduct of a citizen, he may have presented in his mind an exact idea of the will of the legislator in this respect'.⁸⁴ This view was based on Bentham's utilitarian philosophy: the greatest good for the greatest possible number, a philosophy that fits comfortably with a democratic legal system.

More recent proponents of plain legal language come from both inside and outside the legal profession.⁸⁵ They generally agree on the major areas where changes must be made - verbosity, repetitive usages and complicated sentence structures - and they share the common goal of wishing to demystify the law so that people of an average education (see n76 above) can understand their rights and obligations.

This 'people-oriented' approach accounts for the growth of plain language movements. In the USA, in particular, the achievements of the movement have been significant both internally and abroad. The early 1970s saw several important developments.⁸⁶ In 1974 the Nationwide Mutual Insurance Company simplified two insurance policies. Citibank, in 1975, introduced its now famous promissory note,⁸⁷ one result of which was the New York General Obligation Law, which became the first statute to require Plain English in consumer contracts.⁸⁸ Shortly after his election in 1978, President Jimmy Carter issued an executive order directing that federal regulations be 'as simple and clear as possible'.⁸⁹ In the years following, seven more states passed plain English statutes to regulate consumer contracts. At present, nine federal statutes, many state statutes and miscellaneous state laws require clear language in various consumer transactions.⁹⁰ These include leases, loans and other contracts for personal, family or household purposes.

⁸³ Bentham objected to the verbosity of legal texts, the use of technical terms and the style of legislative drafting, all of which were incomprehensible to lay people.

⁸⁴ Bowring (ed) *Works of Jeremy Bentham* cited in Balmford (n46) 515.

⁸⁵ The American Bar Foundation surveyed a large number of practising lawyers about the most important skills for legal practice. Oral and written communication topped the list. ABA Annual Meeting *Clear Writing Pays: The Benefits for Lawyers and Clients*, Committee on Communication Skills, Section of Legal Education and Admissions to the Bar, 6, August 1995 Chicago Illinois. See also Danet (n46) 466-8.

⁸⁶ Redish (n43) 128 attributes the growth of plain English movements in America at this time to two major concerns: the enormous growth in federal government with the inordinate amount of paper work involved and the rise in consumer activism.

⁸⁷ See Danet (n46) 476.

⁸⁸ Section 5-702, cited in Kimble (n45) 2.

⁸⁹ Kimble (n45) 2 and Redish (n43) 128-31. The order was Exec Order 12044, 43 Fed Reg 12,661 (1978). It required that all major regulations '[be] written in plain English and [be] understandable to those who must comply with [them]'. Redish 129. It applied only to executive, not to independent agencies. In November 1979 Executive Order (EO) 12174 required federal agencies to use only necessary forms and to keep these as short as possible 'elic[it]ing information in a simple, straightforward fashion.' Redish 129ff. The intention was to put the provisions of EO 12174 into law but this law did not take effect until after Reagan became President. EO 12,291 46 Fed Reg 13,193 (1981) revoked 12044. Although in the Reagan administration, emphasis shifted from a consumer to a business orientation, from plain English to eliminating paper, the new regime, nevertheless, had similar goals.

⁹⁰ Kimble (n45) Appendix 31-43. Redish (n43) 130 lists seven states with plain English laws by at present: New York, Connecticut, Hawaii, Maine, New Jersey, West Virginia and Minnesota. See also Benson (n53) 572.

In addition a significant number of jury instructions in America, both federal and state, urge the use of plain language in court rooms and offer suggestions on how to implement this requirement.⁹¹ The Document Design Centre, established in Washington DC, constitutes 'one of the most serious commitments of resources to the goals of language reform'.⁹² Within the legal profession the American Bar Association has supported the drive for comprehensible legal language;⁹³ various State Bars have recommended plain language and have established committees to promulgate these resolutions. Numerous state legislative drafting manuals now recommend plain language principles,⁹⁴ and law graduate-school writing programs and a Legal Writing Institute testify to the commitment to improve skills training in legal language.

As in America, plain language movements in Britain have been consumer driven. The Plain English Campaign (PEC) started in 1979, and it has since become an influential lobby for the use of plain language in official and business documents. Since 1980 the National Consumer Council, in association with the PEC has produced reports on *Plain English for Lawyers* (1984), *Making Good Solicitors* (1989) and *Plain Language - Plain Law* (1990). The Corporate Communications Office, Department of Inland Revenue, was formed in 1984 to promote clear and effective communication, and in November 1995, the British Chancellor of the Exchequer announced that the Government had decided on a five year project to rewrite the entire body of Tax Laws.

In Australia, unlike America and Britain, the move for plain legal language has been driven by the profession, not the consumer. The Law Reform Commission of Victoria has led the movement toward a plain language drafting style for both legislation and private legal documents. The 1987 report, *Plain English and the Law*, has had a strong influence on legislative drafting throughout Australia. Various parliamentary groups⁹⁵ and institutes⁹⁶ now also promote plain legal language study and application.⁹⁷

⁹¹ Kimble (n45) 39.

⁹² Danet (n46) 451.

⁹³ ABA Annual Meeting (n84). See also Kimble (n45) 28.

⁹⁴ The State Bar of California in 1989 unanimously adopted a resolution calling for lawyers and legal organisations to simplify documents. This resolution also committed the State Bars to develop guidelines for attorneys. The State Bar of Texas created its own Plain Language Committee in 1990. See Kimble (n45) 2-3 and 37.

⁹⁵ Since 1986 the Office of the Parliamentary Counsel has followed a policy of clear drafting. In a major report on banking (1991), the House of Representatives Standing Committee on Finance and Public Administration recommended Plain English in the code of banking practice.

⁹⁶ The Law Foundation Centre for Plain Legal Language, University of Sydney was established in 1990 to promote plain language methods in legal research, drafting and training. The Communication Research Institute of Australia, Canberra ACT (1987) is recognised as being in the forefront of information on design research.

⁹⁷ Sweden (although not an English-speaking country) also provides an important example. Here, too, the plain language movement began with a sector of the legal profession, but in this case it was the government. As early as 1965, a cabinet minister began the initiative to draft bills in plainer language. In 1976, the first linguist was appointed in the Prime Minister's Office with the task of organising a more

This brief résumé shows the need for (and continuing development) of plain language movements in a range of English-speaking countries.⁹⁷ All of them are from the 'first world' and it might be argued that the situation in South Africa is different. The contention of this thesis, however, is that the need for plain legal language is, if anything, greater, as I shall argue in Chapter 6.

⁹⁷ It can be argued that simplifying legislation in Sweden is simpler than in Britain or South Africa because European-style drafting tends to set out general principles of a law rather than detailed and prescriptive information. Consequently, Sweden's body of law is several hundred pages shorter than the official index to the statute book of Britain. See Cutts *Lucid Law* para 7.5 20. Nevertheless, two significant points must be made. First, the Swedish example illustrates that simplifying any legislation is both possible and beneficial. Secondly, more general concepts are often inherently more ambiguous and readers often have difficulty understanding how these concepts apply to a particular situation.

CHAPTER 6

THE CASE FOR PLAIN ENGLISH IN SOUTH AFRICA

I. INTRODUCTION

Chapters 1-4 present reasons why literate adults with no legal training have difficulty reading legal and quasi-legal texts. They also touch on why the legal profession has not made a concerted campaign to produce texts written in a more accessible way. Chapter 5 argues that, in order to fit in with the new political dispensation in South Africa, legal and quasi-legal texts ought to be more comprehensible to the people they affect. This chapter now gives an account of the particular conditions in South Africa that need to be borne in mind when considering the optimum kind of language for legal and quasi-legal texts.

These particular conditions are the product of a combination of the following major factors and their history. First, two legal systems from different backgrounds (traditional African customary law and Roman Dutch law) that have long co-existed as separate regimes are now drawing together. Secondly, vast differences exist in the language backgrounds between the established and the newer members of the legal profession. Thirdly, relatively few South Africans speak English as a first language. Fourthly, there is a low level of adult literacy, with concomitant constraints on access to knowledge, services and wealth. (One of the consequences of this is the importance of mediators whose role is to explain text content to the illiterate or insufficiently literate.)

This chapter deals with each of these factors in turn, providing more detail about the contemporary picture, showing links between these factors, and discussing salient implications for the case for more accessible legal texts.

1. LEGAL TRADITIONS AND THE LEGAL PROFESSION

Traditional African institutions, notably the courts of chiefly rulers and customary law, are being drawn into South Africa's legal system in ways that suggest a synthesis of previously disparate elements.¹ The harmonisation process offers an opportunity to reconsider and revise legal texts, all of which are available only in English and Afrikaans - a legacy of the colonial and apartheid past - and all of which are written in the style described in chapters 2-4. In the colonial and apartheid eras, no South African law was ever drafted taking into account the home language or literacy levels of the general population. Its target readers were English and/or Afrikaans speaking legal professionals. Thus, until homelands were given legislative autonomy in the 1970s, not even codified indigenous law was written in indigenous languages, or in a style accessible to the majority of people to whom it applied. The written texts were largely for the use of

¹ See the South African Law Commission, Project 90, Harmonisation of the Common Law and the Indigenous Law: Draft Report on Customary Marriages, 1988, paras 4.5.19 and 7.1.22.

magistrates, court officials and other legal professionals of European descent and traditions. (See section III for an analysis of two sections of legal texts that relate to indigenous law.)

Whereas it is true that magistrates working in rural areas (and their predecessors, the commissioners appointed by the Department of Native Affairs) were nearly always proficient in the indigenous languages of the regions, the same was not true of the majority of attorneys, advocates and judges. They were, with some exceptions, English or Afrikaans home language speakers, and during their professional training had had to develop their skills in those languages, and in Latin. Learning an indigenous language was not required in law curricula. When these professionals had to work with indigenous law, or with Roman Dutch law, and with clients who spoke only an indigenous language, they were heavily reliant on translators and interpreters. The problems that arose have been documented.²

The post-1990 cohort of members of the legal profession has a different language profile. It includes many native speakers of indigenous languages. Many studied through the medium of English or Afrikaans at secondary school, but grew up in racially segregated areas and thus did not have much opportunity for extended social contact with native speakers of English or Afrikaans. (School segregation laws became invalid under the 1993 Constitution.) Few of these students have been able to study Latin at school, and they are no longer required to take even an introductory course in it at university. Those growing up in homes which maintain contact with traditional social structures, are better equipped to deal with the content and background of indigenous law, and with its clients than their English- and Afrikaans-speaking colleagues. However, since the laws have been written in the same style as those based on Roman Dutch law, the texts themselves still present problems of the sort outlined in chapters 2-4. There are also the additional lexical problems that face anyone who has not studied Latin at all.

Thus two traditions exist, each associated with different languages and cultures. From these traditions two broad groups of legal professionals have evolved, also with different language skills. Because of the recent political changes, both groups may need to deal with both legal traditions whose texts are, for different linguistic and cultural reasons, not equally accessible both to established and to newer members of the legal profession.

2. LINGUISTIC DIVERSITY IN SOUTH AFRICA

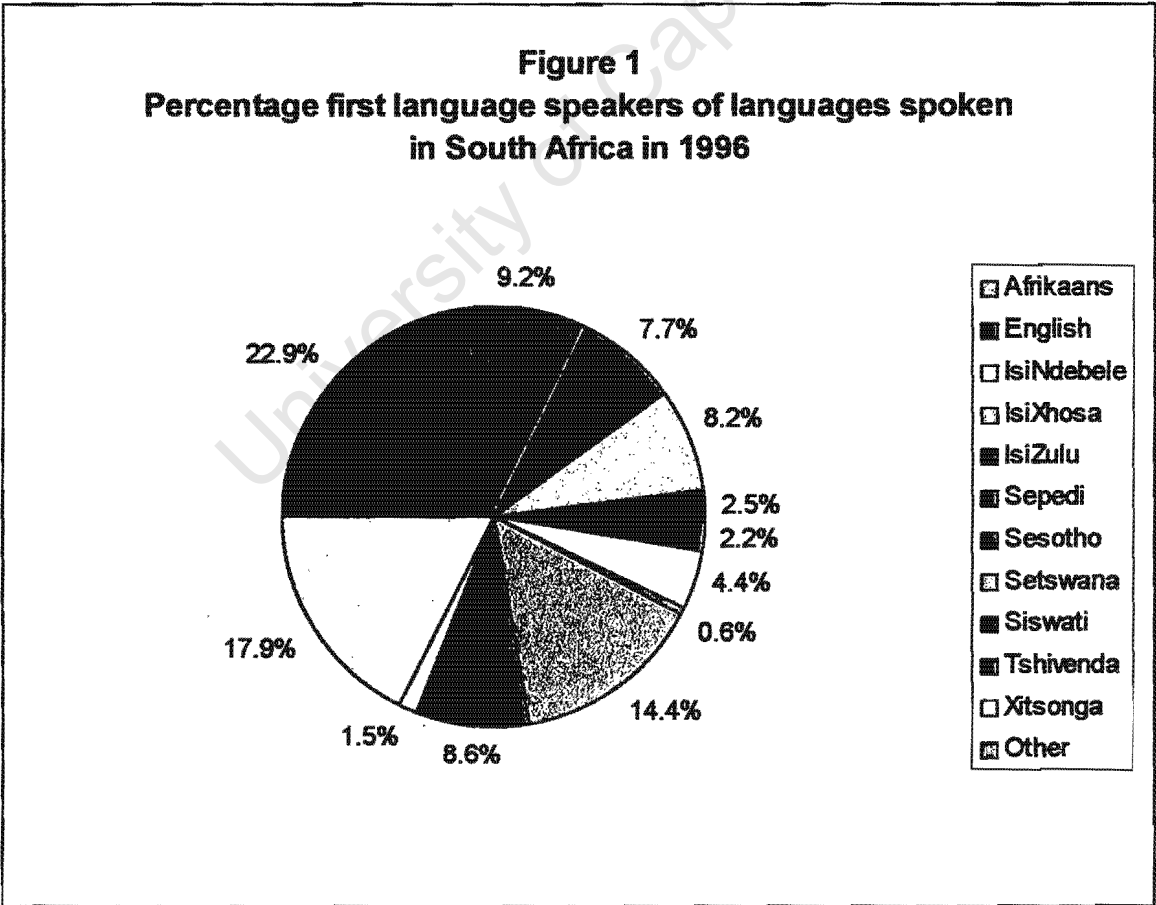
Another significant feature of the contemporary situation in South Africa is the linguistic diversity of lawyers' clients and, of course, of members of the general public, who are affected by laws, regulations and contracts but are unable to afford professional legal assistance. (The term 'linguistic diversity' is used here to cover the range of languages and dialects spoken as first or second languages, and the level of proficiency in speaking and writing.) Language diversity will be dealt with first. Thereafter, the complexity of the adult literacy picture will be discussed.

² See N C Steytler 'Implementing language rights in court: the role of the court interpreter in South Africa' in Prinsloo, Peeters, Turi and van Rensburg (eds) *Language, Law and Equality* 38-56.

(i) Languages

For seventy years prior to the establishment of democratic rule there were two national official languages: English and Afrikaans. These were the home languages of most whites. They were also the home languages of many people classified coloured, and of the younger generation of people classified Indian. Nine other languages gained limited recognition as regional official languages in the former homelands of the apartheid system which were established one by one from the mid-1960s. These nine languages were the home languages of most Africans who now constitute approximately three-quarters of the population in the country as a whole. The languages of the social and political elite were, as is always the case, the languages of access to higher education and economic security. Because of a long history of residential, educational and employment segregation, blacks had little opportunity to learn English and Afrikaans to a high level of proficiency, unless they had several years of secondary schooling. No white, coloured or Indian children were ever obliged to study indigenous languages at school, and very few had the opportunity to do so, should they have wished.

The following tables show relevant aspects of the linguistic demography of the country based (unless otherwise specified) on the results of the 1996 census as published on the Internet by the Central Statistical Service.



The imbalance of numbers between speakers of the most populous languages and of the two former official ones is clear. The major African languages are spoken by the majority of the people in the country: English and Afrikaans have significantly fewer first language speakers, yet these are the languages in which official documents are written.

Over the past four years, it has become clear that, despite its stated commitment to multilingualism, the government is not treating all official languages equally in the domain of law-making. The prohibitive cost of producing Hansard in all 11 official languages has prompted Parliament to propose that only English be used on a permanent basis, with the addition of another official language on a rotational basis each month. Since English is being favoured in Parliament, it is likely that it will also be favoured in provincial legislatures, and that other institutions and big business corporations (which function provincially or nationally) will follow suit in drawing up their regulations and contracts in English. As Figure 1 shows, English is the first language of less than one tenth of the population. There is no current information on the percentage of the population claiming to know English as an additional language, since the last census to elicit this information was taken in 1980. At that time 48% of the population claimed some knowledge of English as an additional language. Precisely what that knowledge was, was not specified.

(ii) Literacy

As is well known, the ability to speak a language is not necessarily accompanied by the ability to read and write it (or vice versa). Of concern in this thesis is the spread of ability to read and understand legal texts written in English. This demand a high level and particular kind of literacy. (For a discussion of what 'being literate' means, see Part II of this chapter.) Few people in South Africa have the requisite literacy, and their distribution across race, gender, age and region is unequal as can be inferred from the 1996 census information.

Since the census did not directly enquire into levels of literacy, they have to be derived indirectly from figures about formal level of education attained. Generally five years schooling (completion of Grade 5) is accepted as a standard of retained literacy.³ However in South Africa this has to be raised to seven years (completion of primary schooling). This is on account of the poor quality of education received by speakers of African languages in the schools set aside for them. In fact the LANGTAG report states that "some would argue that for many people seven years of schooling have been so inadequate that functional literacy is only achieved after nine years of schooling."⁴ The CEPD 1994:1; ANC 1994:87 estimates that 15 million black adults are illiterate.⁵ It is still relevant to consider education and literacy in racial categories because the legacy of racialised education is still having significant repercussions.

³ Krige, Cairns, Makalima and Scott *The Education Atlas of SA*, 91

⁴ Final Report of the Language Plan Task Group (LANGTAG) 1996 *Towards a National Language Plan for South Africa* 143.

⁵ Prinsloo and Brier (eds) *The Social Uses of Literacy* 14.

The figures below and a brief discussion of them give the background to the legacy of poor education and low basic literacy, which lead in turn to a great need for bilingual literacy brokers throughout the country, but particularly for some sectors of the population.

The following table lists the percentage of the population aged 20 years or more in each educational category by population group according to the 1996 census:

Table 1

Percentage of the population aged 20 years or more in each educational category by population group in 1996

	African	Coloured	Indian	White	Total
None	24.3	10.2	6.5	1.2	19.3
Some/complete primary	27.8	30.7	13.1	1.2	24.2
Some secondary	32.8	42.5	40.0	32.8	33.9
Standard 10	12.1	12.3	30.4	40.7	16.4
Higher	3.0	4.3	10.0	24.1	6.2

Figure 2 shows the same figures graphically:

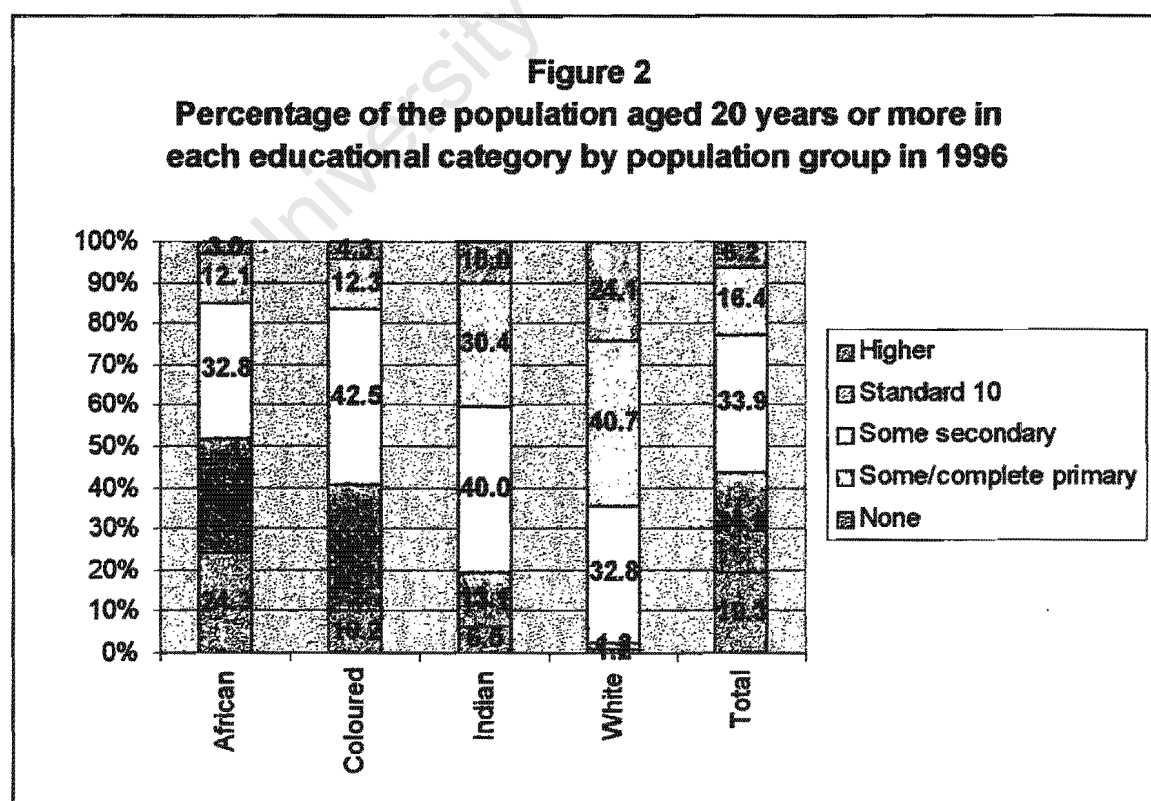


Figure 2 is a stark representation of past inequalities in the racially segregated education system. Compare, for example, the percentages of the two extremes of the education spectrum - no education and higher education - among Africans and whites.

It is not as easy to uncover the current racially based educational inequalities in education since the initiation of the desegregation of schools in 1993. It is common knowledge that schools are not all racially integrated - most of the best equipped schools do draw pupils from all race groups, but the worst equipped schools - those that were originally reserved for African pupils - are still almost exclusively attended by Africans.

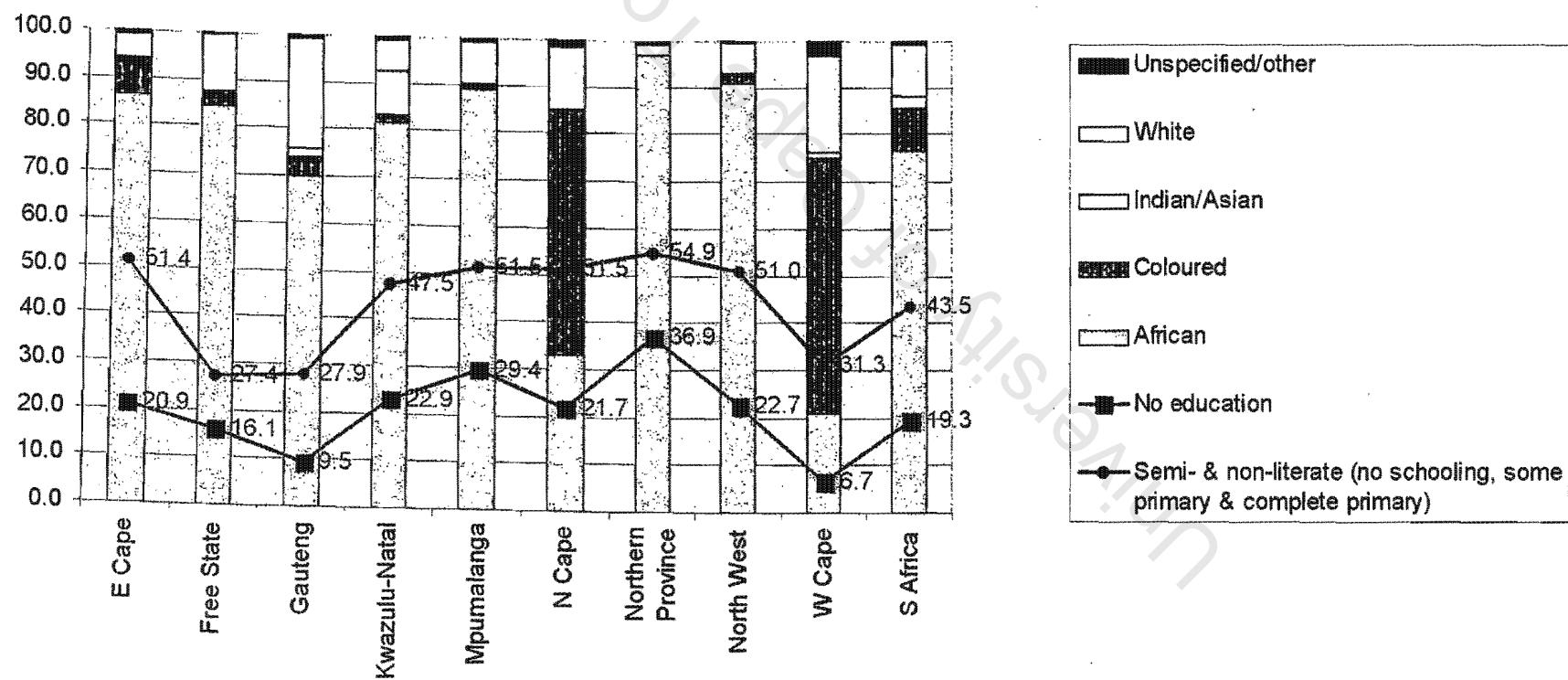
Table 2 gives a composite picture of the distribution of people with insufficient schooling to have retained literacy and their distribution by province according to the 1996 census:

Table 2
Literacy categories in adults aged 20 years or more per province against population group per province in 1996

	E Cape	Free State	Gauteng	Kwazulu-Natal	Mpumalanga	N Cape	Northern Province	North West	W Cape	S Africa
African	86.4	84.4	70.0	81.7	89.2	33.2	96.7	91.2	20.9	76.7
Coloured	7.4	3.0	3.8	1.4	0.7	51.8	0.2	1.4	54.2	8.9
Indian/Asian	0.3	0.1	2.2	9.4	0.5	0.3	0.1	0.3	1.0	2.6
White	5.2	12.0	23.2	6.6	9.0	13.3	2.4	6.6	20.8	10.9
Unspecified/other	0.6	0.4	0.8	0.8	0.6	1.5	0.7	0.5	3.1	0.9
Semi- & non-literate (no schooling, some primary & complete primary)	51.4	27.4	27.9	47.5	51.5	51.5	54.9	51.0	31.3	43.5
Literate	48.6	72.6	72.1	52.5	48.5	48.5	45.1	49.0	68.7	56.5
No education	20.9	16.1	9.5	22.9	29.4	21.7	36.9	22.7	6.7	19.3

Figure 3 shows the same figures graphically. The bar graph gives the racial composition of each province; the superimposed line graphs give information about levels of education.

Figure 3
Literacy categories in adults aged 20 years or more per province against population group per province in 1996



From the combination, the following inferences may be drawn about the racial inequities of schooling and the resulting inequities in access to retained literacy:

- Education and hence literacy levels are lowest in those provinces with a predominantly African rural population, such as E Cape, Mpumalanga, Kwazulu-Natal, Northern Province and North West;
- Education and literacy levels are significantly higher in provinces dominated by large metropolitan areas such as Gauteng (Witwatersrand), W Cape (Cape Town) and Free State (Bloemfontein). The effect of urbanisation around Durban is reflected in the semi- and non-literate percentages for Kwazulu-Natal being the lowest of the "rural" provinces.
- There is a clear correlation between the level of literacy in a province and the proportion of whites in the population: the two provinces with the lowest levels of semi- and non-literate adults, Gauteng and W Cape, also have the largest number of whites of the nine provinces.
- The damaging effect of a failure to develop effective rural education infrastructure is further illustrated by comparing the N Cape and the W Cape. In the N Cape, where 51.8% of the population are classified as "coloured", 21.7% of the total population have no education, while the corresponding figure for W Cape with a comparable racial composition (54.2% coloured) is only 6.7%.
- While there is an understandable correlation between the percentage of adults with no education and those of semi- or non-literate status, the figures for E Cape show an unexpected divergence which indicates that while those living in the E Cape may have access to some educational facilities, the drop out rate after the primary level is higher than in the other provinces, resulting in a higher than expected proportion of semi- and non-literate speakers.

The correlation between urbanisation and literacy apparent in Figure 3 is re-inforced in Table 3 which shows the distribution of illiteracy in rural and urban areas by province based on the 1996 census figures:

Table 3

Percentage semi- and non-literate adults aged 20 years or more per province
and urbanisation per province in 1996

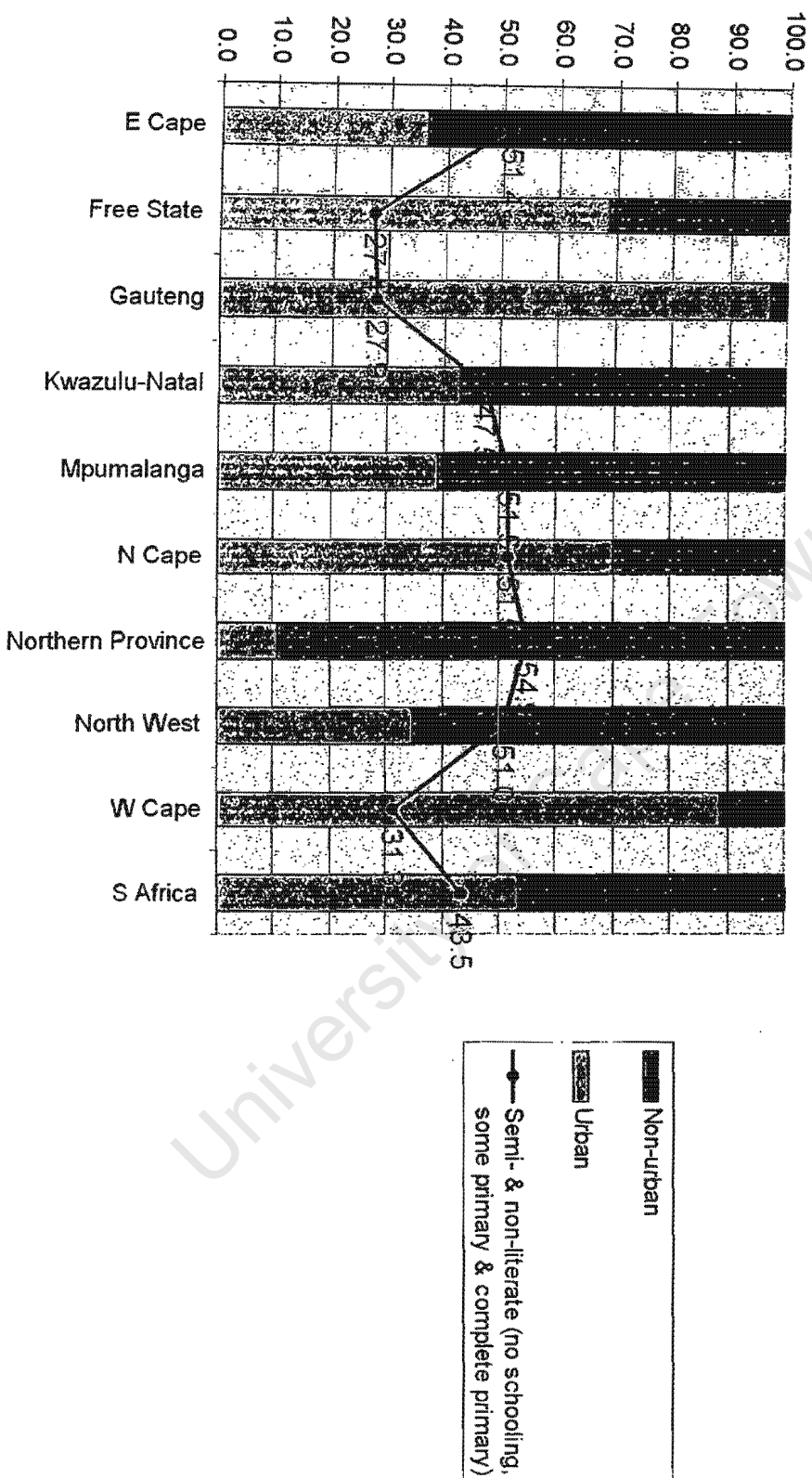
	E Cape	Free State	Gauteng	Kwazulu-Natal	Mpumalanga	N Cape	Northern Province	North West	W Cape	S Africa
Urban	36.6	68.6	97.0	43.1	39.1	70.1	11.0	34.9	88.9	53.7
Non-urban	63.4	31.4	3.0	56.9	60.9	29.9	89.0	65.1	11.1	46.3
Semi- & non-literate (no schooling, some primary & complete primary)	51.4	27.4	27.9	47.5	51.5	51.5	54.9	51.0	31.3	43.5
Literate	48.6	72.6	72.1	52.5	48.5	48.5	45.1	49.0	68.7	56.5

Figure 4 represents the same data graphically: the bar graph gives the rural/urban breakdown per province and the superimposed line graph the percentage of people with insufficient schooling to have retained literacy.

Again the provinces with the highest level of urbanisation, also have the lowest levels of illiteracy, and vice versa. In general, where a province is less than 60% urbanised, the percentage of semi- and non-literate speakers is between 47% and 52%.

An apparent anomaly is N Cape where 70.1% of the population are considered urbanised: however the sparseness of population in this area has produced a somewhat misleading result: the total population recorded for the N Cape is only 840,321 of whom 588,906 are classified as "urbanised". However, it is common knowledge that the so-called "urban" areas of N Cape exhibit signs of rural poverty more akin to rural than urban areas in other provinces.

Figure 4
Percentage semi- and non-literate adults aged 20 years or more per province
against urbanisation per province in 1996



The problem of inequity is further complicated by the extent to which literacy varies according to gender. In 1995, of the South African population with no education, women constituted 61% and men 39%.⁶

An obvious conclusion from the information contained in these figures and tables, is that for many South Africans the quality of school education was so poor that seven years of schooling were inadequate for the achievement of a literacy level that would enable them to function effectively in secondary discourses, particularly those dominated by languages that are not their home language.

The following paragraphs give a very brief background to the factors that gave rise to to-day's inequities. The politics of education under the apartheid regime and its effects on the standard of literacy among black South Africans were primary contributory factors. From the late eighteenth century onwards, the education of black children fell largely on the shoulders of the church and mission schools, of which there were some 5000 operating with state assistance prior to the 1953 Bantu Education Act. This Act aimed to incorporate mission schools into the state education system; those schools which resisted incorporation were closed down.⁷ Apartheid government spending on different race groups' education varied significantly: by 1970 per capita government spending on black education was 5% of that spent on white.⁸ Although, after the 1976 Soweto uprising and the ensuing nationwide unrest, funding was increased, the disparity between spending on black and white education remained.⁹

Funding affects educational quality because of the number of teachers (and the nature of their qualifications) that a school can afford to employ. In 1987 the pupil:teacher ratio in black schools averaged 41:1: in white schools the ratio was 16:1.¹⁰ This variation was 'justified' by the difference in teacher qualifications: in 1986 only 42% of incumbent African teachers had passed matric and had received some teacher training, and black schools had to be staffed by black teachers.

At the same time, school enrolment continued to grow and secondary schools in black and coloured areas increased. In the political turmoil since 1976, however, schools became arenas for apartheid resistance. As a result of strikes and political activity many school days were lost¹¹ and school attendance was erratic. Consequently pupil progress into

⁶ South African Institute of Race Relations survey 1996/97 151.

⁷ Fuller, Pillay and Sirur *Literacy Trends in South Africa* 5.

⁸ Fuller et al. (n7) 5.

⁹ By 1986, per capita spending on black and coloured schools had risen to 19% and 41% respectively: the balance was spent on white education. By 1991, for every rand spent in the African education departments, R4.60 were allocated to white schools, R3.20 to the Indian department and R2.60 to the Coloured department. Fuller et al. (n7) 6-8.

¹⁰ This varied according to province. In KwaZulu the ratio was 53:1; in Transkei 60:1. Fuller et al. (n7) 8.

¹¹ Department of Education and Training reported that in 1993 the number of days that schools were closed equaled an entire school term, 6,6 million pupil days in all. Fuller et al. (n7) 7.

higher standards was not impressive. Less than a quarter of all black children who began Grade 1 completed primary school. This pattern was consistent throughout the school levels. In 1991, the ratio of black children enrolled in Grade 12 compared with children in Grade 1 was less than 25%.¹² Table 5 shows by race the average pupil:teacher ratios in the same year:

Table 4¹³
Average Pupil:Teacher Ratios by Race (1991)

African	1:41
White	1:19
Coloured	1:23
Indian	1:22
RSA	1:31

These factors inevitably had a negative effect on black education. A further adverse influence was the form this education took. The racist assumptions made by the regime about the capacity of black children to learn, as well as their subordinate 'functional' role (blacks were envisaged only as being part of a workforce) were manifested in the syllabi and text books. The focus was on facts rather than on advancing an active form of learning and democratic practice.¹⁴

The content and style of education is now changing but the inequities have not been entirely removed. For reasons explained above, the latest census information is not as simply racially categorised. By plotting the pupil : teacher ratios determined in 1995 and published by the Central Statistical Service on the Internet against the racial composition of the provinces according to the 1996 census, the unequal pattern of pupil:teacher ratios in contemporary schools can be seen (see table 5 and figure 5).

The focus of Outcomes Based Education and Adult Basic Education and Training (ABET) is on relevance. Education must involve life skills and lifelong learning. Social Uses of Literacy research in South Africa has confirmed the need for an informal acquisition of literacy skills as *apprenticeship learning* combined with the practice of shared literacy events (everyday events involving the written word) involving *literacy mediation*.¹⁵ Certainly, laws written in plainer language will greatly assist processes of literacy mediation and, given the enormous and costly task of transforming the education system, literacy mediation will be needed for decades to come.

¹² Fuller et al. (n7) 7.

¹³ Krige et al. (n3) 66.

¹⁴ Fuller et al. (n7) 9.

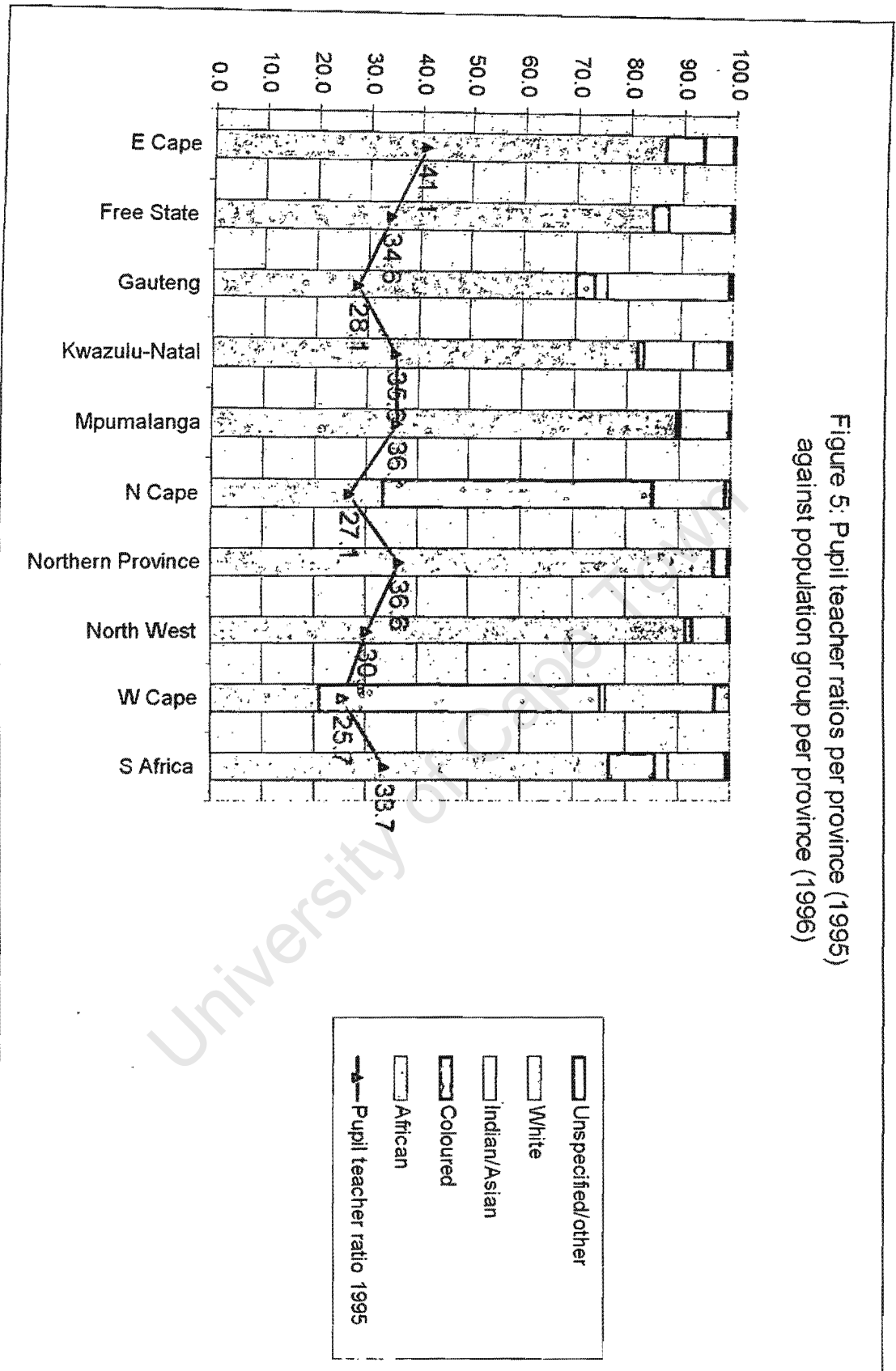
¹⁵ Prinsloo and Brier (n5) 26.

Table 5

Pupil:teacher ratios per province (1995)
and population group per province (1996)

	E Cape	Free State	Gauteng	Kwazulu-Natal	Mpumalanga	N Cape	Northern Province	North West	W Cape	S Africa
African	86.4	84.4	70.0	81.7	89.2	33.2	96.7	91.2	20.9	76.7
Coloured	7.4	3.0	3.8	1.4	0.7	51.8	0.2	1.4	54.2	8.9
Indian/Asian	0.3	0.1	2.2	9.4	0.5	0.3	0.1	0.3	1.0	2.6
White	5.2	12.0	23.2	6.6	9.0	13.3	2.4	6.6	20.8	10.9
Unspecified /other	0.6	0.4	0.8	0.8	0.6	1.5	0.7	0.5	3.1	0.9
Pupil teacher ratio 1995	41.1	34.6	28.1	35.6	36.1	27.1	36.6	30.3	25.7	33.7

Figure 5: Pupil teacher ratios per province (1995)
against population group per province (1996)



II. LITERACY

Section (1) showed the extent of basic illiteracy and of the inability of the majority of population to use English and Afrikaans. This section considers the nature of the literacy that is needed to work with these legal and quasi-legal texts, and who is likely to have this competence.

1. DEFINING LITERACY

'Literacy' does not mean simply the ability to match phonemes and graphemes and understand what is represented. What is perceived as literacy depends on who is doing the defining. In this sense, definitions of literacy are always ideological.¹⁶ Different texts present different problems, which are further complicated when readers come from different cultural and language backgrounds. However, one consistent factor in the definitions is the recognition that a power variable is built into literacy.

All language users acquire at least one primary Discourse¹⁷ which gives them the framework to acquire and learn¹⁸ other Discourses. Their ability and opportunity to participate in secondary Discourses affects their ability to function in society because secondary Discourses '...crucially involve social institutions beyond the family (or the primary socialisation group as defined by the culture). Secondary Discourses are used in the public domain, such as schools, national media, financial and government agencies and *various sorts of professions* (my italics). Legal discourse is always a secondary Discourse.

Those who can work competently in 'dominant Discourses',¹⁹ i.e. have the least conflict between using a dominant Discourse and their other Discourses,²⁰ have access to and control of the social goods of money, power and status. The reverse also holds true: those who lack competence are excluded from membership of the dominant group. Gee²¹ sees this as an inclusive/exclusive relationship. He maintains that, unlike simple language competency, either a person is fluent in a Discourse, or s/he is not; one is either in or out. This stark delineation has the merit of emphasising that it is the use of a particular D/discourse that distinguishes a competent from an incompetent user. Some of the words and structures found in traditional legal English are familiar, but their specialised meaning and use remain largely incomprehensible to non-legal people (i.e. those who cannot work in the legal

¹⁶ Baynham *Literary Practices* 8. See also Gee *Social Linguistics and Literacies* 144 ff.

¹⁷ Gee (n16) 151ff.

¹⁸ Gee (n16) 144 distinguishes acquisition from learning thus: acquisition is a process, often subconscious, through which knowledge [here, of a language] is obtained in 'meaningful and functional natural settings.' Learning involves conscious knowledge gained through teaching.

¹⁹ Gee (n16) 142 uses 'Discourse' with a capital 'D' to refer to 'saying (writing)-doing-being-valuing-believing combinations,' as opposed to 'discourse' meaning connected stretches of language. 'Dominant Discourses' lead to social goods in a society.

²⁰ Gee (n16) 145. These users form 'dominant groups'. They are empowered by dominant Discourses because of their ability to work with them.

²¹ Gee (n22) 155

domain). Although this competence may vary according to a person's literacy skills (in both primary and secondary Discourses) and with the complexity of the text, non-legal people are always marginalised.

If literacy is regarded as '... mastery of or fluent control over a secondary Discourse'²² we are forced to consider literacy as a plural not a single concept.²³ Gee claims that there may be several different primary Discourses. Generally, primary Discourses occur among intimates and involve a high level of acquisition, as opposed to learning. Secondary Discourses force the communicator to interact with non-intimates and institutions. Much secondary Discourse must be learned (see n11). If we understand the notion of 'Discourse' as a 'socially accepted association among ways of using language, of thinking, feeling, believing, valuing, and of acting that can be used to identify oneself as a member of a socially meaningful group or "social network",'²⁴ we see that the language competence required to participate in a Discourse goes far beyond the ability to read.

From the definition of literacy as a social activity we can further define people as literate when they have acquired the essential knowledge and skills that allow them to function effectively in various communities by using those skills towards individual and community development.²⁵ It is therefore misleading to use the term 'standard' of literacy, as a person's ability to apply whatever reading skills s/he possesses will vary according to the context in which the literacy is required.²⁶ However, since it is the text that tests these skills, not vice versa, texts affect the degree to which people can perform the socio-economic, cultural and political activities that govern their lives.²⁷

'Literacy practices', or ways of using literacy,²⁸ vary. When different literacy practices occur in coherent or identifiable groups, they can be termed different literacies and different literacies are associated with different domains of life, for example, home, work, recreation. Significantly, particular institutions may support and nurture their own, often distinct, literacy practices. This is very much the case with legal language, where writing has 'played a major role in the evolution of modern bureaucratic societies and in the specialized scientific, legal, religious and political institutions that comprise them'.²⁹

²² Gee (n16) 153.

²³ Gee (n16) 153.

²⁴ Gee (n16) 143.

²⁵ UNESCO 1962 cited in Baynham (n16) 8.

²⁶ Prinsloo and Brier (n5) 4 claim that 'standard is a cultural artefact, not a universal given'. They give the example of the use of documents and print in squatter communities by political activists who might not pass literacy tests but can incorporate written documents in their presentation of cases to communities and politicians.

²⁷ Yambi in Verhoeven *Functional Literacy* 292.

²⁸ Barton in Verhoeven (n27) 187-8 defines 'literacy practices' as the general cultural ways of utilising literacy which people draw on in a literacy event.

²⁹ Olsen in Verhoeven (n27) 135.

Competency varies according to the domain in which the literacy practice occurs. Some practices happen in specialised domains, such as computer technology; others occur in both specialised and everyday domains. Many legal texts (in the broadest sense that includes contracts and regulations) belong to the latter domain. Although they are inescapably part of everyday life, they require a specialised form of literacy in order to be understood. In the South African context, the division between specialised and non-specialised users increases with the cultural and language differences involved. Most African language speakers are forced to function in literacy domains (Gee's secondary Discourses) that are foreign both linguistically and culturally.

2. IMPLICATIONS OF DISPARITIES IN LITERACY LEVELS

A gulf exists between expectations and levels of competence in the literate world and those of the illiterate world. Literate people set the norms with which illiterate people are expected to work. Non-literate and semi-literate people (those who cannot work effectively with a particular form of literacy) are perceived to be in some way inferior to those who are competent. 'Literacy is imperious. It tends to arrogate to itself supreme power by taking itself as normative for human expression and thought.'³⁰

For these reasons, those who produce the legal and official texts should be trained in how to write these texts avoiding the complicated language features that obscure meaning. These texts need not be written to the lowest level of literacy competence (see Ch 5 III, particularly n81 and 83), because people at this level are unlikely to be direct readers. The level to be aimed at is one that will allow people with a reasonable literacy level to understand legal texts so that they can help those whose literacy level is lower. These 'literacy brokers'³¹ act as intermediaries between illiterate people and the texts they have to respond to. In the South African context, a literacy broker is likely to do the initial (and perhaps only) mediation of legal and quasi-legal texts. With the exception of the staff of legal aid clinics, the literacy brokers are unlikely to be legal professionals or even possess above-average literacy skills. They are usually just members of the community who have had a little more schooling than their peers.

Once again, the relationship between proficient language use and power (as discussed in Ch 1) becomes significant. Not only do literate people have an advantage over the non-literate, because they can work within the normative practice set by their own literacy, but even within the literate world there are areas and degrees of competence. Those who possess the language skills that enable them to work in a particular situation can exclude those without this knowledge. Professional and specialised discourses are clear examples of this form of specialised literacy.

³⁰ Ong in Downing, Lima and Noonan (eds) *The Linguistics of Literacy* 293.

³¹ Barton *Literacy* 202.

One of the effects of institutional involvement with literacy is the creation and maintenance of a power division.³² Those literate in a particular literacy practice are empowered by their literacy; others are correspondingly disempowered. The potential for conflict exists both between specialised and non-specialised language users and between types of specialisations. Within any society there are many language forms (for example, dialects and creoles); the standard is only one variety, whose status is achieved when the language it represents is labelled the 'dominant language'. Literacy is similar: there may be several literacy practices but one will be taken to be the 'dominant literacy'. With recognition of the concept of 'dominance', the literacy issue becomes one of power and of struggle for control of the dominant mode³³ rather than a 'natural' process whereby the best (i.e. optimum), form of literacy will emerge.³⁴

This power division increases when different cultures are drawn into a single or narrow area of literacy. In South Africa, eurocentric literacies are dominant and are often at a considerable remove from African cultures whose own literacy may not even be recognised as such by the dominant literacy groups. The result is that people whose cultural and linguistic background is different from the dominant culture are excluded from real participation in literacy domains. They will continue to be excluded until this dominant literacy culture is changed and until there are widespread successful civic education programs such as those envisaged by Budlender & Everatt³⁵. Such an adjustment is both linguistic (the language must become more familiar) and ideological (those within the dominant literacy group must acknowledge the need to admit other cultural influences).

3. CURRENT STRATEGIES FOR DEALING WITH LITERACY PROBLEMS IN SOUTH AFRICA

The Constitution of South Africa enshrines individual rights at both general and specific levels. Its terms make clear that discrimination is non-democratic and therefore indefensible. The present uneven distribution of literacy skills illustrates an inequality, one that is now being addressed. Whereas literacy was an issue only in oppositional political discourse prior to 1990, it has now become an item on the government's agenda for social development.³⁶ Literacy provision is part of the ABET programme, linked not only to schooling but also to education in the workplace and vocational training schemes. Development focuses on plans for economic and social reform. The ABET proposals aim to offer working classes and the unemployed state-guaranteed access to further education and training, thus promoting people's employment level. Further, this education will be 'outcomes based', focusing on the skills to be acquired rather than the facts a learner can produce under

³² Barton (n31) 190.

³³ Gee (n16) 144-5.

³⁴ Street in Verhoeven (n27) 96.

³⁵ Budlender D and Everatt D Researching the Plain Language Initiative, CASE Evaluation of the Constitutional Assembly April 1996.

³⁶ Prinsloo and Brier (n5) 12.

test conditions. Simpler language is obviously an important factor in outcomes based learning. People learn more easily from texts written in a simple and comprehensible way and, while doing so, they develop language skills based on the more accessible language encountered in their study texts. Where possible and relevant, the drafting of legal and quasi-legal texts, including work-related contracts and procedures, should take account of the needs of adults who have come through ABET programmes.

III. HOW TO ADDRESS THE CHALLENGES

At present there is no South African equivalent of the Plain English Campaign in England or the plain language lobbies in other parts of the world (see Ch 5, III). Although some laws and some parts of laws have been written more simply, this is neither sufficiently extensive in scope nor deemed mandatory by government. Many of those who rewrite documents do so as private consultants. Although these people, particularly those in business, are developing an awareness of the advantages in writing more simply, the effect will be too sporadic to be of wide-ranging benefit until their efforts are part of a more general and concerted effort to use plain language. Resistance to rewriting and drafting legal texts in simpler language will only be overcome when the democratic right to read such texts is recognised. For this to happen, legal drafters need to be retrained and courses in writing simpler, more comprehensible texts should be part of law curricula. The ultimate objective should be for plain language drafting to become "the norm for government drafters, and certainly for important or contentious pieces of legislation".³⁷

Such training is not at present available in South African law faculties. (Occasional and optional half courses offered late in a law student's degree are insufficient.) Regardless of their home language, all law students should be taught which linguistic structures communicate effectively, why this is so and how to use them efficiently. They also need to learn how to decode traditionally written texts; first, in order to understand them, and, secondly, so that they can learn how to avoid the language features that complicate these texts and obscure their meaning.

Efforts to work 'plain language' into legal and quasi-legal texts must be systematic. Individual and localised initiatives efforts are too limited to help the majority of the population and to benefit fully from the democratic values of the Constitution. People have a right of access to information affecting them. Even if a large sector of the population has to rely on literacy brokers, these brokers at least must be able to read and explain legal texts to those dependent on them.

To illustrate this argument, the legal and quasi-legal texts given below are marked for the language features that cause comprehension problems (see chapters 3 and 4), and

³⁷ See the strong recommendations of Budlender & Everatt (n35).

are then rewritten in plain language. The superscripts in the original versions show how often and how densely these features occur, using the following key:

Lexical features		Syntactic features	
1	specificity and generality ✓	10	long and complex sentences ✓
2	technical expressions ✓	11	frequent subordination ✓
3	foreign and archaic words ✓	12	passive constructions
4	common words with uncommon meanings ✓	13	negative constructions
5	doublets and redundancies ✓	14	obscure modal verb meaning
6	compound and complex words ✓	15	directives
7	gender ✓	16	nominalisations
8	prepositional phrases ✓	17	unusual determiners
9	pronouns ✓	18	low incidence of pronouns

Even competent (school leaving certificated) readers would have trouble understanding these texts, and therefore find the information they were looking for. Although the Acts were deliberately chosen for their broader relevance, the extracts were randomly selected; i.e. they are not necessarily the worst or only examples in their respective texts of the traditionally obscure legal style of writing. The features of legal language that cause comprehension problems (as discussed in the chapters on lexis and syntax) appear in these extracts, most more than once.

Divorce Act 70 of 1979 s 4(1) - (4)

Any married person might want to consult this Act, since it will regulate divorce procedures applicable to a large category of South Africans, including both blacks and whites. The Act is available only in the former two official languages. Those with English or Afrikaans competence who are nearly all married by civil or Christian rites and are mostly white, coloured or Indian, could assume that this Act refers to their marriages. Nonetheless, they would find the provisions difficult to understand because of the confusing linguistic features. African people would be even less likely to understand the text since it is not in their home language, and they might also be unsure of how this Act affects marriages under customary law.

Original	Rewritten version
(1) A court may grant ^{1,14} a decree of divorce on the ground of the ¹ irretrievable break-down ² of marriage if it is satisfied that the marriage relationship ² between the parties ⁴ to the marriage has reached such a state of disintegration ¹⁶ that there is no ¹ reasonable prospect ² of the restoration ¹⁶ of a normal marriage relationship between them ^{10,11} .	(1) If a court is satisfied that a marriage relationship has so deteriorated that there is no prospect of reconciling the spouses, it may grant a decree of divorce on the ground of irretrievable break-down of marriage.
(2) Subject to the provisions ⁴ of subsection (1), and without excluding ¹³ any facts or circumstances ⁵ which may be indicative of the irretrievable break-down of a marriage ^{1,11} , the court may accept ¹⁴ evidence— (a) that the parties have not lived together as husband and wife ¹ for a continuous period of at least one year immediately prior to the date of the institution ¹⁶ of the divorce action; (b) that the defendant ² has committed adultery and that the plaintiff ² finds it irreconcilable with a continued marriage relationship; or (c) that the defendant has in terms of a sentence of a court been declared ¹² a habitual criminal ² and is undergoing imprisonment ¹⁶ as a result of such a sentence, as proof of the irretrievable break-down of a marriage ¹¹ .	(2) The court may accept any of the following situations as evidence that a marriage has irretrievably broken down if: (a) the couple did not live together as husband and wife for a year before the beginning of the divorce action began; or (b) one spouse committed adultery and the other finds this irreconcilable with a continued marriage relationship; or (c) one spouse was declared a habitual criminal and, as a result, is currently serving a prison sentence.
(3) If it appears to the court that there is a reasonable possibility ^{1,2} that the parties may become reconciled through marriage counsel, treatment or reflection ^{2,4,16} , the court may postpone the proceedings in order that the parties may attempt a reconciliation ¹⁶ .	(3) If the court considers that marriage counselling or other form of assistance would help the couple to reconcile their differences, it may postpone the divorce proceedings to give the couple time to repair their relationship.
(4) Where a divorce action which is not defended ¹² is postponed in terms of subsection (3), the court may direct that the action be tried ¹² <i>de novo</i> ³ , on the date of resumption ¹⁸ thereof ³ , by any other judge of the court concerned.	(4) If a case is postponed under subsection (3) above, and if the divorce action is not defended, the court may decide that the action must be heard again by another judge of the court concerned.

Regulation 2 (b), (c), (d), (e) of GN R200 of 1987 [passed under s 23(10) of the Black Administration Act 38 of 1927]

This regulation is intended to regulate the devolution of the estates of deceased Africans and it would be consulted by Africans wanting to know whether customary or Roman-Dutch common law would apply. The regulation is based on an assumption that people married by civil/Christian rites with an antenuptial contract (or with a pre-marriage declaration governing their matrimonial property system) are educated. For these reasons, Roman-Dutch law is made applicable to their estates. Although African widows would have a particular interest in these provisions, they are addressed principally to the courts and officials of the apartheid era. Those who are actually affected, and who stand to lose most, are excluded from the content, an exclusion apparent from the language used (English) and its style (traditional legal).

Original	Rewritten version
If a Black dies leaving no valid will, so much of his property, including immovable property, as does not fall within the purview of subsection (1) or subsection (2) of section 23 of the Act shall be distributed in the manner following:	If an African dies without leaving a valid will, any property, including immovable property, that remains in the estate after the conditions of subsections (1) or (2) of section 23 of this Act have been met, must be dealt with according to the conditions listed below:
(a)	(a)
(b) If the deceased² was at the time of his⁷ death the holder¹⁶ of a letter of exemption issued¹² under the provisions of section 31 of the Act, exempting him from the operation of the Code of Zulu Law, the property shall devolve^{2,14,15} as if he had been a European¹⁰.	(b) If the deceased was exempt from the Code of Zulu Law, common law must be applied to inheritance of the estate.
(c) If the deceased², at the time of his⁷ death, was- (i) a partner in a marriage in community² of property⁵ or under antenuptial contract²; or (ii) a widower, widow or divorcee^{1,11}, as the case may be¹, of a marriage in community of property or under antenuptial contract and was not survived¹² by a partner to a customary union entered into¹² subsequent to the dissolution^{2,16} of such¹⁷ marriage, the property shall devolve^{2,14,15} as if the deceased had been a	(c) If the deceased had been married out of community of property or had entered into an antenuptial contract common law must be applied to inheritance of the estate.

European^{10,11}.

(d) When any deceased² Black is survived by any partner-

(d) In all other situations customary law must be applied, unless the Minister considers it inappropriate to apply that law. In this case the Minister may direct that all or part of the estate is to devolve according to the common law and that the deceased is to be deemed married out of community of property.

(i) with whom he⁷ had contracted a marriage which¹¹, in terms of subsection (6) of section 22 of the Act, had not produced the legal consequences² of a marriage in community of property; or

(ii) with whom he⁷ had entered into a customary union; or

(iii) who was at the time of his⁷ death living with him as his putative spouse²;

or by any issue² of himself⁷ and any such¹⁷ partner, and the circumstances¹ are such as¹¹ in the opinion of the Minister to render any application¹⁶ of Black law and custom² to the devolution^{2,16} of the whole, or some part, of his property inequitable or inappropriate⁵, the Minister may¹⁴ direct that the said¹⁷ property or the said¹⁷ part thereof³, as the case may be, shall devolve^{2,14,15} as if the said¹⁷ Black and the said¹⁷ partner had been lawfully married out of community of property, whether or not such was in fact the case, and as if the said¹⁷ Black had been a European¹⁰.

(e) If the deceased² does not fall into any of the classes described in paragraphs (a), (b), (c), and (d), the property shall be distributed¹² according to Black law² and custom.

Section 1(1), (2), (3) and (4) of the Law of Evidence Amendment Act of 1988

These provisions were directed mainly at white administrators and the judiciary of the apartheid system. Nevertheless, the Act speaks, in the first instance, to *any court*, and so it would apply to the traditional rulers of the African population (who also run legally recognised tribunals). Africans who want to know whether they are subject to customary law or common law might consult this legislation. The Act is available only in English and Afrikaans.

Original	Rewritten version
(1) Any ¹ court may take ^{1,14} judicial notice ² of the law ⁸ of a foreign state ⁸ and of indigenous law ⁸ in so far as such ¹⁷ law can be ascertained ¹² readily ^{1,2} and with sufficient ^{1,2} certainty ⁵ : Provided that indigenous law ² shall ¹⁴ not be opposed ^{12,13} to the principles of public policy or natural justice ^{5,2} : Provided further that it shall ¹⁴ not be lawful ¹³ for any court to declare that the custom of lobola or bogadi ⁵ or other similar custom is repugnant ^{2,4} to such ¹⁷ principles ^{10,11} .	(1) (i) Any court may recognise and apply indigenous laws, without calling for evidence of their existence and contents, provided that these laws are readily available and comprehensible, and that they do not contradict principles of public policy or natural justice. (ii) No court may decide that the customs known as lobola or bogadi or other similar name contradicts the principles of public policy or natural justice is incompatible with these principles.
(2) The provisions of subsection (1) shall ¹⁴ not preclude ^{2,13} any party from adducing ² evidence of the substance ⁸ of a legal rule ^{2,8} contemplated ⁴ in that subsection ⁸ which is in issue ⁸ at the proceedings concerned ⁸ .	(2) The provisions in subsection (1) above do not prevent a party from leading evidence of the existence or content of a rule of indigenous law.
(3) In any ¹ suit ² or proceedings ^{2,5} between Blacks who do not belong to the same tribe, the court shall ¹⁴ not in the absence ^{8,13} of any agreement between them with regard to ⁸ the particular system of indigenous law ⁸ to be applied ¹² in such ¹⁷ suit ⁸ or proceedings ⁵ , apply any system of indigenous law ² other than that which is in operation at the place ⁸ where the defendant or respondent ⁵ resides or carries on business or is employed ⁵ , or if two or more different systems are in operation at that place (not being within a tribal area) ¹³ , the court shall ¹⁴ not apply ¹³ any such ¹⁷ system unless it is the law of the tribe (if any) ¹ to which the defendant or respondent ⁵ belongs ^{10,11} .	(3) In legal disputes between Africans from different tribes, the court must only apply the system of indigenous law that the parties agreed should apply. If the parties did not agree on the applicable law, the court must apply the law that operates in the place where the defendant lives or works. If two or more systems operate there, and if the place is outside a tribal area, the court must apply indigenous law used by the defendant's tribe.
(4) For the purposes of this section "indigenous law" means the Black law or customs as applied by the Black tribes in the Republic or in territories which formerly formed part of the Republic.	(4) In this section 'indigenous law' means the law or customs followed by the African tribes of South Africa.

In this re-writing, a number of principles have been applied. They could be taught. Systemised and enforced rewriting requires guidelines, because many of those involved in legal drafting have been trained in the traditional style and are unfamiliar with the methods used to write more simply. Even people who support the idea and the results of writing in

plainer language are not sure exactly how to go about it. Plain language may be easier to read, but it is not immediately simple to produce. Chapter 7 provides information on how to deal with the linguistic problems identified and discussed in chapters 3 and 4. This kind of information could form the basis of courses in appropriate drafting or revising of legal and quasi-legal texts.

University of Cape Town

CHAPTER 7

REWRITING LEXIS AND SYNTAX

I. INTRODUCTION

In order to write more simply, writers need to understand the communication process and how it affects the author-reader relationship. 'In one blow, good communication can make a document both more effective and more efficient. At the same time, it makes the document fairer. People are able to understand the documents that bind them.'¹

In order to achieve 'clear, straightforward expression, using only as many words as are necessary',² writers must have a clear idea of what they wish to communicate. They need also to identify the intended audience, anticipate their abilities and adjust the language they use to match these expectations. 'Writers of plain English let their audience concentrate on the message instead of being distracted by complicated language. They make sure that their audience understands the message easily.'³

The key factor is 'effectiveness', rather than 'correctness'.⁴ Effectiveness can be measured by the extent to which the author's intent is comprehended by the receiver, a result dependent on various factors, predominant amongst which is the language used. Traditional legal texts are not likely to communicate efficiently, partly because of the situations in which lay-people consult them (i.e. when they need assistance to discover the law) and partly because of the way in which lay-people read legal documents (in sections, not as continuous text, and usually unassisted).⁵ While both these factors interfere with communication,⁶ it must be appreciated that the language of the texts is the main problem.⁷

Effective communication is even further obstructed by the very different legal skills in the groups of people producing and using legal texts. Four general audience groups can be identified, three of which have legal knowledge, but at different levels of competence and qualification. The first is officialdom, i.e. government officials, members of Parliament who

¹ Balmford (1994) 111 *South African Law Journal* 514.

² Eagleson cited in Kimble (1992) 9 No 1 *Thomas M Cooley Law Review* 14.

³ Eagleson cited in Kimble (n2) 14.

⁴ Sentences that conform to the rules of grammar may be syntactically correct but may not necessarily communicate effectively. Conversely, syntactically incorrect language may be perfectly comprehensible in situations where sender and recipient understand what the incorrect forms mean. Legal language is an example of correct but ineffective language.

⁵ Legal language 'is essentially a visual language, meant to be scrutinised in silence'. Crystal and Davy *Investigating English Style* 194. Generally, readers are in a one-to-one relationship with legal texts; i.e. the texts are read in situations where the reader has to struggle unaided.

⁶ 'Interference' is anything that distorts the information transmitted to the receiver or distracts him or her from receiving it. Two kinds of interference can be identified. 'Technical interference' refers to factors that cause the receiver to perceive distortion in the intended information or stimuli, for example, by a situational disturbance. 'Semantic interference', for present purposes occurs when the receiver does not attribute the same meaning to the signal that the sender does. See Tubbs and Moss *Interpersonal Communication* 33-5.

⁷ Tubbs and Moss (n6) 19-38.

construct the laws and legal drafters. (Many MPs and all drafters have legal qualifications.) The second group includes the legal professionals, such as judges and lawyers, who must apply and interpret legislation. (They may also produce other kinds of legal texts, notably judgments and case reports.) In the third group are officials such as police officers who administer law. They may know of the law but do not necessarily understand it fully. Each of these groups is more familiar with legal texts than the final, and largest, group of law-users - the society that is regulated by legislation.

The means of production, the communication process and the style of legal texts keep non-legal readers at a distance.⁸ At source, the communication process is obstructed by a disruption in the author-reader relationship: the drafter is not the source of the text, but its amanuensis.⁹ A similar schism is repeated in the readership. Unlike many other types of text, laws are intended for an audience which often cannot read them (the general public); the main readers (lawyers) are not usually the specifically targeted audience.

... in most varieties [of English text] the reader and the recipient for whom the document is meant are the same person, whereas in the case of legislative provisions, the document is meant for ordinary citizens but the real readers are lawyers and judges, who are responsible for interpreting these provisions for ordinary citizens.¹⁰

Changes to the *methods* of producing laws are costly and difficult to implement, whereas change to the language in which laws and in other legal documents are written is far easier to implement. Government, drafters and lawyers need to become involved in a collaborative effort to make information available, since they both need to motivate for and to use language that will communicate the legal message more effectively.

Simpler language will ease the task of all participants in the legal process. Legal drafters could write the instructions they receive from the legislature in less complex terms. Their job would in turn be made easier if, at an earlier stage, parliamentarians and civil servants expressed themselves more clearly. The recipients of legislation, legal professionals, should also be encouraged to use simpler language to explain and interpret the law to their clients.

The linguistic problem of legalese, therefore, has a linguistic solution: use plainer language. To do this two major problems must be tackled. First, lawyers (and companies using legal

⁸ Talbot in Fairclough (ed) *Critical Language Awareness* 175 makes this point about mass media. 'Interaction in mass medial discourse is one-sided and there is a great distance between producer and interpreter.' Similarly, the source and recipient in legal texts are fixed in a non-reciprocal interaction, whereby the texts construct, or synthesise, their audience.

⁹ Conceptual responsibility for statutory provisions ostensibly rests with the legislature, but these intentions will only be understood when they are realised in texts, for which legal drafters are responsible. '...[the draftsperson] is required to use linguistic resources and discursal strategies to do justice to the intent of the Parliament and also to facilitate comprehension of the unfolding text for ordinary readership at the same time. Reconciling the two is not always an easy task.' Bhatia in Gibbons (ed) *Language and Law* 137.

¹⁰ Bhatia (n9) 137.

documents, such as contracts) must be convinced that change is in their interests.¹¹ They need to be persuaded that simple language is more effective and no less professional than complicated language.¹² Secondly, law curricula must offer appropriate training in language skills. These skills will not only improve communication between lawyers and non-lawyers, but will also help practitioners themselves to understand legal texts. At present, students at South African universities are no longer required to complete any language credits in order to qualify for law. The onus is on law faculties to alter their curricula so that this omission is corrected and appropriate courses offered.

II. STRATEGIES FOR DEALING WITH PROBLEMS IN TRADITIONAL LEGAL WRITING

Chapters 2-4 analysed the striking linguistic characteristics of legal language, not only those which are problematic and in what remains of this chapter, ways of circumventing obstacles to lay peoples' comprehension of legal texts will be described. The strategies described are presented as recommendations and guidelines, not as unbending rules that would deny writers the freedom to exploit the flexibility of language and to use their own judgment.¹³

To correct the problems presented by legal texts, writers need to do more than merely recognise the features outlined in Chapters 2, 3 and 4: they must understand why these features obstruct comprehension. They must also consider lexis in relation to syntax, and both in relation to discourse cohesion, because all these factors operate interdependently. Because readers of legal texts are both lawyers and lay people, with different comprehension skills,¹⁴ writers must first identify their potential readers. They must then be more sensitive to the expressions and types of structures that are likely to cause confusion.¹⁵

The main lexical problems that readers encounter are unfamiliar terms, ambiguous meaning, redundant expressions and problems with specific types of lexical items, such as nominalisations, pronouns and modals. Substitution, pruning and defining are strategies which can be used, singly and in combination, to deal with most of these problems. In what follows in this section the three

¹¹ Balmford at a seminar 'Plain Language – The Law and the Right to Information', Cape Town March 1995, made the point that the drive for plainer language in Britain and America was consumer driven. This means that pressures external to legal, commercial and official text producers acted coercively (as well as persuasively) for change. See also 'The Balmford-Duckworth Tour of the United States – and Their Message That Plain Language Pays' (1995) 32 *Clarity* 15.

¹² This is unlikely to be an easy task. In South Africa, training courses in legislative drafting are scarce. Moreover, attorneys are still paid per folio (an estimated one hundred words per page) and where simpler language involves brevity, it will be pitted against financial benefits. Although changes to four hundred years of tradition will not be easily accomplished, that is no reason to give up the endeavour.

¹³ The strategies and suggestions for rewriting also apply to drafting original texts. Rewriting is a short-term solution. It is obviously a waste of time and energy to rewrite documents which could have been more simply written in the first place. Because centuries of tradition cannot be changed overnight, however, rewriting is essential if existing texts are to be made more comprehensible. See 'Summary of Guidelines' in Cutts *The Plain English Guide* 9-10.

¹⁴ Even professionals are affected by legalese: surveys have shown that lawyers often prefer simpler language. Asprey (1995) 32 *Clarity* 3-7; Kimble (n2) 24-5.

¹⁵ Writer-driven reworking is more effective, because more practical, than statutory edicts. See Knight (1995) 32 *Clarity* 22-28 on the Canadian Motor Dealer Leasing Regulation Requirements.

strategies will be defined and the general function of each will be discussed before their use in countering specific problems is demonstrated.

Both substitution and definition require a writer first to identify words likely to obstruct comprehension. Before another expression can be substituted, however, s/he must be absolutely certain what the original words meant, otherwise the replacement itself could be vague or misleading.

1. SUBSTITUTION

Substitution does not necessarily involve substituting a word with another single word, but rather finding and using a word, phrase or structure which will be more accessible to the lay reader than the traditionally used equivalents. At the same time, substituted terms must fulfil the necessary informative purpose. Since substitutions should demystify, they should not serve the (secondary) purpose of making the lay reader dependent on the interpreting skills of the legal professional.

A vocabulary checklist may be established for some of the categories discussed in Ch4 - technical, archaic and unnecessary terms. Words with no currency except in traditional legal usage, such as *witnesseth*, *aforesaid* and most of the *here-* words, can be replaced by more modern terms.

Many of these terms have, in any case, virtually disappeared from modern laws, proving that they are indeed dispensable.¹⁶ When writers replace obscure and archaic words with appropriate plain ones, they help readers to understand the text without affecting its validity or undermining the language. 'When people no longer understand a word, or if it is not doing a useful job, its day is done and other words will move in to fill the gap.'¹⁷

2. PRUNING

Removing unnecessary words, or 'pruning,' can only improve consistency and clarity. Wordy texts confuse because they violate the popular assumption that law is precise and that every word has a distinct purpose. Redundant words therefore contradict a fundamental belief about law.

For several reasons readers are less likely to be confused by pruned texts. First, reducing the number of words creates a shorter text, usually making the meaning more accessible.¹⁸ (Pruning can be similar to substitution in that it is sometimes possible to use one word or a short phrase to subsume a long list of separate terms.) Secondly, although shorter does not necessarily mean simpler, in legal texts it is usually the case that shorter texts are simpler. The word clusters in legal

¹⁶ Cutts' (n13) 142 term 'legal flavouring' indicates the non-essential function of these expressions: they add to legal style but in a non-essential way.

¹⁷ Cutts (n13) 22.

¹⁸ Writers need, however, to be aware that tersely written texts may be cryptic and offputting. A plain and tight style must include the necessary information and be clear but not offensive to the reader. See Cutts (n13) 40.

language frequently occur in complicated structures. Thus, reducing the word count reduces syntactic complexity. Finally, fewer words focus the attention of readers on what is important.

3. DEFINING

In cases where an appropriate substitute for an obscure term does not exist, the writer may define the term. A fundamental question in the process of definition is to decide what terms need further explanation. As a rule of thumb, any word that is not widely understood needs definition. The word may be a neologism (timeshare),¹⁹ ambiguous (merchant) or technical (lien).

The problem of what to define can be dealt with by specifying a particular meaning for the context. Just as word meaning varies according to context, so too do definitions. The word *instrument*, for example, would require one definition in a legal text and another in a text on music. And, if the meaning is uncertain, this can be explained; for example 'competent witness' means a person of the age of 14 years or over and who... is not incompetent to give evidence in a court of law.

Because definitions disrupt the flow of information, they should be kept to a minimum. Writers need to be aware when a definition will create more information than is necessary to define a term; i.e. they must avoid definitions of definitions. A word that needs to be defined is, by implication, an unfamiliar one; but a defined word acquires specific, technical meaning precisely because its particular meaning needs to be made clear. If the definition does not successfully explain the word, the meaning of an already unfamiliar term becomes even less accessible. For example, 'gonad' means the human organ which produces gametes is not informative because the explanatory referents are either too vague (human organ), or too unfamiliar (gametes).²⁰ Unwisely used, definitions become self-defeating.

Definitions should give the core meaning of a term as it is relevant to the context and they should amplify that meaning to make it clear. They should not introduce new meanings. At times, it may be necessary to illustrate the meaning of a word with a reasonable range of examples of what is referred to; for example 'premises' includes land, any building or structure, or any vehicle, conveyance, ship, boat, vessel, aircraft or container.²¹

Defining a word can both limit and extend its referential scope. Writers can use the selection process involved in defining to condense a range of referents into one term that applies to the particular text. They thereby can avoid a long list of specific terms, as in, for instance, 'magistrate' includes an additional magistrate and an assistant magistrate and any Commissioner, Additional Commissioner and Assistant Commissioner.²² A simple word or short phrase can then be used

¹⁹ As a result it may not appear in a dictionary.

²⁰ Section 1(b) of the Human Tissue Act 65 of 1983. Although gametes is defined just before the extract quoted, that definition provides little assistance to the lay reader: 'gamete' means either of two generative cells essential for human reproduction.

²¹ Section 1(vii) of the Human Rights Commission Bill [B 8F-94].

²² Sections 1(xvi) and (xviii) of the Child Care Act 74 of 1983.

instead of the longer, more complex original one.²³ For example, once odd lot is defined as a parcel of shares that is less than a marketable parcel, for example, the shorter phrase can be used.

The writer can select the aspect of the defined term that is appropriate to the context. A definition may have three components: a general class, a sub-class, and the distinctive features of the sub-class.²⁴ By using all three components, writers can make definitions as specific or general as seems appropriate to the context and audience needs. For example, in 'district' means the area subject to the jurisdiction of the court of any magistrate or Commissioner, the general meaning of district is explained in terms of its sub-class (what district means in the Act), together with the distinctive (i.e. specific) features (of any magistrate or Commissioner).

Definitions are a useful method for resolving the uncertainty that may arise where a text does not make clear whether a term refers to a new referent and where it is not clear whether another term is being used for the same referent.²⁵ The terms *de facto* partners and parties to the application, for example, may refer to the same individuals in different parts of an act. A definitions section can clarify this as 'parties to this application' refers to 'de facto partners'..²⁶

Definitions should be complete in themselves: the information needed to complete a definition should not be found elsewhere.²⁷ Although some cross-referencing in a complex document is inevitable, this should be restricted to essential information; extensive cross-referencing may indicate poor planning. 'If the point can't be made in a way that people can understand, it may not be worth making at all.'²⁸

III. CIRCUMVENTING LEXICAL PROBLEMS

The following section will show the three strategies of substitution, pruning and defining being applied to particular types of lexical problems. These problems are briefly described, cross-references to more detailed expositions in previous chapters are provided and then appropriate strategies for dealing with each type of problem are described.

1. UNFAMILIAR TERMS

As was explained in Chapter 3 II, sections 2 and 3, terms familiar to lawyers may be unfamiliar to lay people because they are archaic, or foreign, or as the result of specialist usage of common words.

²³ Williams *Ten Lessons in Clarity and Grace* 89-92.

²⁴ State of Victoria, Law Reform Commission *Plain English and the Law* (1987) s113.

²⁵ See the earlier examples; in In a prosecution of a person for failing to serve a notice on a securities exchange under this section, it is a defence if the defendant establishes... the terms person and defendant have the same referent: in Any person...shall on the application of any person and on payment to him of the prescribed fee (if any) issue to such a person a certificate the same noun refers to two different agents.

²⁶ Law Reform Commission of Victoria (n24) s106g.

²⁷ Section 1 of the Human Rights Commission Bill [B 8F-94].

²⁸ Cutts (n13) 69.

Many archaic expressions alienate readers without conveying a clear meaning. *Know All Men By These Presents*, for example, is intimidating rather than informative.

For most English speakers, unassimilated Latin is more difficult to understand than French loan words.²⁹ When borrowed, words become part of English (judge, government), their foreign origin is no longer a problem. Words which are not translated (*seriatim*, *sub judice*), however, may remain unknown, and the use of italics to mark them indicates that they have not been fully assimilated. If an entire phrase is Latin, comprehension is even more difficult.³⁰

The foreign and archaic terms associated with legal language can often be replaced with more familiar terms: except instead of save, and this for aforesaid.³¹ For instance, the here- words are rarely indispensable. In Any order resulting *herefrom* shall be subject to the conditions stated *herein*...in any of the debtor's documentation as may be in conflict *herewith*, the first here- word can be omitted altogether and the others replaced by more familiar prepositional phrases in it and with it respectively.³²

Support for retaining foreign and archaic terms is based on their technical meaning. As with all professional vocabularies, some terms, such as affidavit, spoliation, cannot and should not be changed. The constitutive force and professional nature of legal language mean that only certain technical expressions may be effective in particular contexts; for example, irrevocable instruction in a contract. Other technical terms have an authority and appropriateness for which there is no adequate substitute. For example, *in camera* is specific without a clandestine inference, as compared with the translation behind closed doors. In such cases, the meanings of the terms should be explained or defined.

It is often argued that no other word can do the work of a foreign term and that to abandon traditional vocabulary would be to introduce more confusion than it would save. Both points are debatable. While foreign terms may encode technical concepts, 'most Latin used in legal writing is no longer more precise. In fact, the original Latin words have taken on a life of their own by acquiring new meanings.³³ *Dominium*, for example, may seem to express concisely a particular legal concept, but in modern South African law the word has many connotations that make it every bit as imprecise as the more familiar English word ownership. Some foreign words have additional

²⁹ After the Norman invasion, bilingualism existed in England for nearly two centuries. The Normans came to settle as well as to rule. They spoke Norman French, but, as England and French speakers mixed, French words flooded the native vocabulary. When English again became the language of government and literature the French borrowings remained in the language.

³⁰ Since Latin is no longer a compulsory subject in the South Africa legal curriculum, many lawyers are now unfamiliar with any more than a few frequently used expressions.

³¹ See Cutts (n13) 39 for a list of meanings and alternative (plainer) expressions which can replace Latin and French phrases.

³² The word *hereby* does not add an iota of precision. *Said plaintiff* is no more precise than *the plaintiff*. Kimble (n2) 21.

³³ Hunter and Chambers (1994) 1 *Explain* (Newsletter of the Centre for Plain Legal Language, University of Sydney) 2. They cite 40 most commonly used Latin words, all with translations.

meanings which differ from their original (translated) meaning; *bona fide*, for example, can be used to mean 'genuine' as well as 'in good faith' or 'with honest intentions'.³⁴

In The terms and conditions of this application shall apply *mutatis mutandis* to this suretyship,³⁵ the level of incomprehensibility is high. The Latin phrase is likely to be unknown to a non-lawyer and the context provides little assistance, because the phrase links two referents with general meaning (terms and conditions) to an obscure referent (suretyship). In What I have said above regarding Latin Intensive and Latin I applies *mutatis mutandis* to Afrikaans Intensive and Afrikaans I,³⁶ the judge uses the point he made about Latin in his judgment to refer to Afrikaans, but does not repeat the details of his argument, because this is understood in *mutatis mutandis*. Although the Latin phrase is economical, it is not effective, because the reference it encodes (with suitable changes or with necessary alterations) would generally be unfamiliar outside the legal profession. The appropriate strategy would be either to define the term or substitute a more familiar expression for it. In fact, one strategy can be used to supply the information for the other, as the definition could produce the alternative version. *Mutatis mutandis* means 'with the necessary/suitable changes'. Either the writer can indicate that an explanation of the Latin can be found in the definitions section, or the statement can be rewritten, substituting with necessary changes for the problematic Latin phrase.

2. AMBIGUITY

Ambiguities in legal texts are of different kinds and occur in both lexis and syntactic structure. The syntactic problems identified in Ch4 will be dealt with in sIV following. Eliminating ambiguities requires using different strategies according to the nature of the problem.

Ambiguity is found in doublets, because they are not regularly used in synonymic pairs (see Ch 3 II (5)). When consistently confronted with coordinated pairs, writers must ascertain whether the terms are synonymous, in which case one can be pruned (preferably the less familiar). In will and testament, for example, testament can be discarded. If the words are not synonyms, either the doublet can be left or more familiar words substituted for one or both: cease and desist thus becomes clearer as stop.

Specialist terms are ambiguous when they are encoded by familiar words (see Ch 3 II (4)). Lay people will interpret terms such as sanction and without prejudice according to their more current usage and they will not know the legal meaning. Writers must either substitute a more familiar expression or define the technical term.

Use of the generic masculine pronoun is ambiguous, because it does not reflect the existence of two genders, and so too is repetition of the same noun when a different referent is involved; for

³⁴ Hunter and Chambers (n33) . For an evaluation of Latin in the legal curriculum see Stewart Smith (1991) 283 *De Rebus* 503-07.

³⁵ Clause 5 of a Terms and Conditions of Sale contract.

³⁶ *University of Cape Town v Cape Bar Council* 1986 (4) SA903 (A) at 917C.

example, person or party may be used to refer to more than one entity. Substitution is the way to avoid these ambiguities. Writers can use the s/he form to ensure that both male and female reference is reflected in pronoun usage. They should also use pronoun forms or marking modifiers to distinguish different referents when the same noun is used. As illustration, more specific modifiers, such as the *first* party, the *other* person differentiate more effectively between possible referents.

By reason of their meaning, modal auxiliaries can potentially be ambiguous. To a certain extent, this is entrenched in their modal function, particularly in the case of *may*. The modal *shall*, however, has specific and ambiguous legal usage and will be dealt with separately under discussion of the verb phrase.

3. REDUNDANCY

(i) Doublets

As was indicated in the section above, where doublets pair terms of which one is archaic (*will* and *testament*), the archaic word can be discarded. If the doublet terms are synonyms, one can be discarded; *will* is quite sufficient; *cease and desist* can be replaced with *stop*. Deleting one word in these cases has the advantage of reducing unfamiliar and unnecessary words and of removing the possibility of irregularity (i.e. knowing whether the doublets co-ordinate synonyms or not).³⁷

(ii) Lists

Doublets are not the only source of redundant terms in legal language. Groups or lists of words are also common and they, too, contribute to the wordiness of legal language. Often a whole group can be reduced to a single appropriate term. Writers should substitute a general referent or generic term that will include the listed items.

For example, the phrase *assaults, obstructs, threatens, intimidates* can be rewritten more simply and exactly as *interferes with*.³⁸ A second option is to discard the list and keep the intention of the statement. In *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief culture, language and birth*,³⁹ could simply include all these grounds under the general idea of non-discrimination: *The state may not unfairly discriminate directly or indirectly against anyone*. Alternatively, when it is necessary to retain the list of words, a generic term can be inserted. For example, *or causes any form of harm* may be added to one of the terms in the list *assaults...intimidates*.

³⁷ The remaining doublets do not confuse in this way, because they are not synonyms (*rights and remedies*).

³⁸ Section 112(3)(c) of the Mental Health Act 1986 cited in Law Reform Commission of Victoria (n24) s100.

³⁹ S9(3) of the Constitution of the Republic of South Africa 1996.

The general term increases the scope of reference and thereby avoids the problem encountered in all detailed lists: the more items listed, the more are automatically excluded. Because laws cannot cover all eventualities, general terms are more effective in regulating a broader scope of behaviour than specific terms. Hence the paradox that general terms may yield greater precision.⁴⁰ The advantages of precision are evident in the following example. If no person shall - ...*(f)* remove, conceal or cover up, deface, damage or interfere with any notice, sign or mark erected by the council⁴¹ is rewritten as ...*(f)* cause any damage to any council property, ambiguity is reduced and the rule is given a broader scope of reference. Both damage and property are more general than remove....interfere and any notice....mark.

Simpler phrases not only reduce the word count produced by noun chains, but they are also easier to refer back to than long phrases. For example, the assaults...intimidates chain referred to above was not repeated exactly in the next phrase, where it occurred as or attempts to obstruct or intimidate a community visitor.⁴² Readers are confused by inconsistencies.

4. POLYSYLLABIC WORDS

Polysyllabic words are often technical (suretyship), Latinate (expedite), foreign (usufruct) or nominalised (indebtedness). Many of them can be replaced by simpler terms which are more appropriate (in terms of the scope of reference). For example, The creditor shall not be liable under any circumstances whatsoever for any indirect or consequential damages of any nature whatsoever⁴³ is clearer when simpler words are substituted: The creditor is not liable in any way for any damages at all. Otherwise, a new phrase or longer structure may be necessary. In this event, the writer should first identify the main point of the word, then the subsidiary or dependent parts and then devise a new structure.

5. PROBLEMS WITH SPECIFIC KINDS OF LEXICAL ITEMS

(i) Rewriting nominalisations

Nominalisations lack concrete reference and they focus on activity instead of an agent or an affected entity.⁴⁴ What is more, they do not conform to the principle that subjects should clearly identify the characters or agents of processes (see Ch4 V(2)(i) on nominalisations). The solution is obviously to use fewer nominalisations.⁴⁵ Williams advises thus:

'First, locate the cast of characters and the actions that those characters are performing (or are the objects of). Then if you find that those characters don't appear in the subjects of their

⁴⁰ The reverse is also true: words that specify exclude.

⁴¹ Section 9(2)(f) of the Vryburg Municipality By-laws Relating to Taxis and Buses.

⁴² See n41 above.

⁴³ S9.4 of a Terms and Conditions of Sale agreement between a building contractor and homeowner. It is worth noting that neither of the contracted parties is a legal professional yet both are bound by a document written in this almost unintelligible language.

⁴⁴ See Ch 4 V (2)(i).

⁴⁵ It is possible to assess whether too many nominalisations have been used. Texts with as many or more nominalisations than stable nouns, have an excess of the former.

sentences, and that the actions those characters perform appear not in verbs but in abstract nouns, revise.⁴⁶

Many nominalisations have a clear and stable reference. The meanings of abortion, constitution, for example, have been fixed through long use and interpretation. Rewriting such familiar terms is obviously unnecessary. Only nominalised terms that create lexical uncertainty and syntactic confusion should be revised.

Nominalisations may be replaced by one of the following structures:⁴⁷

- (a) A nominalisation after *there is/are* should be changed to a verb, which will require finding an appropriate subject. *There is a need for further consideration of the evidence is clearer as the lawyer must consider this evidence further.*
- (b) When the nominalisation is the subject of an 'empty' verb,⁴⁸ it should be changed to a verb and a new subject provided. *The discussion concerned a will is more effective as They discussed a will.*
- (c) When two nominalisations occur in a row, the first at least should be changed into a verb. The second may remain, or it too can be changed into a verb in a clause beginning with *how* or *why*. *There was first a review of the evolution of the bill of rights is less effective than: First, she reviewed the evolution of the bill of rights or First, she reviewed how the bill of rights evolved.*
- (d) When nominalisations perform both subject and verb functions, or link S-V-O in the same clause or sentence, the alterations are more complex. The abstractions should be changed to verbs; subjects should be found for these verbs and the new clauses thus created should be logically connected. *Their cessation of hostilities was because of their financial losses is more effective as They ceased hostilities because they lost money.*
- (e) When the nominalisation follows a verb referring to metaphoric action, the nominalisation should be changed to a 'full' verb. *The police conducted an investigation is less specific than The police investigated.*
- (f) When nominalisations are linked to *part of*, *have* or *be*; the sentence is more effective if the original verb is used. *I have now had sight of your letter and The original intention of the law was to ensure public safety are clearer and more effective as I have now seen your letter and Originally the law was intended to ensure public safety.*⁴⁹

⁴⁶ Williams (n23) 10.

⁴⁷ Williams (n23) 16-7.

⁴⁸ 'Empty' verbs do not refer to specific action: their reference is often metaphorical (*No person shall conduct an investigation*). Complex verb phrases often contain empty verbs (*The discussion concerned control of the union by the shop stewards*). 'Full' verbs refer to specific actions (*the police investigated the matter; they discussed the control of the shop stewards over the unions*). See Crystal *Rediscover Grammar* 61.

⁴⁹ Cutts (n13) 56-9.

- (g) When nominalisations are linked to active verbs or infinitives, the nominalisation should be rewritten as a verb in active voice. The mediator's role is *to perform problem definition and resolution* is better as the mediator's role is *to define and resolve* problems.
- (h) When nominalisations are linked to passive verbs, a similar revision that restores the original active verb is more effective. *Notification has been received* from the insurers thus becomes *The insurers have notified us*.

All these revisions tackle the four major problems occasioned by nominalisations (see Ch4 V (2) (i)). The comprehension difficulties caused by abstract reference are removed; nouns and verbs are more clearly distinguished; syntactic function supports meaning; and the causal connection between Subject and Verb is made visible. In addition, when a nominalisation is restored to a verbal form, a subject has to be supplied, the verb must be more explicit and better connections have to be made between clauses. Connecting markers, such as *because*, *although*, *if* and *when*, must be used to link new sequences of clauses,⁵⁰ and these connections communicate information more clearly.⁵¹

In some instances, however, nominalisations may actually increase coherence in a text.⁵²

- (a) If a nominalisation as a subject refers to a previous sentence, it functions effectively as an anaphoric referent. *These arguments* all depend on a single unproven claim.
- (b) Nominalisations in the object position may often be more succinct than verb phrases. *Neither the motivation nor the intention* is clear is less wordy than *I do not understand either what the motive was or what was intended*.
- (c) Nominalisations can provide a word for a phrase, thereby reducing word number and sentence length and improving comprehensibility. Although brevity does not guarantee clear meaning, a shorter, less complicated sentence is more likely to achieve this aim than a long, multi-clause one. *My denial* of what I was accused of or even the two nominalisations *My denial of his accusation* is less cumbersome and more comprehensible than *The fact that I denied* what he accused me of.

(ii) Pronouns

Pronoun usage creates two problems in legal texts. One is lexical (the use of a generic masculine), the other concerns text cohesion (a low incidence of pronouns). The second problem will be discussed in V below on discourse.

⁵⁰ Williams (n23) 12.

⁵¹ Texts with a low incidence of connectedness undermine their own existence as texts (see Ch2 II).

⁵² Williams (n23) 19,

Formerly, the use of male pronouns was thought to be generic and therefore conducive to legal certainty because it was inclusive. This argument has no foundation.⁵³ The rule that male includes female is, in fact, a legal fiction, for the complete elimination of a visible female referent is obviously not intended in laws that are supposed to apply to women. Hence alternatives to the generic masculine pronoun do not undermine legal certainty and in some cases may improve it. For example, in *If he is not so satisfied he shall refuse to solemnize the marriage*,⁵⁴ the reference to the marriage officer as he (generic masculine) is inaccurate since women can be marriage officers.⁵⁵

The South African constitutional prohibition on gender discrimination⁵⁶ now implies that writers should avoid male-dominant language. Because English pronouns convey gender information, writers have to pay particular attention to them. Although legal texts tend to refrain from using pronouns by repeating the noun, pronouns cannot be completely eliminated. In the first place, English does not easily permit extended use of the impersonal pronoun one. In the second place, when used correctly, pronouns contribute to the comprehensibility of texts, because they distinguish syntactic function (Subject/Object), differentiate between singular/plural and, in the case of third person pronouns, they distinguish male/female referents. In addition, pronouns are an effective means of connecting discourse, for they refer to referents in other parts of the text.

When a pronoun is unavoidable, a writer must employ some linguistic device to avoid the generic masculine, particularly with third person singular pronouns which are the most clearly marked for gender (he, she, him, his, her).⁵⁷ The simplest method is to rewrite the antecedent noun as a plural, which means that the gender non-specific plural pronouns (they, them) can be used in subsequent clauses.⁵⁸ For example, *The CH (Card Holder) may by written notice to the Bank change his domicilium*⁵⁹ becomes gender neutral as CHs should notify the Bank in writing of changes to their addresses.

Where it is not possible to change a singular noun to a plural, any modifiers specifying gender can be altered. Singular nouns are usually preceded by determiners, among which are the gender-marked possessive pronouns his, hers. These possessive pronouns can be replaced by definite or

⁵³ In any discourse, legal or otherwise. On the patriarchal nature of English, Spender *Man Made Language* 31 states: 'Language is a cultural artifact which has been invented by human beings: because males have primarily been responsible for the production of cultural forms and images it would be surprising if language were to be an exception.'

⁵⁴ Section 23(4) of the Marriage Act 25 of 1961.

⁵⁵ The definitions at the start of the Marriage Act 25 of 1961 state that 'marriage officer' means any person who is a marriage officer by virtue of the provisions of this Act. These provisions refer to magistrates, those in the public, diplomatic and civil services and ministers of religion. All these positions are open, in varying degrees, to women.

⁵⁶ Section 9(3) of the Constitution of the Republic of South Africa 1996.

⁵⁷ Both male and female forms are equally marked for gender so there is no reason to select the male over the female form. Now it is unacceptable to do so. Either both or neither should be used.

⁵⁸ Cutts (n13) 73 claims that the old use of they, them and their as singulars has been revived; for example Give details of your partner's income. If they have been unemployed for more than 12 months...

⁵⁹ Section 14.2 of the Terms and Conditions of Use for The Queenspark Card.

indefinite articles or by demonstrative pronouns, all of which are gender-free. In the following example, the Minister may *himself* grant consent to the marriage and *his* consent shall...,⁶⁰ is offensive and less accurate than the Minister may grant consent to the marriage and *this* consent shall.... The alterations have clarified meaning and removed sexist denotations.

Another way of dealing with gender-specific pronouns is to replace the noun with its verb form, thus doing away with the need for a possessive pronoun. For example, If a parent or guardian refuses his consent,⁶¹ can be rewritten as If a parent or guardian refuses *to consent*.

It has become accepted practice to use both singular personal pronouns, either in the phrase he or she or in an orthographically contracted form s/he. Extended and repetitive use of this form, particularly the he or she phrase, however, is cumbersome. A more effective technique is to alternate the full noun form with the pronoun: for example, During the currency of the RCP facility the borrower must ensure that *his/her* income is paid into any account held by *the borrower* with the bank.⁶²

(iii) Dealing with modals

By reason of their function, modals do not convey exact meaning and are a source of possible ambiguity (see III(2) above). In legal texts, the modal shall presents particular problems for which specific solutions have to be found.

Although shall is now seldom used to express future action (shall with I and we is 'old-fashioned and is nowadays widely ignored'),⁶³ the word often occurs in legal texts. The reader may as a result be uncertain whether obligation or futurity was intended. (see Ch5 V (1) (i)). In order to rewrite clauses containing shall, writers must first determine what the word was supposed to mean and then find a more appropriate expression.⁶⁴ The following are useful guidelines.⁶⁵ Shall is commonly used to express:

- (a) the creation of a right, in which case *is entitled to* can be used instead;
- (b) the creation of a discretionary power: *may* can be used instead;
- (c) the creation of a duty: this usage correctly captures the meaning of *shall*;
- (d) the creation of a condition precedent: *must* is better here, as in To be eligible to occupy the office of mayor, a person must... ..⁶⁶

⁶⁰ Section 59(4) of the Childrens Act 33 of 1960.

⁶¹ Section 59(5) of the Childrens Act 33 of 1960

⁶² Section 7 of the Terms and Conditions of Revolving Credit Plan ("RCP") loans granted by the Standard Bank of South Africa Limited.

⁶³ Quirk et al. cited in Kimble (1992) 3 *The Scribes Journal of Legal Writing* 62.

⁶⁴ Dickerson cited in Kimble (n63) 64 stipulates:

- (1) To create a right, say *is entitled to*.
- (2) To create discretionary authority, say *may*.
- (3) To create a duty, say *shall*.
- (4) To create a mere condition precedent, say *must*.

⁶⁵ Kimble (n63) 69.

⁶⁶ Dickerson cited in Kimble (n63) 66.

It is significant that the alternatives to shall are all present tense verbs. This tense form is preferable to the future, which may conflate futurity and obligation in a way that could obscure the intended meaning. The authority of legal documents applies immediately and for the indefinite future.⁶⁷ Without necessarily introducing the idea of obligation, the present tense verb form conveys the sense of 'now', whenever the 'now' time happens to be.⁶⁸

When shall means has a duty to, must can be considered as a substitute.⁶⁹ Must is a present tense modal auxiliary that expresses obligation without confusion with futurity. Although it has a shorter history of legal use, there is no confusion about whether must is mandatory or discretionary. Moreover, because must has only modal meaning, it does not convey a sense of time (other than the present), so there is no overlap between obligation and futurity.⁷⁰ Hence, must is especially suitable when statutes and regulations have to convey obligation;⁷¹ Passengers must now board through Gate 12, for example.⁷²

Sometimes, the sense of obligation implicit in shall is misplaced. A simple conditional clause may be used instead. For example, in the reworked version of this condition the rewriter has opted for a non-mandatory expression. The original:

The offeree's giving, within the time allowed under this section, notice of cancellation of the agreement to the offeror at a time when the agreement has been entered into shall have the effect of cancelling the agreement.

The revised version: an agreement is cancelled if the customer gives the seller notice of cancellation within the time this section allows.⁷³ Instead of the ambiguity of shall (not to mention the syntactic and lexical density of the original), the writer has opted for a simple declarative clause, An agreement is cancelled, to precede the clearly marked information supporting the declaration. The intention that the contract continues indefinitely is unchanged, but uncertainty about futurity and obligation has been removed.

Like all words in English, must does not have a fixed meaning. It can, for instance, express

⁶⁷ Kimble (n63) 65.

⁶⁸ The present tense has the further advantage of being free of the uncertainty inherent in modals.

⁶⁹ Law Reform Commission of Victoria (n24) s137; Cutts *Unspeakable Acts?* 11 and 14. The suggestion makes semantic sense, because the Old English root of shall is sceal meaning I must or I owe. Cutts (n13) 37. Kimble (n63) 70, 75 has reservations; see discussion below.

⁷⁰ The National Conference of Commissions on Uniform State Laws cited in Kimble (n63) 68 suggests always using must in passive constructions (A notice of appeal must be filed within 30 days) and in expressions linked by the copular verb be (The applicant must be an adult).

⁷¹ Kimble (n63) 65. See also the Law Reform Commission of Victoria (n24) s137: 'Use *must* to describe obligations and not *shall*, for example, the Minister *must* seek the advice not the Minister *shall* seek the advice.'

⁷² See Kimble (n63) 76 for further suggestions.

⁷³ Cutts (n69) 6.

both conditions precedent⁷⁴ and directory provisions, as in The owner must sign the application.⁷⁵

'We are still left without a word to express a mandatory, or absolute, duty, but I doubt that switching to *must* would do the job, because courts generally equate it with *shall* and seem equally willing to give it a soft interpretation.'⁷⁶

The uncertainty about whether *shall* means *must* or *should* challenges drafters to distinguish the degree of duty involved and to specify the possible consequences of non-compliance.⁷⁷

IV. CIRCUMVENTING SYNTACTIC PROBLEMS

The syntax of legal texts poses greater problems for readers than the lexis. Because it is impossible to give equal and simultaneous concentration to structure and content (see Ch 2 II), complicated syntax leads readers to concentrate less on content as they attempt to make sense of the grammar. A writer's first duty, therefore, is to ensure that syntax will facilitate the ready comprehension of content.

A brief recapitulation of the nature of the comprehension will be followed by suggestions for ways of reducing the complexity of legal sentences. Generally the difficulties have to do with sequence and embedding and how these affect a reader's recall and understanding of the relationship between the constituents of a sentence. As stated in Ch4 the main problem areas are sentence length, amount and nature of modification, sentence complexity and the use of marked sentence forms.

Readers need to be able to identify the subject or agent and link this with an appropriate process. They expect the main elements (subject, verb and object) to occur in positions associated with their function within an accepted range of patterns and they expect information in the sentence to develop along the same lines.⁷⁸ The correlation of position and function is fundamental to the principles of rewriting for greater clarity, for the position of syntactic elements in a clause has a significant effect on comprehension. The further an agent is from the leftmost (Subject) position and the wider the separation of Subject, Verb and Object, the more difficult it becomes to identify these syntactic units and to connect their meaning.

⁷⁴ Kimble (n63) 66. Conditions precedent refer to the action of the verb being realised; directory provisions indicate the obligation on the subject to perform the action. Directory provisions propose a norm of conduct to follow.

⁷⁵ Drieger cited in Kimble (n63) 66.

⁷⁶ Kimble (n75) 74-5. He refers to a number of cases where *must* has not been read as having mandatory meaning.

⁷⁷ Kimble (n63) 77.

⁷⁸ See Ch2 II

The expectation that Noun Phrases are about agents and affected objects and that Verb Phrases are about processes is basic to English language experience.⁷⁹ Legal language often fails to meet these expectations. Thus two basic principles for rewriting legal texts are: that the subjects of sentences should clearly identify the agents of the processes and that verbs should identify the key actions.⁸⁰ Once the agent is placed in the initial position, grammatical experience can be coordinated with thematic intention.⁸¹

Position is connected with both the status of the information encoded and the chronology. Information in the first position of a sentence indicates what the sentence is about; information in modifying phrases is less significant. When the position of information does not conform to these basic principles, a text is likely to confuse. The original text below and its rewritten version illustrate the point. The original is: Subject to subsection (3) below, where a person who enters into a timeshare agreement to which this Act applies as offeree has not received the notice required under section 2 of this Act before entering into the agreement, the agreement may not be enforced against him and he may give notice of cancellation of the agreement to the offeror at any time.⁸² Because a welter of information is crammed into a single sentence, the reader will find it difficult to establish what data is primary and what is supportive. The actual agent of the action (whose story it is) occurs only after a great deal of modification. The main verb (has not received), which should identify the central action, is difficult to find because of the many modifying phrases that separate the main verb phrase from the agent. Additional modification after the verb requires readers to disentangle what modifies the affected (the notice) and what is part of the next clause (the agreement may...any time).

In the revised form the primary information has been given positional and syntactic emphasis. If a customer who enters in an agreement does not receive the notice required by section 3 beforehand, then, subject to section 4.3:

- (a) the customer may give the seller notice of cancellation of the agreement at any time; and
- (b) the seller may not enforce the agreement against the customer.⁸³

⁷⁹ 'When you use subjects to name characters and verbs to name their actions, you write sentences that are more specific and concrete.' Williams (n23) 11. In support of this Redish in Greenbaum (ed) *The English Language Today* 132 cites research at Carnegie-Mellon University which showed that readers trying to make sense out of traditional legal documents translate them into scenes in which there are people doing actions.

⁸⁰ 'When we link the simple point that sentences are stories about characters who act to the way we use the grammar of a sentence to describe those characters and their actions, we get a principle of style more powerful than any other.' Williams (n23) 9. See also Gopen (1987) 54 *The University of Chicago Law Review* 1188; Cutts (n13) 56-60.

⁸¹ This is a simplistic outline of the basic features of connected discourse. The information unit acting as agent may, of course, change frequently. In well connected text, however, these changes will be justified by the content development.

⁸² Section 5(32) of the Timeshare Act of 1992 cited in Cutts (n69) 5.

⁸³ Section 4.2 of the Clearer Timeshare Act cited in Cutts (n69) 5. The section numbers of the original and reworked versions of the Act do not correspond because restructuring made exact parallel text revision impossible. See Cutts 4. The substitution of seller for offeree is a lexical substitution (see II (1) above).

The agent, the customer, whose rights make up the substance of the regulation (its 'story'), is clearly identifiable in the initial position. The critical process, receive notice, follows soon after. The uninterrupted V-O sequence positions the affected entity, the notice...beforehand, immediately after the process, which makes clear what the customer (more familiar than offeree) must receive.

Similarly, readers expect syntax to correspond to the order in which events actually happen. For example, in For the purpose of implementing an alteration in terms of subsection (12), or an alteration pursuant to a referendum held in terms of subsection (3), the Independent Electoral Commission shall, if it considers it necessary to do so as a result of an alteration to be made, give directions concerning,⁸⁴ the agent, the Independent Electoral Commission, is far from the initial position and various modifications are presented before the agent and process have been identified. This pattern is contrary to reader expectations that syntax sequencing parallels the order and connection between what is described. To read about restrictions first does, of course, emphasise the restrictive effect of laws, but this emphasis is only implicit and the complexity of the sentence militates against understanding much of its meaning.

1. LONG SENTENCES

The section on redundancy in III above dealt with one way of reducing sentence length. This section will show how, by reducing the number of coordinated and embedded structures, long sentences can become more comprehensible.

A guideline for a reasonable sentence is a word count of 20-25 words.⁸⁵ Longer sentences can be effective, but not if they are syntactically and lexically overloaded as is so often the case in legal texts. In the section on lexis, two solutions to reduction of sentence length were suggested: substitution and pruning. Two other strategies may now be considered. The first is to restructure the sentence and possibly create two or more shorter sentences. (This strategy may also solve problems that arise when there is a great deal of subordination and/or when unusual types of subordination occur.) The second strategy is to present the components of the sentence in a more reader-friendly way, using spacing and indentation. This strategy will be discussed in section VI on organisation and layout.

(i) Information structuring in multi-clause sentences

⁸⁴ Section 13(a) of Act 200 of 1993.

⁸⁵ See Danet (1980) 24 *Law & Society Review* 479 and 486; Cutts' (n13) 12 recommendation of an average of 15-20 words per sentence is based on what people are used to. Studies of particular types of documents produced average sentences lengths of 13-25 words. Significantly, government and scientific documentation, 'perhaps the only material that could be classed as essential information' produced the highest scores.

Generally each idea should be allocated its own sentence, a principle that would encourage shorter sentences but not exclude comprehensible compound and complex ones.⁸⁶ Effective sentence construction involves allocating positions of prominence to important concepts.

In general, a vigorous sentence moves quickly from a short and specific subject through a strong verb to its complement, where we can, if we wish, more gracefully elaborate our syntax and more fully develop our ideas.⁸⁷

Syntactic overloading is caused by multi-clause structures and features such as nominalisations, passives and negatives. Effective rewriting does not mean reducing all sentences to single clauses and active and affirmative declaratives, for an unrelieved series of simple sentences of the same type would be tedious. In order to work productively with the variations in syntax and lexis offered by English, however, writers must limit syntactic complexity and prune unnecessary words.

In a multi-clause sentence, the syntactic hierarchy implies a semantic hierarchy: the main and subordinate clauses express main and supportive information. Writers must thus arrange syntactic units so that the dependent relationships are clearly revealed. One way of doing this is to break a multi-clause sentence into two or more sentences by removing competing main clauses and their attendant modification. Shorter sentences organised to develop the information in logical sequence produce comprehensible extended text. This, too, needs to be arranged in logically connected units, such as paragraphs.

The guiding principle of this reordering is to distinguish main from elaborative material, and to ensure that the information is conveyed in a connected form (see Ch2 II). Readers should be given time to absorb one piece of information before receiving the next. Sentence breaks should come as information shifts occur, with connecting words, such as *however*, *in addition*, *but* and *consequently*, used to indicate the relationship between sentences.

In the following examples, material in the reworked version has been rearranged in shorter sentences. Typographic signposts, in the form of alphabetical ordering, visibly rank the information in a way that is easily understood.

The original: In the event of legal title to the Chattels described in the Schedule hereto or any part thereof not having vested in the Mortgagor at or prior to the execution of these presents the Mortgagor covenants to acquire such legal title and possession of the Chattels free from all encumbrances and that the legal title to the Chattels and each part thereof shall at or after the acquisition thereof by the Mortgagor vest in the Mortgagee on the happening of any of the following

⁸⁶ It is no longer essential to write one sentence per section of an Act, so information may be structured into separate syntactic units. Maley *The Language of Legislation* 39. She refers to law drafting in USA, Britain and Australia, where changes to the traditional way of drafting are being implemented.

⁸⁷ Williams (n23) 127.

events (whichever shall first occur).⁸⁸ This long (89 word) sentence contains many modifying, conditional and co-ordinate clauses embedded in an unpunctuated text. Readers would find the sentence difficult to understand, as it is not clear which are main clauses and which are dependent.⁸⁹

The reworked version is clearer because the main ideas have been separated from the elaborative information:

The mortgagor agrees that if the legal title to any goods listed on page 5 is not vested in the mortgagor at the time of this mortgage:

- (a) the mortgagor will acquire title and possession of the goods free of any encumbrance; and
- (b) the title will vest in the mortgagee on the first of the following events.⁹⁰

Layout is obviously part of making texts more readable. Ordered subsections and punctuation make the subdivision of information clear. The material in these subsections can be understood in connection with the proviso in the preceding conditional clause. Some of the other changes above involved vocabulary: Chattels is an archaic and unfamiliar term for material goods; thereof can be omitted. Technical terms, such as vest, and the legal sense of title are easier to understand when the rest of the text is simpler.

(ii) Dealing with coordination

Sentences in legal texts are often extended by coordinated phrases and clauses that provide modifying information. Unlike subordinate words and phrases, coordinated units have the same grammatical status; i.e. any unit in a coordinated sequence should be from the same form class as the unit to which it is connected (a phrase followed by other phrases; a clause by other clauses).⁹¹ Writers must therefore ensure that the coordinating markers (the conjunctions and, but, or, both...and and (n)either...(n)or) do not link units of unequal status or different grammatical form (a phrase linked by and to a clause; a noun phrase connected to a verb phrase).⁹²

Rewriting coordinate structures involves both lexis and syntax. Specific meanings are associated with the main coordinating conjunctions, whose syntactic function is to connect. And generally expresses addition, but it may also denote result (he confessed and went to prison) or sequence (the judge rose and left the courtroom). Or introduces alternatives which are usually

⁸⁸ Section 2 of the Law Institute of Victoria: Mortgage over Business cited in Law Reform Commission of Victoria (24) 35.

⁸⁹ Moreover, the use of capital letters for words other than proper nouns and initial words is unfamiliar and thus confusing.

⁹⁰ Law Reform Commission of Victoria (n24) 34.

⁹¹ Crystal (n48) 180ff.

⁹² A coordinated clause is fixed in relation to the previous clause, and cannot change places with it. Crystal (n48) 181. This is of particular significance in legal texts which generally stipulate the order in which events must occur.

exclusionary (this week or next). But always expresses a contrast in meaning.⁹³ When these lexical markers of coordination are used in constructions that do not clearly conform to their associated meaning, or are embedded in poorly developed sequence, confusion results. In the example, request from the owner or person in control of the premises or from any person in whose possession or control that article or document is, information regarding that article or document,⁹⁴ it is difficult to sort out which alternatives belong to which agents, and whether there is an initial set of alternatives from which the others stem.

The conjunctions *and* and *or* may connect larger units (phrases, clauses) or link words within these units.⁹⁵ Writers must make clear which function a conjunction is performing, otherwise readers may not be able to tell whether a new syntactic unit, i.e. another phrase or clause, has commenced or whether the conjunction is linking alternative words within the same phrase or clause. Because new units convey new information, and additions to an existing unit (in the form of optional terms) do not, this uncertainty has a serious effect on meaning.

The following example illustrates the problem. In if the person *or* persons who may consent to the entering *and* search for *and* attachment *and* removal of an article *or* document consents *or* consent,⁹⁶ the Subject and Verb phrases are coordinates (person or persons, consents or consent). These main units are separated by four coordinate phrases that interrupt the S+V connection. They are additionally confusing because it is difficult to distinguish main phrase coordination from coordinate phrases modifying the main phrase (entering...document). The solution is to restructure the sentence so that the coordinate phrases do not separate the Subject and Verb. Additionally, these coordinate phrases can be reduced to one: If the persons involved consent to the entering, search, attachment and removal of an article or document...

Another problem arises when the coordinated structure parallels constituents that are not of equal or similar rank. In Pinewood Village is designed for people who wish to remain active but not have the responsibilities of large homes, big gardens, cleaning swimming pools and building maintenance, for example, the comma implies the coordinate *and* that links three noun phrases (large homes [and] big gardens [and] and building maintenance) with a verb phrase (cleaning swimming pools). The irregularity in the syntax pattern creates problems for the reader, because the pattern of NP+NP+...NP is interrupted by a VP. Nouns deal with agents; verbs deal with processes: the coordination combines syntactic forms that have different information functions.

The position of coordinate clauses may also affect comprehension. They are usually more effective when they extend verb rather than noun units.⁹⁷ Although such a coordinate interrupts the

⁹³ Crystal (n48) 188. He also attributes an inclusionary meaning to *or* akin to *and*, as in You can eat now or later – I don't mind which. This is a very fine distinction, no doubt useful to grammarians, but probably an over-refinement in guidelines for writing more clearly.

⁹⁴ Section 10(3)(e) of the Human Rights Commission Bill [B 8F-94].

⁹⁵ Gopen (n80) 1197.

⁹⁶ Section 10(6)(a) of the Human Rights Commission Bill [B 8F-94].

⁹⁷ Williams (n23) 127.

V-O progression, it is less disruptive in this position than between the S-V, (where it has the effect of left-branching subordination (see Ch4 IV (2)). In addition, coordinate clauses following the subject noun introduce unwieldy noun chains that readers have to retain in memory while they seek the verb to which these agents are connected.

The confusion caused by incorrectly positioned coordination is obvious in the following example. In the Hirer may on the payment to the Owner of the total amount of any instalments then remaining unpaid of the rent hereinbefore reserved and agreed to be paid during the term and the further sum of ten shillings purchase the goods,⁹⁸ it is not clear whether the further sum of ten shillings is coordinated with its immediate nominal, the term, or the earlier, multi-clause of the total amount...the term. The latter was the intended meaning,⁹⁹ but readers would have difficulty establishing the correct connections, for the syntax does not make clear the coordinate relationships and overall clause hierarchy. When rewritten as The Hirer may purchase the goods when s/he pays the owner the total amount of any remaining instalments plus an additional ten shillings, as previously agreed to, the agent, process and affected are clearly identifiable, the elaborative information modifies the correct constituent (the affected, in this case the outcome, of the process) and punctuation indicates that as previously agreed to modifies the whole clause.

Coordination should not obscure the connections between the main syntactic units. If it does so, the sentence must be reorganised. The first half of the coordination can be shortened so that the second half is closer to the words connected by the coordinating conjunction. Significant noun or verb phrases that refer back to earlier concepts, can be reused mid-sentence and the structure may be broken down into two or more sentences positioned in a logical sequence.¹⁰⁰ The comparison between the original and reworked sections below illustrates the effect of these techniques.

The original:

Company X will be entitled upon the occurrence of any event which will reasonably increase the lending risk of X or any factors becoming known to it which may affect the viability of the scheme or in the event of failure by the Employer to secure deductions as contemplated herein or non-compliance generally by the Employer with the above terms, to suspend the granting of new loans.¹⁰¹

Confusion in this sentence is due mainly to poor syntactic order and sequence. What the subject is entitled to is delayed by several coordinate alternatives, and it is not clear whether these conditions are interdependent or sequential. Additionally, the agentless passive in the main verb phrase implies that other agents are involved (those who entitle Company X to take the subsequent

⁹⁸ Crystal and Davy (n5) 196.

⁹⁹ Crystal and Davy (n5) 206.

¹⁰⁰ Williams (n23) 130.

¹⁰¹ Clause 12 from the Loan Bank General Purpose Loan Scheme contract.

actions), but these authoritative agents are concealed. Consequently, the allocation of rights and obligations in the contract is not clear.

In the reworked version these distinctions are clearly made.

Company X is entitled to suspend the granting of new loans if :

- (i) an event occurs which reasonably increases the lending risk of X; or
- (ii) factors affecting the viability of the scheme become known; or
- (iii) the Employer fails to secure the deductions agreed to in the contract; or
- (iv) the Employer fails to comply generally with the terms of the contract.

In this version the coordination has been shortened so that the main agent and what that agent is entitled to are placed together (X is entitled to suspend the granting of new loans if:). In the list of conditions, the importance of the Employer is emphasised by making the Employer the subject, in subject position, in the clauses detailing his/her obligations.

The internal order of coordinate clauses is also important. Coordinators must occur at the beginning of a clause, for they mark the clause as a coordinate and they are syntactically attached to that clause.

When strings of noun and verb phrases are coordinated, as in Any member of the Commission, or any member of the staff of the Commission or a police officer,¹⁰² sentences are extended. These word strings overload the Subject, Verb and Object units, interrupt the S+V+O progression and require readers to understand the syntactic relationship within and between phrases. Readers' comprehension is taxed when they have to understand the combined meaning of all the words in a phrase and apply it to other phrases.

Writers could rewrite a long list of coordinates more effectively by reordering the sentence, putting the less elaborate units in earlier positions and then listing the options to which these apply. The noun string in the example above (Any member of the Commission, or any member of the staff of the Commission or a police officer) would be easier to understand if it followed the verb phrase may be done by after either a noun phrase or an appropriate heading. The section would read better as:

Conditions for entry and search of premises.

Entry and search may be done by:

- (a) any member of the Commission, or
- (b) any member of the staff of the Commission, or
- (c) a police officer.

¹⁰² Section 10(1) of the Human Rights Commission Bill [B 8F-94

In the revised version, the coordinated phrases have been moved from their early position in the sentence. In the new position, they function more effectively as the agents of the passive verb phrase (as they are in the correct syntactic position for this function) and they provide new information where readers expect to find it (at the end of the sentence). An initial heading, *Conditions for entry and search of premises*, focuses reader expectations appropriately, and of course, layout makes the text easier to read.

(iii) Dealing with conditions and exceptions

The need for both precision and flexibility in the law requires frequent use of multiple conditions and exceptions to introduce new, but related, information in legal texts. Too many modifying units of this nature may lead to confusion.

When rewriting conditions and exceptions, writers must keep in mind both the function of these structures (to facilitate precise or flexible rules) and what a reader needs to know before a condition or exception becomes applicable. The conditions should also be ranked, and, where possible, the order of importance should be indicated by headings, alphanumerical markers and such layout adjustments as the indentation of sections containing conditions and exceptions. Content may, alternatively, be ordered according to the sequence in which it would apply; for instance, the first condition listed would be the first to be applicable; if it were not relevant, the second option would apply, and so forth.

(a) Conditions

When rewriting conditions, writers must decide whether the agent or the action is more important. Patterns such as, if X does Y then Z, and a negative form, such as X may not do Y unless/except/without doing Z, place the focus on an agent; for example, *If you need assistance ask the librarian and Clients may not enter the bank until the green light shows*. Alternatively, the anticipated action or outcome may be emphasised;¹⁰³ for example, *In order to vote, voters must be on the voters roll*.

Conditional sentences may be structured so that X is permitted to do Y provided that Z is taken into account: *Passengers may proceed beyond this point once they are in possession of boarding passes*. Or, in order to do Y, X must first do Z, as in *All baggage must be checked through before clearing Customs*. In both these versions the affirmative instruction is clearer, because the emphasised instruction occurs in first position.

Because one of the functions of law is to restrict behaviour, conditions are often expressed as in the negative, followed by the conditions which make it possible; as, for example, in *no deletion, addition, alteration or interlineation made in a will executed on or after the said date...shall be valid unless...*¹⁰⁴ As discussed in Ch4 IV (4), too many negative expressions may result in a confusing

¹⁰³ Williams (n23) 102.

¹⁰⁴ Section 2(1)(b) of the Wills Act 7 of 1953.

text. Accordingly, when writing conditions, writers should restore the positive form where possible. For example, No provision of this agreement will be waived unless done in writing by either party¹⁰⁵ combines an overt negative (No) and two implicit ones (waived and unless) to describe the condition under which provisions may be put aside. Since the condition depends on the consent of the contracting parties, an affirmative version reflects the conditional implications more clearly; If either party wishes to waive any provision of this agreement, he *or she* must do so in writing..¹⁰⁶

(b) Exceptions

Exceptions are by their nature contradictions of main statements or general rules.¹⁰⁷ They are introduced by conjunctions, such as *or* and *unless*, or expressions, such as *except that*. Statutes frequently express an initial rule in general terms and then list exceptions to it in more detail. Writers should make use of this prioritising technique. Because the first (general) statement is more important, it should be given grammatical priority and any exceptions should clearly be dependent upon it, as in An entry and search in terms of subsection (6) shall be executed by day *unless* the execution thereof by night is justifiable and necessary.¹⁰⁸

The position of exceptions in a text is critical. If writers cluster exceptions around an initial statement, especially between Subject and Verb, syntactic progression is interrupted by the separation of main units. Moreover, because of their detail, exceptions are usually longer than the initial statement, which may misdirect readers by suggesting an importance that does not in fact exist. To correct these problems, an exception should be located at the end of a section.

When many exceptions are listed, however, a text becomes more complicated as is evident in the following example. In Any person who obtains payment or acceptance and any prior transfer warrants to a person who in good faith pays or accepts that

- (a) he has good title to the instrument or is authorised to obtain payment or acceptance on behalf of one who has good title; and
- (b) he has no knowledge that the signature of the maker of drawer is unauthorised, *except* that this warranty is not given by the holder in due course acting in good faith
 - (i) to a maker with respect to the maker's own signature; or
 - (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

¹⁰⁵Williams (n23) 102.

¹⁰⁶Williams (n23) 102. The italicised *or she* is my improvement.

¹⁰⁷This principle applies whether the initial statement is positive or negative. By reason of being an exception, the information in this section is juxtaposed to that in the main section. In No entry except for authorised personnel, for example, the main clause is negative; in Exit: Staff only the main clause is positive. In each case the exception offers necessarily contrastive information.

¹⁰⁸Section 10(7) of the Human Rights Commission Bill [B 8F-94].

- (iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorised;¹⁰⁹

Here the stipulations contradict earlier information. The apparent certainty stated in the inclusive meaning of Any person...(b) is undermined by clauses that reduce inclusivity (except that...). The list of exceptions also adds considerably to sentence length, as all the information they provide is part of the same sentence.

Again restructuring is the solution. The exceptions should be extracted and regrouped under the main clauses. A list of this sort is easier to read if each listed item has a similar grammatical structure. A revised version could read:

Any person who either

- (i) is a prior transferor or
- (ii) obtains payment/acceptance

warrants the following to a person who in good faith pays/accepts:

- (a) either he personally has a good title to the instrument or is authorised to obtain payment on behalf of someone who is entitled; and
- (b) he has no knowledge that the signature of the maker/drawer is unauthorised (see exception E(1)(b) below); and
- (c) the instrument has not been materially altered (See exception E(1)(c) below).¹¹⁰

In general, because exceptions are subordinate to the main statement or rule, they should be separated from it. The spatial distinction can be indicated by reference (See exception X below) or by typography, EXCEPTIONS:. Alternatively, any qualifying or elaborating information may be expressed in separate sentences.¹¹¹

2. MARKED SENTENCE STRUCTURES

Two marked sentence types that occur frequently in legal texts are passive sentences and negative sentences.

(i) Passive constructions

Passive constructions enable writers to emphasise certain information and, when effectively used, the passive conforms to the theme-rheme principle See Ch2 II (1).

Like their active counterparts, passive constructions work with the principle of developing information from given to new. When the agent and affected are reversed, information can be added to the affected referent (in given position) and new agents can be introduced in the final

¹⁰⁹ Section 3-417 of the Uniform Commercial Code cited in Gopen (n80) 1196.

¹¹⁰ Gopen (n80).

¹¹¹ Cutts (n69) 14.

position. The new agents then become the given referents of any following text. In this manner, the passive focuses and connects text. Writers have to decide, therefore, what needs to be emphasised, whether the agent has to be identified and whether the agent is foregrounded or backgrounded information.

Use of the passive reversal is effective if: the objects or goals are ordered in a logical sequence; these goals are the appropriate entities to be emphasised; and the agent can be identified or if knowing the agent is unimportant.¹¹² (The agent becomes irrelevant, for example, in general statements that begin statutes. In It is hereby notified that the State President has assented to the following Act which is hereby published for general information,¹¹³ for instance, the agents involved in notifying and publishing are less important than the authority of the State President's assent and official promulgation (hereby published).)

Writers need to bear the principles above in mind when rewriting passive constructions. Although readers can usually work out the S+V+O reversal in single occurrences, they will have difficulty correlating grammatical function and position over extended text. In Judges of the Constitutional Court and the Supreme Court shall receive such remuneration as may be prescribed by or under law, and their remuneration shall not be reduced during their continuation in office,¹¹⁴ for example, the prominence given to the judges misleadingly presents them as the subjects, not the affected entities, of the action. The real agents in charge of delivering and reducing the remuneration are not mentioned. Although, arguably, this is a situation where knowing the outcome of a process is more important than knowing who is responsible, writers need to be aware that the positional reversal affects readers' understanding. Passive constructions should be used far less frequently than previously common to legal texts and writers should be guided by the general principles for use of the passive: when the agent is unknown, unimportant or the activity is routine.¹¹⁵

Connected with the syntactic reversal is the effect the passive has on causal connections between sentence constituents. By allowing an agent to be concealed,¹¹⁶ the passive obscures causality both grammatically (by abrogating the S-V-O connection) and semantically (readers may not be able to discover who was responsible for the effect of the process). In delivery dates shall be treated as approximated only,¹¹⁷ the agent accountable for this decision should be identified. This would be achieved by restoring the active form.

¹¹² Williams (n23) 24-5.

¹¹³ Cover page of the Government Gazette Vol 343 No. 15466 Cape Town 28 January 1994.

¹¹⁴ Section 104(2) of Act 200 of 1993.

¹¹⁵ Swan *Practical English Usage* 406; Murphy *English Grammar in Use* 82; Swan and Walter *How English Works* 175.

¹¹⁶ 'Legislation often confers a power or imposes an obligation on a person and if the reduced form of the passive voice is used it does not specify who is to have the power or obligation.' Law Reform Commission of Victoria (n24) s79.

¹¹⁷ Section 9.3 of a Terms and Conditions of Sale contract.

Passive constructions are usually more wordy than their active counterparts; for example, shall be given to instead of shall receive; been authorised by instead of authorised. The absence of an agent also leads to cumbersome expressions, such as there shall be substituted. Again, restoring the active form is often the solution.

Generally, the solution to ineffective use of the passive is simply to restore the active form. When the agent of a verb is restored and situated in Subject position, a clearer causal link emerges between agent and process, and empty referents (i.e. words that have no specific referent) or those whose reference is unclear disappear. For example, It in It is submitted does not refer to an antecedent noun but to the clause following submitted (that...). When the active form is substituted, a context-appropriate referent must be supplied; The defendant submits or we submit. In these situations, the active is more precise than the passive.¹¹⁸

Passives are often used unthinkingly to conform to a style traditionally expected of legal documents. By enhancing the formal and impersonal style typical of legalese, they alienate readers. This institutionalised use is self-perpetuating: because passives contribute to a formal style, they are used in documents where formality is considered correct.¹¹⁹

(ii) Negative expressions

Because the purpose of law is to control behaviour, which includes prohibiting certain actions, negative expressions are unavoidable.¹²⁰ They need not be problematic, but the manner and context in which they occur in legal texts leads to confusion (see Ch4 IV (4)).

Positive expressions are usually more direct and more concise. Keep off the grass, for example, is more explicit than Do not walk on the grass, which could reasonably imply that running, jumping or other non-walking activity is acceptable. The word only, which has positive but restrictive meaning, is a useful means of converting a negative statement into a positive one. Hence, Vote for one candidate only is easier to understand than Vote for not more than one candidate.

Where a negative has to be used, the writer needs to be aware that difficulties for the reader occur when: negative markers are incorrectly positioned; negative and positive constructions are combined in the same sentence; multiple negatives are used; a confusing syntax or wordy construction is produced; negatives are combined with modal auxiliaries.

Negative markers need to be positioned correctly. Negation has a clear function to express prohibition, but in order to be effective the negative marker must be attached to the correct word or phrase. When cast as firm, irrevocable directives, negative constructions communicate their

¹¹⁸ Law Reform Commission of Victoria (n24) s79.

¹¹⁹ The passive used with nominalisations is even more confusing. Williams (23) 23.

¹²⁰ Negatives are both direct, where negative marks are added, and indirect through the use of lexical terms with inherent negativity, such as cease, curtail, avoid and ban.

message efficiently: No dogs allowed; and No smoking permitted in the auditorium are more effective than Dogs not allowed and Smoking permitted outside the auditorium only.

Writers usually construct negatives by inserting the negative marker at the earliest opportunity. But, if the marker is attached to the wrong word, the negative emphasis is misdirected and the expression may confuse. A negative must be applied to the linguistic unit directly affected. The choice is invariably between the noun *or* verb phrase; i.e. the restraint is on agents *or* processes.¹²¹

For example, in no deletion, addition, alteration or interlineation made in a will executed on or after the said date and made after the execution thereof shall be valid unless,¹²² the validity of a will is the crucial concept, not the items which may invalidate it. If the clause is rewritten with the negative marker either on the noun phrase (referring to the will) or on the verb phrase (dealing with validity), the emphasis becomes clearer: either No will executed...shall be valid/ or A will executed.....is not valid/ if there is any deletion, addition, alteration or interlineation.

Writers should avoid mixing negative and positive expressions, because readers have particular difficulty with sentences that combine affirmative and negative instructions. Confusion increases if negative markers are incorrectly positioned. In No taxi shall be allowed to load or offload any passenger on the loading area for buses, as marked by applicable signs,¹²³ the contrast between a prohibited entity, no taxi and a positive verb, allowed, is confusing (even though allowed has a curtailing inference). The mismatch of negated and affirmed is extended in as marked by applicable signs, which conveys positive information: the signs exist, but taxis are not allowed near them.¹²⁴ To sort out the confusion here, the writer must decide whether the process or the agent should carry the negative constraint. Since the process of loading is curtailed, this phrase should carry the negative injunction, as in Taxis must not load or offload.

Writers must also ensure that a negative expression does not contradict any positive statements in the same sentence. They must check that the meaning of a sentence is consistently positive or negative. For example, in Time *shall not be* of the essence of the contract and delivery dates *shall be treated as approximate*,¹²⁵ the initial negative is immediately followed by a positive in similar verb phrases. The meaning is clearer when either the positive/negative factor is more consistent - Time is unimportant in terms of the contract and delivery dates shall be treated as approximate - or if the similarity between the positive and negative phrases is reduced - In terms of the contract, time is not a crucial factor and delivery dates are to be treated as approximate. When an initially positive message becomes negative, the reader does not encounter the negative until

¹²¹ See Ch4 IV (4) for discussion on the exclusivity of negative markers; either they are applied to the verb phrase or to another form class phrase.

¹²² Section 2(1)(b) of the Wills Act 7 of 1953.

¹²³ Section 2(3) of the Vryburg Municipality: Bylaws Relating to Taxis and Buses.

¹²⁴ It is also unclear whether the loading area or the buses are designated by the applicable signs.

¹²⁵ Section 9.3 of a Terms and Conditions of Sale contract.

later in the sentence and may be confused; as in *Dogs and Chinese not allowed*.¹²⁶ Since this is a clear prohibition, the negation should come at the start of the sentence: *No dogs or Chinese allowed*, or (questionably) better as *No Chinese or dogs allowed*.

Multiple and duplicated negation must also be avoided. Although standard English permits the use of odd numbered negatives (paired negatives are regarded as cancelling each other out), multiple negatives involve readers in complicated computation; are there odd or even numbers of negatives? For example, in [T]he Mortgagor further covenants:....*Not without* the Mortgagee's prior written consent further to assign mortgage charge or otherwise encumber the Lease *nor* sublet or part with possession of the premises *nor* enter into any agreement regarding the same,¹²⁷ the initial negative (*Not without*) is followed by two other negative markers *nor*...*nor*. Even though this adds up to an odd numerical total, indicating that the overall negative holds true, the effect challenges rather than supports the initial negation.

In order to rework multiple negatives, writers should reduce the negative markers, placing them on the information that is constrained or forbidden. In the rewritten version below, only one negative is used in the imperative verb construction, emphasising the prohibition to which the mortgagor must conform:

The mortgagor must not without the mortgagee's consent

- (a) assign or encumber the lease; or
- (b) sublet the premises or part with possession of them; or
- (c) enter into any agreement regarding them.¹²⁸

The effect of negative markers on syntax must be carefully considered, since the order in which negative directives are given is critical. In poorly structured texts the negative marker may be incorrectly positioned and the sequence in which instructions are presented may not reflect the actual order of their performance. The instructions in a book club contract provide an example. *Do not send any payment until you receive your first order* is a less easy sequence to understand than *Wait until your first order arrives before paying*, because the second version corresponds to the sequence of actions to be followed. In addition, the first version involves both negative and positive commands in the same sentence (although the positive has been elided): *Do not send payment money until your first order arrives [and then do send money]*. Because the positive instruction is only implied, it is more difficult to retrieve.

Negative phrases containing modals may cause a particular problem. They hypothesise the pre-existence of a positive concept, now negated. If the positive base contains a modal which

¹²⁶ This notorious sign existed in Hong Kong under British rule.

¹²⁷ Section 6(4)(iii) of the Law Institute of Victoria Mortgage over Business cited in Law Reform Commission of Victoria (n24) Appendixes 3-8 45.

¹²⁸ Reworked section 9(a)(b)(c) of the Law Institute Mortgage over Business cited in the Law Reform Commission of Victoria (n24) 44.

conveys likelihood not certainty, negation increases the uncertainty. When, in addition, the meaning of the modal, such as *can* and *may*, is potentially ambiguous (see Ch4 V(1) (i)), negation compounds the ambiguity. Although *can* ostensibly has a positive meaning, it implies some negativity, because it has the sense of doubt, possibility or unlikelyhood.¹²⁹ *May* has both mandatory and permissive functions. Hence, expressions using *cannot* and *may not* force readers to embark on a complicated conceptual process. First, they have to reverse the negation; then they must work out whether it is mandatory or discretionary, and if discretionary, the degree of likelihood conveyed by the positive; finally, they have to deny this meaning by reapplying the negation. The prohibition expressed in the accused may not make contact with the plaintiff, for example, is presumably restrictive, not advisory, but it lacks the explicitness conveyed by *must*.

V. STRATEGIES FOR IMPROVING TEXT COHESION

Reading is an interactive process between the text and the reader. To this process readers bring knowledge and expectations from which they will make inferences (see Ch2 I (2)). Writers can guide (although not control) the readers' progress and inferences by attending to the way a text is structured. This section will deal with ways of meeting readers' requirements and expectations. Suggestions are made concerning information structuring, connections between sentences and text sections. The focus in this section is on conceptual and syntactic features that contribute to effective, because cohesive, discourse.

1. INFORMATION STRUCTURING

Earlier chapters have already made clear why the focal slots in a sentence have to be appropriately filled, why the text as a whole should distinguish new information from given and why unambiguous relationships between the constituents of a sentence aid comprehension.¹³⁰ Writers need to bear these factors in mind when organising information in a sentence.

Additionally, writers should be aware of the lexical and syntactic markers that control the presentation and flow of information to readers. Repetition of words, replacing nouns with pronouns, use of the definite article and modifying phrases are devices that can mark given information (although this is not their only function). Similarly, writers should consciously use lexical and syntactic features which mark new information, such as nouns preceded by the indefinite article, previously unmentioned referents and the final, stress position in a sentence. Sentences using these devices communicate their information clearly and effectively.

When writers consciously reserve the first and last positions for the important (main) information, they structure the hierarchy of information (main as opposed to background), meet reader expectations and avoid the tendency of putting lengthy premodifying phrases at the start of a sentence. For example, the writer of the original sentence below did not use the topic and stress

¹²⁹ Kress and Hodge *Language as Ideology* 142.

¹³⁰ See Ch2 II, Ch3 II and Ch4 II.

position correctly, nor did it make clear what the reader was assumed to know (given information) and what was introduced as new information. The original:

During your interview with X Bank for a housing loan, the following important issues below were discussed with you:

The revised version:

Important issues that are involved when you take out a housing loan with X Bank are explained in this letter.¹³¹

The reworked version puts significant information in first and final positions of the sentence. The first phrase, Important issues, tells the reader what the sentence is about (the theme), and what follows (the rheme)¹³² provides information to do with these issues (in this case what to do if the reader is uncertain). The last (new) item mentioned, this letter, can then be used to connect with the next sentence: Please bring this letter with you to your nearest X Bank office if there is anything you do not understand.

Internal organisation of a sentence therefore plays a part in connecting larger text. Various devices to connect and alter text enable writers to make these connections:

2. CONNECTIONS BETWEEN SENTENCES AND TEXT SECTIONS

(i) Reference and lexical cohesion

Reference occurs both within a sentence (anaphoric and cataphoric) and in the way referents relate to the larger text (endophoric).¹³³ With referents within the sentence, writers must check that the reference is consistent (the same entity is referred to by the same referent) and connected (the connection between referents is clear). For example, in The number of instalments and the amount of each instalment is based on how much you can afford, but you can shorten this period,¹³⁴ the phrase this period must refer to one of the earlier referents, but which one is not clear. When rewritten as The number of instalments and how much you pay is based on how much you can afford. You can shorten the repayment period by increasing the amount you pay in each instalment, the sentence break divides the information: how instalments are calculated and what can be done to adjust the repayment. The writer has linked the two sentences by repeating the significant referents with additional information (repayment period, amount you pay). This links the idea of repayment, conveyed by instalments in the first sentence, to an associated factor, repayment period.

¹³¹ Application form for a housing loan. The revised version omits the reference to a previous interview and sums up the important points because they are relevant to the next step in the application process.

¹³² See Ch2 II(1) for discussion on theme and rheme.

¹³³ See Ch2 II(1) and Brown and Yule *Discourse Analysis* 192. Ellipsis (the omission of a part of the sentence that would otherwise repeat what is said elsewhere) Crystal (n48) 174ff. Ellipsis also operates cataphorically (referring forwards) and anaphorically (referring backwards).

¹³⁴ Application for a housing loan from a financial institution.

In order to use lexical cohesion effectively, writers must check that the referents they use are appropriate together and in the text. For example, formal and informal expressions do not cohere; words associated specifically with other domains should be avoided, because readers expect legal documents to contain legal words; words from appropriate subsets should be used because they add coherence.

Reference extends into larger text because of the way readers read. Readers expect sentences to connect into larger text.¹³⁵ Lexical markers of surrounding text (as mentioned above; continued on page 32) and devices such as marginal notes draw readers' attention to larger text.

Another co-textual device that links parts of text is cross-reference. In legal texts, this device frequently obstructs more than it clarifies, but this need not be the case. Effective use of cross-reference is discussed in VI below.

(ii) Use of conjunctions

The conjunctions that connect sentences express the additive, adversative, causal and temporal relations sentences have to each other.¹³⁶ Writers have to be acutely aware of the conceptual nature of the link between different units of text and they must make sure that these links are clearly and correctly marked.

Correct use of linking conjunctions has several advantages. First, writers can make the semantic relation between the sentences clear. In this example The terms and conditions of insurance are set out below. *However*, these are not affected by the Summary of benefits,¹³⁷ the adversative conjunction *however* indicates that the sentence following provides constraining rather than elaborating advice.

Secondly, when writers are consciously aware of using conjunctions, they will break long sentences up in order to connect them. The original, No other guarantees or representation, either expressed or implied, are to be construed as being included in the foregoing and no adjustments beyond the repair of the defective material as the Contractor may determine shall be made,¹³⁸ would be easier to read (though not much more comprehensible without further revision) as No other guarantees or representation...are to be construed as being included in the foregoing. *And*, no adjustments...shall be made.

Thirdly, conjunctions must be positioned correctly (at or near the beginning of the subsequent sentence). When writers do so, they will avoid using this position for multiple prepositional phrases. For example, From time to time at the request of the Employer, *therefore*, X shall agree to an audit of X's books relating to loans granted by X¹³⁹ is more effective as *Therefore*, X shall agree

¹³⁵ Brown and Yule (n133) 196; Halliday and Hasan *Cohesion in English* 23.

¹³⁶ See Ch2 I(3) and (4); Halliday and Hasan (n135) 4.

¹³⁷ Certificate of Insurance application form.

¹³⁸ Section 7.2 of General Terms and Conditions of a pool installation contract.

¹³⁹ Section 8 of a housing loan scheme contract.

from time to time to an audit of X's books relating to loans granted by X at the request of the Employer because the causal connection is made at the start of the relevant information.

(iii) Pronouns

Effective use of pronouns is a form of substitution that ensures cohesion without clumsiness. As indicated in Ch4 V (2)(iii), legal texts tend to avoid using pronouns. In so doing they avoid the benefits of an effective referential device. Used appropriately, pronouns make good connections within a text and add lexical variety, in contrast to repeated use of the noun form. Alternating nouns and pronouns effectively links sentences and varies the terms used without changing the referential meaning.¹⁴⁰

(iv) Determiners

Noun phrases which repeat the main noun but vary the article and other premodifiers can both clarify and connect text. A shift from a to the, and from either of these to the demonstrative pronouns this and that, may assist comprehension, provide emphasis and increase text cohesion, as in In proceedings against a person...it shall be a defence for *that* person.¹⁴¹ A change from the indefinite to the definite article before the same noun indicates greater specificity, establishes the noun in the context and makes readers aware that this noun has probably been mentioned before. In A vacancy exists in *a* provincial legislature when -, for example, the indefinite article introduces provincial legislature. Once introduced, this referent can be referred to as one known to the reader, hence the more definite reference in (c) a member is absent from *the* provincial legislature.¹⁴² (See also Ch 2 II (1)).

(v) Ellipsis

Ellipsis contributes towards cohesion because of its referential function. The omitted term can connect either backwards or forwards to a full term, but because some of the text is missing, readers have to supply the missing information, thereby involving themselves in the text. Reader involvement is part of textual cohesion. Writers should use ellipsis with care, however, for it can result in confused or obscure meaning.

The governing principle for omitting part of a sentence in order to avoid repetition¹⁴³ is that the omitted word/s must be recoverable.¹⁴⁴ If there is either a range of possibilities or no possibility for recovery, then ellipsis is not an appropriate procedure. In order for a word or phrase to be recoverable, it must exist in the text (the full form can be found elsewhere), be recoverable

¹⁴⁰ One problem that pronouns do raise (and one of the reasons legal texts tend to avoid them) is gender specificity. In cases where this is a problem and where it would be clumsy to use s/he and his/her, repeating the noun without using the pronoun is effective. Cutts (n13) 72 provides a list of gender-specific words and their neutral alternatives.

¹⁴¹ Chapter 35 s8(1) of the Timeshare Act 1992 cited in Cutts (n69) 6.

¹⁴² Ch 8 s122(1) and (1)(c) of the working draft of the new Constitution of South Africa.

¹⁴³ Crystal (n48) 174; Leech, Deuchar and Hoogenraad *English Grammar Today* 179.

¹⁴⁴ Leech et al. (n143) 180 comment that 'the more complex a sentence is, the more likely it is to mismatches of ellipsis'.

situationally (the full form can be deduced by referring to the situation), or be recoverable structurally (the full form can be supplied from knowledge of grammar).¹⁴⁵

One of the syntactic characteristics of legal language is the frequency with which the relative pronoun is omitted. This does not usually pose too great a problem for comprehension. Omission of an agent, however, as in the agentless passive or nominalisations, is potentially more serious. Equally serious is when the meaning of a phrase is implied but omitted,¹⁴⁶ because the ellipsis puts a strain on readers' inference and thus on their perception of coherent text. If writers of legal texts leave out a phrase, they must consider whether a reader could recover the omitted information from their own knowledge or whether only a legal professional could. For example, in *Interest will be paid on credit balances at a rate advertised by the Bank*, the lay reader could recover the omitted information that the interest had to be paid [by the card holder], because of the text and situation in which this sentence occurred (the Terms and Conditions of use for a credit card). However, in more complex sentences, writers must ensure that recoverability is possible. If it is not, they must repeat the information in the full form. For example, in a letter from a bank asking a client to come in and discuss banking affairs, the sentence *A passport is a useful means of identification*, the omitted *so please bring your passport* was unrecoverable.

VI. ORGANISATION AND LAYOUT

Texts communicate their information effectively when the arrangement of words and sentences is clear and simple. 'Language and design work together to make your document easy to read, and easy to use. Good design acts as a map for your reader. It signposts material and makes information easier to find.'¹⁴⁷

Signposting information involves not only organisation of content, but also layout and print style. As far as statutes are concerned,¹⁴⁸ it must be borne in mind that few people will ever read the full text: non-lawyers in particular consult legislation only to retrieve specific information. Hence, how to locate the information as quickly and easily as possible should be a major concern for the drafters of statutes.

1. WHERE TO PLACE DEFINITIONS

Definition sections must be separated from the main part of the text to which they refer. Two options exist: within the main text, in brackets, or in a glossary or definitions section, at either the beginning or end of the text. Opinions vary as to whether a definitions section is more effective at the beginning or the end of a document. In statutes, a definitions section was traditionally included after the preamble. This position interrupts reader concentration, however, because definitions are

¹⁴⁵ Crystal (n48) 175.

¹⁴⁶ The elliptic effects of passives and nominalisations have already been discussed in this chapter.

¹⁴⁷ Information sheet from the Centre for Plain Legal Language, University of Sydney.

¹⁴⁸ Knight at a seminar *Plain Language – The Law and the Right to Information* Cape Town March 1995.

written in a different style to that of the preamble,¹⁴⁹ and the Law Reform Commission of Victoria felt that definitions inserted before the main text contradicted a general principle of organisation in statutes: that principal substantive matters should be placed first¹⁵⁰ and less important or procedural information later.¹⁵¹

Wherever definitions are put, readers have to turn from the main text to find them, thus breaking concentration. An introductory position may delay readers. (With statutes this argument is less persuasive, because readers consult statutes for a particular reference; they are unlikely to read the text in sequence.) On the other hand, when definitions are placed at the end of a long text, readers may be discouraged by the number of pages to be turned over and back. Although initial and end positions pose problems, either position is preferable to embedding definitions in the text. Whether they are placed at the beginning or end, definitions should clearly not be part of the text and should be made relatively easy to find.

In order to indicate defined terms, various typographic options are possible: footnote references, italics, bold print and asterisks.¹⁵² Whatever method writers use, they must realise that all marking systems will to some extent interrupt reader concentration, because marked words are visibly different. Awareness of this potential exerts another form of check on the selection of words to be defined: if too many are chosen, the typological marking will seriously disturb typeface continuity.

2. CROSS-REFERENCING

Just as readers have difficulty understanding definitions that depend on other definitions for their explanation, so too are they confused by information that depends on other information before meaning can be fully comprehended. Legal texts show a marked tendency to use a type of cross-referencing, which is an immediate indication that information needs to be organised differently. Drafters should not have to refer readers back and forth but should lead them through the material in a steady progression.¹⁵³

Because it is not always possible to avoid cross-references, the reference should be incorporated with minimal interruption to the main text. Some statutes in Britain include the heading after the cross-reference number, as in sanctioned in accordance with section 425 (company compromise with creditors and members).¹⁵⁴ A quick-access means of locating the extra-

¹⁴⁹ In the reworked Timeshare Act the definitions section occurs after the Table of Contents and before the Act begins. Cutts (n69) 15.

¹⁵⁰ '...definitions need not appear at the beginning of Acts. They are better placed at the end with words which are defined being highlighted in the text.' Law Reform Commission of Victoria (n24) s37.

¹⁵¹ Law Reform Commission of Victoria (n24) s118.

¹⁵² A typeface change can either be used consistently, i.e. every time the defined word is used, or only the first time the word appears. Several problems exist with the latter option. The marked term may be used elsewhere with another meaning. Readers are likely only to consult those sections of a statute that they believe will help them, hence they will miss an indication that a particular word is defined, if they do not read the section of the statute in which the word first appears.

¹⁵³ Law Reform Commission of Victoria (n2) s62.

¹⁵⁴ Law Reform Commission of Victoria (n24) s64.

text information is to put specific detail in a footnote. For example, section 75 of the Financial Services Act 1986 is footnoted 1986 c60.¹⁵⁵ This method provides information simply and economically, and also recognises the different reading and interest levels of the intended audience: fewer readers will want to know this information, but those who do will know where to find it. Another technique is to extract the cross-references and group them in a separate sentence at the end of the relevant section.¹⁵⁶ This avoids interruptions to the text and makes clear what is main and what is supportive information.

All cross-referenced information should be succinct. Repeated words and phrases stating the obvious, of this Act, in this section, can be deleted. Specific alpha-numerical reference, s53(1)(a), is clearer than relative terms such as preceding and previous.

3. LAYOUT

To organise information effectively, writers must rank their material in order of importance: the most important information should be presented first, followed by supportive and explanatory material. Ranking implies division, and, to indicate divisions, headings and subheadings can be used. These indicate what readers will find in each section, which sections introduce new material and which sections are dependent on others.

In order to divide texts, writers need to consider what materials belong together, the order of relative importance, and how divisions should be distinguished from each other. (With statutes, subdivision is particularly helpful, because statutes are seldom read from start to finish.) If correctly applied, the selection and ordering processes produce texts with a logical cohesion: the more important before the less important, the general before the specific and the ordinary before the extraordinary.¹⁵⁷ When readers perceive order and pattern, in both content and layout, the likelihood of their understanding a text increases. Better organisation benefits the writer, too, since a well connected text enables a writer to check his or her work for inconsistencies, omissions and duplication, and also to ensure that information progresses logically.

Headings and titles can 'flag' information by providing visible indicators of the subject matter,¹⁵⁸ the hierarchical arrangement and how sections are distinguished. A title has a significant effect on reader comprehension, because it gives readers a starting point for understanding the text that follows. At the same time, an initial focus constrains the interpretation of what follows.¹⁵⁹

When misused, however, titles and headings may seriously mislead. Readers will endeavour to read a text according to how they understood the title. A title such as The Child Care Act, for example, will correctly lead most readers to expect that the Act is about the protection of children's

¹⁵⁵ Cutts (n69) 4.

¹⁵⁶ Cutts (n13) 70.

¹⁵⁷ Kimble (n2) 12.

¹⁵⁸ Brown and Yule (n133) 71-3, 139-40.

¹⁵⁹ Brown and Yule (n133) 140.

rights. The more detailed a title, the more focused reader expectations become. The Income Tax Act and the Death Duties Act have a very specific focus: the Banks Act is more general and a reader would have to work through a great deal in order to identify which sections were relevant to his or her particular query. The infamous Immorality Act was misleading because the immorality identified only corresponded to the value set of those whose values it had been designed to support. The real immorality lay in this very selective value base. Single noun headings and general titles are usually less helpful because they imply rather than inform; for example Guaranteed Student Loan Program gives less guidance to readers' expectations than What is the guaranteed student loan program?¹⁶⁰

Within a text, headings have the same focusing effect as titles, but in addition they may connect sections of subdivided text by identifying a section and showing its relationship to surrounding text. These functions can be performed both substantively and typographically.¹⁶¹ Thus the information provided in headings indicates how the content following relates to that before. For example, 3. Seller must tell customers about their right to cancel timeshare agreements and 4. Customer's right to cancel timeshare agreements¹⁶² are individually informative, and they show clearly the connection between the two parties to this agreement.

4. PRINT FORMAT

The print size and the forms in which titles and headings are presented have a marked effect on reader comprehension, for readers react more favourably to some type faces than to others. Because readers respond more positively to serif typefaces, one of these should be used for the main text. Sans serif typeface provides visual emphasis, which distinguishes words printed in this format from those that are not. Sans serif typefaces are effective for headings and for emphasis.¹⁶³

A type set between 10 to 12 points is generally easy to read, although writers must also consider x-height (height of the lower case letters, such as x, m, n, in proportion to the type size).

¹⁶⁰ Redish (n79) 127. (See comment below on the disturbing effect that capital letter words have on readers.) Because titles introduce a theme, more general titles, for example The Wills Act, are less informative than those that provide more detail, such as the Matrimonial Causes Jurisdiction Act. Alternatively, explanatory material can follow in brackets: Infertility (Medical Procedures) Act. Law Reform Commission of Victoria (n24) s40. Question format headings are effective because questions tend to 'provoke interest in readers by bringing them into action.' They also convert 'dull, plodding label-headings into verb-rich information'; for example Frequency of use by paramedics of aspirin in the treatment of heart attack victims is more effective as How often do paramedics use aspirin to treat heart attack victims? Cutts (n13) 112.

¹⁶¹ Opinions differ on whether a decimal or alpha-numerical system is more effective. Balmford 'Simply Better: The case for clearer life office documents' in *First Report* of the Life Insurance Federation of Australia Inc (LIFA) Simplification Documentation Task Force Life Insurance Federation of Australia Inc (1993); Cutts (n69) 15 uses the alpha-numerical system very effectively in his reworking of the British Timeshare Act. The point to be made is that each permits a writer to recognise and mark off information units in terms of prime and secondary significance, but section numbering beyond a third level (3.1.2) should be avoided. Cutts (n69) 115.

¹⁶² Cutts (n69) 5.

¹⁶³ Examples of serif type faces are: foundry old style, times roman, plantin, palatino, bodoni, berno, garamond and bookman. Sans serif type faces include: foundry sana, helvetica, optima, gill sans, futura, avant garde and univers. Information sheet *Designing your Document* from the Centre for Plain Legal Language University of Sydney. The addition of bold type further distinguishes headings from the main text and emphasises the information presented.

Provided the x-height is 1,5mm or more, the type will be highly legible in ordinary conditions.¹⁶⁴ Margins and generous spacing between sections and below headings also make for better legibility and comprehension. Highlighting techniques, such as bold type and underlining, give visual emphasis to important information.¹⁶⁵ Other than when grammatically correct, capital letters should be used only to indicate titles.¹⁶⁶

VII. THE SOUTH AFRICAN SITUATION

The low level of literacy in South Africa makes the need for plainer official texts even greater. The CASE evaluation of the language of the Constitution¹⁶⁷ is clear on this:

'All the research instruments found overwhelming support for the plain language initiative. All demonstrated that the plain language versions were more accessible for a wide range of users. They also highlighted difficult terms and phrases and the dissonance between plain language and traditional, more complex language clauses, which commingle in the draft Constitution.'

Consequently, the research recommended that plain language drafting become the norm for government drafters, and that this drafting should, wherever possible, be done immediately into as plain a language as possible, rather than into a traditional style which has then to be made plain. This would both save time and break existing habits and styles of legal drafting.

A similar study undertaken for the Constitutional Assembly,¹⁶⁸ identified and tested potential users of the Constitution, dividing their research population into three groups: Legal Professionals (judges, magistrates, attorneys, advocates, etc.); service Professionals (nurses, social workers, teachers, police, clergy etc.); and NGOs and CBOs (advice office workers, trade unionists, civic leaders, etc.). The focus was on those who would play a role in interpreting or mediating constitutional rights to those whose literacy level made it impossible for them to read a legal document written in English.

Because of the complexity of South Africa's linguistic and literacy demography, there is no simple and obvious way of selecting a *representative* sample of legal and quasi-legal texts. CASE had the resources and funding necessary to draw an *appropriate* national sample of people who might read or wish to read (sections of) the Constitution. Such resources were not available to the author who has therefore chosen to use their material as a primary source of information on what it is in legal texts that is difficult or inaccessible to the kinds of South Africans who mediate these texts to the largely illiterate population (who themselves cannot afford frequent recourse to lawyers).

¹⁶⁴ Cutts (n13) 150.

¹⁶⁵ In addition, font changes, such as italics and sans serif indicate how the content thus marked relates to what surrounds it.

¹⁶⁶ Readers find words in block capitals offputting because ordinary printed text is not in this form.

¹⁶⁷ De Castro, Everatt and Budlender 'Evaluating the Plain language Initiative' in Everatt *Taking the Constitution to the People: Evaluating the Constitutional Assembly*.

¹⁶⁸ Vaughn and Aitchison 'Assessing the Plain Language Working Draft of the New Constitution' in Everatt (n167)

The following table illustrates the demographic characteristics of the respondents in CASE survey (except where indicated, the figures represent numbers of respondents):¹⁶⁹

Table 6
Demographic characteristics of respondents in CASE survey

		Legal Professional	Service Professional	NGO/CBOs	Total
Language	English	17	18	9	44
	Zulu	2	6	7	15
	Xhosa	5	3	5	13
	Afrikaans	4	3	3	10
	North Sotho	0	2	1	3
	South Sotho	1	1	0	2
	Sotho	0	1	0	1
	Setswana	2	0	0	2
	Polish	0	1	0	1
Race	African	12	15	14	41
	White	10	8	6	24
	Coloured	5	9	4	18
	Indian	4	3	1	8
Sex	Female	18	14	14	46
	Male	13	21	11	45
Average Age (years)		34.4	40	32.4	36
Educational Qualifications	Grade 11	0	0	3	3
	Grade 12	0	7	7	14
	Diploma	2	4	3	9
	Bachelors degree	2	5	5	12
	Honours and LLB	18	8	6	32
	Masters	2	3	1	6
	Doctorate	0	1	0	1

Some participants did not specify their educational qualifications.

Several points must be made. There is a division between legal knowledge and language knowledge; without the latter (English or Afrikaans competence), the former is more difficult to apply. This is shown in the results.

Among the legal professionals (Group 1), the English and Afrikaans speakers processed legal language with greater ease. With regard to the service professionals, English and Afrikaans

¹⁶⁹ Vaughn and Aitchison (167) 6-7/

and *university educated* speakers of African language had similar competence with the legal information, but those African Language speakers with Grade 12 had more problems. This suggests that the working draft of the new Constitution can be processed by people with tertiary education, but is harder for English second language speakers with only Grade 12 or less.¹⁷⁰

The same pattern occurs in Group 3.

The research concludes that without English or Afrikaans, legal texts are difficult, even for legal professionals. Additionally, higher level education is required, particularly if the reader is not an English or Afrikaans first language speaker. 'Speakers of the African languages who do not have degrees and only have std 10 (Grade 12) find it more difficult to process the language used in the Constitution than people from the other groups.' The implications of these results are even more serious because the Constitution had already been written in plainer language: the disparities in language proficiency, and thus access to text information, would have been far greater with a document written in traditional legal style.

The connection between education and language proficiency is clear, as we have seen in Ch6 I, but since it will take years to redress the imbalances in the South African education system, writing legal and quasi-legal texts in simpler language is obviously sensible, and necessary.

Because the CASE research focused on middle users rather than endline users (ordinary people), its findings are particularly significant. First, if people from these groups have problems understanding the language of the Constitution (see Table 6 above), this language needs to be plainer still. Secondly, their role as mediators becomes even more important (see Ch 6 I), because people with less education will find legal texts largely incomprehensible, even if these have been written more simply. Thirdly, since even a plain language-worked document poses problems for relatively well-educated people, plain language must be seen as a process to be entered into and developed, not a finite and limited concept. Fourthly, given the discrepancy between Group 1s' responses and those of Groups 2 and 3, legal professionals are still advantaged when dealing with legal texts. While to a certain extent this is acceptable, because all professions have their own professional discourse, even within this group there was an imbalance: mother tongue speakers of African languages had greater difficulty.

The CASE researchers concur on the features of plain language that improve text comprehensibility. All of these have been discussed in this chapter. These features should include using verbs in preference to nouns (or nominalisations), keeping verb phrases intact (i.e. avoiding the branch effect of subordination), gender-free references and being aware of words

¹⁷⁰ Vaughn and Aitchison (n167) 23.

whose meaning is too general to be helpful.¹⁷¹ In the CASE study, a list of problem words and phrases was drawn up by language and information specialists.¹⁷² The list aimed to identify words, phrases and sentences that were non-technical but difficult, particularly for a non-native user of English (see Ch 3 II (4)); technical (see Ch 3 II (2)); those requiring definition and possibly an example (see VI (1) above); sentences with complicated syntax (usually long sentences or those with too many embedded clauses: see Ch 4 III and IV (2)); sentences whose meaning, for whatever reasons, was unclear (see Chapters 3 and 4). In only 60 pages of a legal text that had already been written more plainly, over 500 problematic words, phrases and sentences were identified.¹⁷³

Readable language (for literacy levels of grade 9 and below) must have short sentences, simple tenses, few passives and simple connectives.¹⁷⁴ Writers of simple texts should avoid long and complex sentences, preferably keeping to one subordinate clause per sentence; they should use and, but, so, therefore and then in preference to unless, although, yet and thus. Conditional expressions and modals need additional explanation; for example, Even if you have paid this installment, *still* contact your local branch in preference to Should you have any queries in this regard do not hesitate to contact the appropriate branch even if your account has been settled and Suitably qualified people should apply *because* ... instead of Applicants may apply if When using pronouns, writers must check that their referents are clear and jargon should be avoided as far as possible.¹⁷⁵

Layout and organisation should also be improved on.¹⁷⁶ Larger print (point size 12 minimum), ample spacing, shorter lines, lower case headings and indented subsections all make reading easier.¹⁷⁷

VIII. CONCLUSION

Rewriting is a process that varies from text to text. It is not a set of quick fix devices. Writers and rewriters need to consider their audience, the purpose of writing the text and how successfully the language they use will convey this purpose. Writers need to understand the effect that certain lexical and syntactic choices have on readers. They can then assess whether their texts are likely to communicate or confuse. If the latter seems more likely, rewriting is essential and writers must consider alternative ways of expressing their message. Few, if any, revisions are sole or perfect solutions, but most attempts to deal with the lexical, syntactic and

¹⁷¹ Vaughn and Aitchison (167) 18 cite a list of words from just three clauses of the Constitution (25(1), (2) and (3)) that all the participants found difficult because imprecise. These include *access*, *adequate*, *relevant circumstances*, *equitable*, *reasonable* and *progressive legislation*. They are apparently familiar but their legal sense is uncertain, even to the legal professional group.

¹⁷² Vaughn and Aitchison (168) 88 -101.

¹⁷³ See n171 above.

¹⁷⁴ Hutton *A Manual for Writers of Learning Materials* 63.

¹⁷⁵ Hutton (n167) 72-76.

¹⁷⁶ De Castro et al. (n167) 1.

¹⁷⁷ Vaughn and Aitchison (168) 43.

Applying plain language to legal and quasi-legal documents in South Africa is made both necessary and more complicated by the illiteracy level among African language speakers. People who have trouble reading even very simple texts will never be able to read more complex ones. Plainer written texts should not aim to include this very basic group. Unfortunately, however, this includes the bulk of the population, and a population that was previously disadvantaged politically and linguistically and which has every reason to expect the new democracy to rectify the situation. This will occur only slowly with developments in education, but with more immediate effect if texts are written so that mediators or 'literacy brokers', can understand most of the text. As we have seen, these people are rarely legal professionals and usually do not have tertiary education. They are, however, the fulcrum upon which any claim for more accessible legislation turns.

A second point that must be made is that there may be a variation in the degree of plain language used in different texts according to their function and how much they are likely to be consulted or used by ordinary people. Statutes are necessarily complicated because of their legal implications which no amount of plain language can totally reduce to Grade 7 simplicity. Hire purchase agreements, credit and bank contracts, by contrast, should be far simpler.

Plainer legal language is the way forward. Its use in rewriting and drafting legal documents is ideologically more sound than using traditional legal English. The characteristic lexis and syntax of this traditional style made reading and comprehension far more difficult for ordinary, even well-educated, people who were not part of the legal profession. Particularly in South Africa, the power imbalance created by this professional inclusion/lay exclusion has to be addressed alongside programmes to improve overall education and literacy. Whatever the variation in applying plain language to legal texts, it can and must be used if the ordinary people in South Africa are to rise above the constraints of illiteracy and achieve the democracy encoded in the Constitution and the ethos of the post-apartheid regime.

BIBLIOGRAPHY

- Alexander N 'Language Policy and National Unity' (1989) 4 No 3 *Language Projects Review* 29, Cape Town
- Althusser L (translated by Brewster B) *Lenin and Philosophy* (1971) Monthly Review Press, New York
- Apte M 'Multilingualism in India and its Socio-Political Implications: An Overview' in O'Barr (ed) *Language and Politics* (1976) Mouton and Co, The Hague 141
- Arnheim M T W 'Latin and the Law' (1983) *South African Law Journal* 374
- Asprey M M 'It's Official: New South Wales Solicitors Favour Plain Language' (1995) 32, *Clarity* 3, Dorking Surrey
- Bakhtin M (translated by Emerson C) *Problems of Dostoevsky's Poetics* (1984) University of Minnesota Press, Minneapolis
- Balmford C 'Adding Value by Writing Clearly' (1994) 111 *South African Law Journal* 514
- Balmford C and Kelly D 'Simply Better: The Case for Clearer Life Office Documents' *First Report of the Life Insurance Federation of Australia Inc (LIFA) Simplification of Documentation Task Force* Life Insurance Federation of Australia Inc (May 1993)
- Barker H J 'Latin and the Value of a Dead Language' (1987) 111 *De Rebus* 111
- Barton D 'The social impact of literacy' in Verhoeven (ed) *Functional Literacy* (1994) John Benjamins Publishing Company, Amsterdam/Philadelphia 187
- Barton D *Literacy* (1994) Blackwell, Oxford
- Baynham M *Literacy Practices: Investigating literacy in Social Contexts* (1995) Longman Group Ltd., London
- Belsey C *Critical Practice* (1980) Methuen, London
- Beinart B 'Rule of Law' 1962 *Acta Juridica* 99
- Beinart B 'Parliament and the Courts' 1954 *South African Law Review* 134
- Bennett T W 'Terminology and Land Tenure in Customary Law' 1985 *Acta Juridica* 173
- Bennion F A R *Halsbury's Laws of England* (4ed) (1995) vol 44 (1) Butterworths, London
- Bertens H *The Idea of The Postmodern, A History* (1995) Routledge and Kegan Paul, London and New York
- Benson R 'The End of Legalese: The Game is Over' (1984-1985) 13 *New York Review of Law and Social Change* 519
- Benveniste E 'Subjectivity in Language' (1958) 55 *Journal de Psychologie* 224
- Bhatia V 'Cognitive structuring in legislative provisions' in J Gibbons (ed) *Language and the Law* (1994) Longman Harlow, Essex 136
- Boberg P Q R 'Latin' (1987) 16 *Businessman's Law* 112

- Boulle L 'Latin: The Future of the Past' (1987) 111 *De Rebus* 23
- Boyd-White J *Herades' Bow - Essays on the Rhetoric and Poetics of the Law* (1985) University of Wisconsin Press, Madison, Wisconsin
- Boyd-White J 'Justice as Translation: An Essay in Cultural and Legal Criticism' (1990) University of Chicago Press Chicago
- Brice Heath S 'Standard English: Biography of a Symbol' in Shopen T and Williams J M (eds) *Standards and Dialects in English* (1980) Winthrop Publishers Inc, Cambridge, Massachusetts
- Brown R and Gilman A 'The Pronouns of Power and Solidarity' in Giglioli P P (ed) *Language and Social Context* (1972) Penguin, Harmondsworth 252
- Brown G and Yule G *Discourse Analysis* (1983) Cambridge University Press
- Butler C *Interpretation, Deconstruction and Ideology* (1984) Oxford University Press
- Comrie B *Aspect* (1976) Cambridge University Press
- Comrie B *Tense* (1985) Cambridge University Press
- Coulthard M *An Introduction to Discourse Analysis* (1977) Longman Group, London
- Coward R and Ellis J *Language and Materialism* (1977) Routledge and Kegan Paul, London
- Crawhall N 'Language and Materialism' (1991) 6 No 12 *Language Projects Review* 40
- Crystal D *A First Dictionary of Linguistics and Phonetics* (1980) André Deutsch, London
- Crystal D *Rediscover Grammar* (1988) Longman Group, UK Ltd, Harlow, Essex
- Crystal D *Cambridge Encyclopaedia of Language* (1987) Cambridge University Press
- Crystal D and Davy D *Investigating English Style* (1969) Longmans, Harlow, Essex
- Culler J *On Deconstruction. Theory and Criticism After Structuralism* (1983) Routledge and Kegan Paul, London
- Culler J *Framing the Sign: Criticism and its Institutions* (1988) University of Oklahoma Press, Oklahoma
- Culler J *The Pursuit of Signs* (1981) Cornell University Press, New York State
- Cutts M *Unspeakable Acts* (1993) Words at Work, Whaley Bridge, England
- Cutts M *Lucid Law* (1994) Plain Language Commission, Stockport, England
- Cutts M *The Plain English Guide* (1995) Quality Paperbacks Direct, by arrangement with Oxford University Press, Oxford
- Cutts M 'Writing on the Wall for Law Language' (1995) 43 Vol 11 No 3 *English Today* 45

Danet B 'Language in the Legal Process' (1980) 14 *Law and Society Review* 445

Danet B 'Language and Law : An Overview of 15 Years of Research' in H Giles and W P Robinson (eds) *Handbook of Language and Social Psychology* (1990) John Wiley and Sons, England 537

de Castro J and Nicolson F *Public Participation Programme of the Constitutional Assembly: Summary of existing data* (1996), Community Agency for Social Enquiry (CASE), Cape Town

Delmonte R and Dibattista D 'Switching from Narrative to Legal Genre' in Bruge L (ed) *Working Papers in Linguistics* (1995) Vol 5 No 1, University of Venice 1

Desai Z 'Praat or Speak but don't Theta: On Language Rights and Education' in Barton D (ed) *Language and Education: An International Journal* (1991) 19-30 Clevedon, Avon, England

Dias R W M *Jurisprudence* (1964) Butterworths, London.

Dicey A V 'Introduction to the Study of the Law of the Constitution (10ed) (1959) Macmillan, London

Downing P, Lima S, Noonan M (eds) *The Linguistics of Literacy* (1992) John Benjamins Publishing Company, Amsterdam/Philadelphia

Douglas K J 'Latin : The Death Throes' (1987) 111 *De Rebus* 115

du Plessis L M 'A Significant Contribution to the Latin Debate' (1986) 103 *South African Law Journal* 452

du Plessis L M 'Statute Law and Interpretation' (1990) 25 *Law of South Africa* Butterworths, Durban

du Plessis L M 'Bill of Rights Interpretation in the South African Context (1993) 4 *Stellenbosch Law Review* 63

Edwards J *Language, Society and Identity* (1985) Blackwell, Oxford

Everatt D *Taking the Constitution to the People: Evaluating the Constitutional Assembly* Compiled for the Constitutional Assembly by Community Agency for Social Enquiry (CASE) 1997

Fairclough N *Discourse and Social Change* (1992) Polity Press Cambridge in association with Blackwell, Oxford

Fairclough N *Critical Language Awareness* (1992) Longman Group, Harlow, Essex

Ferguson C A 'Diglossia' in Hymes D (ed) *Language in Culture and Society* (1964) Harper and Row, New York 429

Fasold R *The Sociolinguistics of Society* (1984) Blackwell, Oxford

Fasold R *Sociolinguistics of Language* (1990) Blackwell, Oxford

Final Report of the Language Plan Task Group (LANGTAG) 1996 *Towards a national Language Plan for South Africa*

Fine D *How to Use Plain Language* (1995) Legal Education Action Project, University of Cape Town, Cape Town

Fish S *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literacy and Legal Studies* (1989) Clarendon Press, Oxford

Fish S *Doing What Comes Naturally* (1989) Duke University Press, North Carolina

Fisher S and Dundas Todd A (eds) *Discourse and Institutional Authority : Medicine, Education and Law* (1986) Vol 19 Ablex Publishing Corporation, New Jersey

Fishman J 'The Sociology of Language' in Giglioli P (ed) *Language and Social Context* (1972) Penguin, Harmondsworth 45

Flynn B W and Flynn J M 'The Evolution of Courts, Councils and Legislatives' in O'Barr W (ed) *Language and Politics* (1976) Mouton and Co, The Hague 165

Foucault M (translated by Sheridan Smith A M) *The Archaeology of Knowledge* (1972) Tavistock, London

Foucault M (translated by Hurley R) *History of Sexuality* 1 (1981) Penguin, Harmondsworth

Foucault A (translated by Sheridan Smith A M) *Discipline and Punish: The Birth of the Prison* (1979) Penguin, Harmondsworth

Fowler R, Hodge B, Kress G and Trew T *Language and Control* (1979) Routledge and Kegan Paul, London

Freire P and Macedo D *Literacy: Reading the Word and the World* (1987) Routledge and Kegan Paul, London

Fromkin V and Rodman R *An Introduction to Language* (1978) Holt, Rinehart and Winston, New York

Fuller L *The Morality of Law* (1964) Yale University Press, New Haven

Gardener M (ed) *The Annotated Alice* (1965) Penguin, Harmondsworth

Gee J *Social Linguistics and Literacies: Ideology in Discourse* (1990) The Falmer Press, Basingstoke

Gibbons J 'Introduction: Language Constructing Law' in Gibbons J (ed) *Language and the Law* (1994) Longman, Harlow, Essex 3

Gibbons J 'Introduction: Language and Disadvantage before the Law' in Gibbons J (ed) *Language and the Law* (1994) Longman, Harlow, Essex 195

Giglioli P P (ed) *Language and Social Context* (1972) Penguin, Harmondsworth

Gilbert S and Gubar S *The Madwoman in the Attic* (1979) Yale University Press, New Haven

Giles H and St Clair R *Language and Social Psychology* (1979) Blackwell, Oxford

Gilliland J *Readability* (1972) University of London Press Ltd

Givon T *Syntax: A Functional-Typological Introduction* (1984) Vol 1 John Benjamins Publishing Company, Philadelphia

Givon T (ed) *Syntax and Semantics* (1979) Vol 12 Academic Press, New York

- Goad H *Language in History* (1958) Penguin, Harmondsworth
- Gough I P 'Conflict of Interests' (1987) 111 *De Rebus* 121
- Goodrich P 'Law and Language: An Historical and Cultural Introduction' (1984) 11 No 2 *Journal of Law and Society* 173
- Goodrich P *Reading the Law: A Critical Introduction to Legal Method and Techniques* (1986) Blackwell, Oxford
- Goodrich P *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Thoughts* (1987) Macmillan, London
- Goody J *The Domestication of the Savage Mind* (1977) Cambridge University Press
- Goody J *The Interface Between the Written and the Oral* (1987) Cambridge University Press
- Gopen G 'The State of Legal Writing: *Res Ipsa Loquitur*' (1987) 86 No 2 *Michigan Law Review* 346
- Gopen G 'Let the Buyer in the Ordinary Course of Business Beware: Suggestions for Revising the Prose of the Uniform Commercial Code' (1987) 54 No 4 *The University of Chicago Law Review* 1178
- Grobler E, Prinsloo K, van der Merwe I (eds) *Language Atlas of South Africa* (1990) Human Sciences Research Council, Pretoria
- Guthrie J and Seifert M *Measuring Readership* (1984) Unesco, Paris
- Hahlo H R 'Here Lies the Common Law : Rest in Peace' (1967) 30 *Modern Law Review* 244
- Hahlo H R and Kahn E *The South African Legal System and its Background* (1968) Juta and Co, Cape Town
- Hall A *On Ideology* (1979) Centre for Contemporary Cultural Studies, Hutchinson London
- Halliday M A K 'Notes on Transitivity and Theme in English' (1967) 3 *Journal of Linguistics* 199
- Halliday M A K 'Language Structure and Language Function' in Lyons J L (ed) *New Horizons in Linguistics* (1970) Penguin, Harmondsworth 140
- Halliday M A K *Explorations in the Functions of Language* (1973) Edward Arnold, London
- Halliday M A K *Language as Social Semantic* (1978) Edward Arnold, London
- Halliday M A K *An Introduction to Functional Grammar* (1985) Edward Arnold, London
- Halliday M A K and Hasan R *Cohesion in English* (1976) Longman, London
- Harlech-Jones B 'Language Policy, Language Planning and Namibia' (1989) 4 No 3 *Language Projects Review* 2
- Hart H L A *The Concept of Law* (1961) Clarendon Press, Oxford
- Heine B 'Language Policies in Africa' paper presented at Conference on *Sociolinguistics in Africa* (1990) University of the Witwatersrand, Johannesburg

- Heine B 'On Planning Indigenous Languages : A Challenge' paper delivered at First International Languages in Contact and Conflict in Africa (LiCCA) Conference *Towards Language Planning in Post Apartheid South Africa* (1991) Pretoria, South Africa
- Hinds J 'Organizational Patterns in Discourse' in Givon T (ed) *Syntax and Semantics* (1979) Academic Press, New York 135
- Hirst G *Semantic Interpretation and the Resolution of Ambiguity* (1987) Cambridge University Press
- Hirst P *On Law and Ideology* (1979) Macmillan, London
- Hodge R and Kress G *Language as Ideology* (1979) Routledge and Kegan Paul, London
- Hodge R and Kress G *Language as Ideology* (2ed) (1993) Routledge and Kegan Paul, London
- Hofman J 'Language Rights, Legal Rights and Plain Language' in Prinsloo K, Peeters Y, Tuin J and van Rensburg C (eds) *Language, Law and Equality* (1993) UNISA, Pretoria
- Hopper P J 'Aspect and Foregrounding in Discourse' in Givon T (ed) *Syntax and Semantics* 213
- Hopper P J 'Ergative, Passive, and Active in Malay Narrative' in Klein-Andreu F (ed) *Discourse Perspectives on Syntax* (1983) Academic Press, New York 67
- Hunter M and Chambers A 'Save Latin for Your Clients Who are Ancient Romans' (1994) 1 *Explain* (Newsletter of the Centre for Plain Legal Language), University of Sydney
- Jakobson R *Selected Writings Poetry of Grammar and Grammar of Poetry* (1981) Vol 3 Mouton, The Hague
- Jolowicz H F *Historical Introduction to the Study of Roman Law* (1954) Cambridge University Press
- Kedar L (ed) *Power Through Discourse* (1987) Ablex Publishing Corporation, New Jersey
- Kennedy W P M *The Law and Custom of the South African Constitution* (1935) Oxford University Press
- Kidder R 'Language and Litigation in South India' in O'Barr W *Language and Politics* (1978) Mouton and Co, The Hague 235
- Kimble J 'Plain English - A Charter for Clear Writing' (1992) 9 No 1 *Thomas M Cooley Law Review* 1
- Kimble J 'The Many Misuses of *Shall*' (1992) 3 *The Scribes' Journal of Legal Writing* 61, West Publishing Company
- Kimble J 'Answering the Critics of Plain Language' (1994/5) 5 *The Scribes' Journal of Legal Writing* 13 West Publishing Company
- Kimble J 'Answering the Critics of Plain Language' (1995) 32 *Clarity* 8 Dorking Surrey
- Kimble J 'Clear Writing Pays: The Benefits for Lawyers and Clients' paper delivered at the American Bar Association (ABA) Annual Meeting Committee on *Communication Skills, Section of Legal Education and Admissions to the Bar* (1995) Chicago, Illinois

- Kipling R *Just So Stories* (1918) Macmillan and Co, London
- Klein-Andreu F (ed) *Discourse Perspectives on Syntax* (1983) Academic Press, New York
- Knapp S and Michaels W B 'Against Theory' in Mitchell W T J (ed) *Against Theory, Literary Studies and the New Pragmatism* (1982) University of Chicago Press
- Knight P 'Comments on a New Plain Language Law' (1995) 32 *Clarity* 22, Dorking Surrey
- Kress G 'Ideological Structures in Discourse' in van Dijk T (ed) *Handbook of Discourse Analysis* (1985) Vol 4 Academic Press, London 27
- Kress G *Linguistic Processes in Sociocultural Practice* (1985) Oxford University Press
- Kriel M 'The Future of Latin in South Africa', Paper delivered at proceedings of the 18th Biennial Conference of the Classical Association of South Africa (1989) Rhodes University, Grahamstown
- Krige D, Cairns S, Makalima B and Scott D *The Education Atlas of South Africa* (1994) Indicator Press Education Foundation, Durban
- Kurzon D *It is Hereby Performed...Explorations in Legal Speech Acts* (1986) John Benjamins, Amsterdam/Philadelphia
- Labov W 'The Study of Language in its Social Context' in Giglioli P (ed) *Language and Social Context* (1992) Penguin, Harmondsworth 283
- Leech G and Svartvik J *A Communicative Grammar of English* (1975) Longman, Harlow, Essex
- Leech G, Deuchar M and Hoogenraad R *English Grammar for Today* (1982) Macmillan, London
- Leibowitz A 'Language and the Law : The Exercise of Political Power through Official Designation of Language' in O'Barr W (ed) *Language and Politics* (1976) Mouton and Co, The Hague 449
- Levinson S *Pragmatics* (1983) Cambridge University Press
- Longacre R E 'The Paragraph as a Grammatical Unit' in Givon T (ed) *Syntax and Semantics* (1979) Academic Press New York 115
- Love N 'The Fixed Code Theory' (1985) 5 No 1 *Language and Communication* 1
- Lubbe W J G 'Latyn en die Regstudent' (1987) 111 *De Rebus* 169
- Lyons J L (ed) *New Horizons in Linguistics* (1970) Penguin, Harmondsworth
- Lyons J L *Semantics* (1977) Vols 1 and 2 Cambridge University Press
- Lyons J L *Language Meaning and Context* (1981) Fontana, London
- Lyons J L *Language and Linguistics* (1981) Cambridge University Press
- Maley Y 'The Language of Legislation' (1987) 16 *Language in Society* 25
- Maley Y 'Language of the Law' in Gibbons J (ed) *Language and the Law* (1994) Longman, Harlow, Essex 11
- McCabe C *James Joyce and the Revolution of the Word* (1978) Macmillan, London

- McCLean D and McCormick K 'English in South Africa 1940-1993' in Fishman J, Conrad A and Rubal-Lopez A (eds) *Post-Imperial English* (forthcoming publication 1996) Mouton de Gruyter
- McClennan D M *On Ideology* (1975) Fontana/Collins, London
- McCormick K M 'Language in Post Apartheid South Africa', Paper delivered at a conference on *The Consultative Conference on Language Policy* (1990) University of the Witswatersrand
- McCormick K M 'Code Switching, Code Mixing and Convergence in Cape Town' in Mesthrie R (ed) *Language and Social History* (1995) David Philip, Cape Town 193
- McKenzie M 'What I've Always Known but Never Been Told : Euphemisms, School Discourse and Empowerment' in Fairclough N (ed) *Critical Language Awareness* (1992) Longman, Harlow, Essex 223
- McMahon A *Understanding Language Change* (1994) Cambridge University Press
- Meek M *On Being Literate* (1991) The Bodley Head Children's Books, London 38
- Meintjes E 'Translating for a New and Progressive South Africa' (1991) 6 No 12 *Language Projects Review* 35
- Mellinkoff D *The Language of the Law* (1963) Little, Brown and Company, Boston and Toronto
- Mesthrie R (ed) *Language and Social History* (1995) David Philip, Cape Town
- Milner A *Contemporary Cultural Theory* (1994) University College Press, London
- Mitra A 'The Empire is Dead but Long Lives the Imperial Lingo' (1989) 4 No 1 *Language Projects Review* 18
- Morris C 'Law, Reason and Sociology' (1958) 107 *University of Pennsylvania Law Review* 147
- Norris C *Deconstruction : Theory and Practice* (1982) Methuen and Co, London and New York
- O'Barr W *Language and Politics* (1976) Mouton and Co, The Hague
- O'Barr W *Linguistic Evidence: Language, Power and Strategy in the Courtroom* (1982) Academic Press, New York
- Odell S J 'The Powers of Language: A Philosophical Analysis' in Kedar L (ed) *Power Through Discourse* (1987) Ablex Publishing, New Jersey 19
- Olsen D 'Literacy and the making of the Western mind' in Verhoeven (ed) *Functional Literacy* (1994) John Benjamins Publishing Company, Amsterdam/Philadelphia 135
- Ong W 'Writing is a technology that restructures thought' in Downing et al. (eds) *The Linguistics of Literacy* (1992) John Benjamins Publishing Company, Amsterdam/Philadelphia 293
- O'Reagan C 'No More Forced Removals? An Historical Analysis of the Prevention of Illegal Squatting Act' (1989) 5 *South African Journal on Human Rights* 361
- Orwell G *Nineteen Eighty Four* (1954) Penguin Books, Harmondsworth
- Orwell G *Collected Essays* (1970) Penguin, Harmondsworth

Perrott D L 'The Logic of Fundamental Rights' in Bridge J W et al (eds) *Fundamental Rights* (1973) Sweet and Maxwell, London

Pinker S *The Language Instinct* (1994) Penguin, Harmondsworth

Prinsloo K, Peeters Y, Turi J and van Rensburg C *Language, Law and Equality* (1993) UNISA, Pretoria

Prinsloo M and Breir M (eds) *The Social Uses of Literacy* (1996) SACHED Books, South Africa, John Benjamins Publishing, Amsterdam

Quirk R *Words at Work* (1986) Longman, London

Reagan T G 'Language Planning and Language Policy in South Africa: A Perspective on the Future' in Mesthrie R (ed) *Language and Social History* (1995) David Philip, Cape Town 319

Redish J 'The Plain English Movement' in Greenbaum S (ed) *The English Language Today* (1985) Pergamon, New York 125

Redgment J *The Law Student's Companion* (1984) Juta and Co, Cape Town

Rheinstein M (ed) *Max Weber on Law in Economy and Society* (translated Shils E and Rheinstein M) (1954) Harvard University Press, Cambridge, Massachusetts

Romaine S *Language in Society* (1994) Oxford University Press, New York

Roots Marketing and Research *The new constitution: Research Findings* (1995) Cape Town

Rosen H 'The politics of writing' in Kimberley et al. (eds) *New Readings. Contributions to an Understanding of Literacy* (1992) A and C Black, London 119

Rule S, Fenyes K, de Castro J and Everatt D *A New Constitution for a New South Africa: Evaluating National Constitution Week - Quantitative and Qualitative Findings* (1997) Community Agency for Social Enquiry (CASE) Report, Johannesburg

Sampson G *Making Sense* (1980) Oxford University Press

Sarup M *An Introductory Guide to Post-Structuralism and Post-Modernism* (1988) Harvester Wheatsheaf, Hemel Hempstead

Sayers P 'Making it Work - Communications Skills Training at a Black Housing Association' in Fairclough N (ed) *Critical Language Awareness* (1992) Longman Group, Harlow, Essex 91

Schank P C 'The Only Game in Town: Contemporary Interpretive Theory, Statutory Construction, and Legislative Histories' (1990) 82 No 3 *Law Library Journal* 419

Schiller J E 'Stammler and Kelsen: Theories of Legal Science' 1979 *Acta Juridica* 347

Schuring G K 'Towards a New Language Policy for South Africa: The Status of the Indigenous Languages' paper delivered at Languages in Contact and Conflict in Africa (LiCCA) conference *Towards Language Planning for a Post Apartheid South Africa* (1991) Pretoria

Searle J R (ed) *The Philosophy of Language* (1971) Oxford University Press

Searle J R *Expression and Meaning* (1979) Cambridge University Press

- Segalowitz S J and Gruber F A *Language Development and Neurological Theory* (1977) Academic Press, New York
- Shapiro M (ed) *Language and Politics* (1984) Blackwell, Oxford
- Shepherd V *Playing the Language Game* (1993) Open University Press, Buckingham
- Smit P C 'Latyn: Die Gotterdammerung?' (1982) *De Jure* 267
- Smith A *The Mind* (1984) Hodder and Staughton, London
- Spender D *Man Made Language* (1980) Routledge and Kegan Paul, London
- Spindler G (ed) *Doing the Ethnography of Schooling* (1982) Holt, Rinehart and Winston
- Spiro E *Law of Parent and Child* (1985) Juta and Co, Cape Town
- South African Law Commission, Project 90, Harmonisation of the Common Law and the Indigenous Law: Draft Report on Customary Marriage, 1988.
- South African Survey 1996/97, South African Institute of Race Relations (1997), Johannesburg
- State of Victoria, Law Reform Commission *Plain English and the Law* (1987) Report 9 Government Publisher, Melbourne
- Steytler N C 'Implementing language rights in court: the role of the court interpreter in South Africa' in Prinsloo, Peeters, Turi and van Rensburg (eds) *Language, Law and Equality* (1993) UNISA Pretoria
- Stone J 'A Primer on Codification' 1955 *Tulane Law Review* 307
- Stewart Smith A E 'The Value of Latin in the Legal Curriculum' (1991) 283 *De Rebus* 503
- Street B *Literacy in Theory and Practice* (1984) Cambridge University Press
- Street B 'Cross-cultural perspectives on literacy' in Verhoeven (ed) *Functional Literacy* (1994) John Benjamins Publishing Company, Amsterdam/Philadelphia 95
- Suzman H *In No Uncertain Terms* (1993) Jonathan Ball, Johannesburg
- Swan M *Practical English Usage* (1995) Oxford University Press
- Talbot M 'The Construction of Gender in a Teenage Magazine' in Fairclough N *Critical Language Awareness* (1992) Longman Group, Harlow, Essex 174
- Tallis R *Not Saussure: A Critique of Post-Saussurean Literary Theory* (1988) Macmillan, Houndmills
- Tannen D 'Remarks on Discourse and Power' in Kedar L (ed) *Power Through Discourse* (1987) Ablex Publishing Corporation, New Jersey 3
- Taylor C T *Theories of Meaning* (1982) Oxford University Press
- Thomas R 'Plain English and the Law' (1985) *Statute Law Review* 139
- Thompson J B *Studies in the Theory of Ideology* (1984) Oxford Polity Press

- Traves P 'Reading: the entitlement to be "properly literate"' in Kimberley et al. (eds) *New Readings. Contributions to an Understanding of Literacy* (1992), A and C Black, London 77
- Trubek D M 'Max Weber on Law and the Rise of Capitalism' 1972 *Wisconsin Law Review* 720
- Tubbs S and Moss S *Interpersonal Communication* (1977) Random House, New York
- Turk C and Kirkman J *Effective Writing* (1982) E and F N Spon Ltd London
- Turpin C *British Government and the Constitution* (2ed) (1990) Weidenfeld and Nicolson, London
- Verhoeven L *Functional Literacy* (1994) John Benjamins Publishing Company, Amsterdam/Philadelphia
- Viljoen F 'Look Who's Talking in the Courtroom, Too!' (1992) 109 *South African Law Journal* 64
- Visser C 'Observationes de *Ex Parte Friedgut*: Only Injury Time Left for the Latin Requirement' (1983) 100 *South African Law Journal* 378
- Walker A G 'Linguistic Manipulation, Power and the Legal Setting' in Kedar L (ed) *Power Through Discourse* (1987) Ablex Publishing, New Jersey
- Wardhaugh R *Languages in Competition* (1987) Blackwell, Oxford
- Webb V (ed) *Language in South Africa: An input into language planning for a post-apartheid South Africa* (1995) Licca (SA) Report, University of Pretoria, Pretoria
- Werle G and Wandres T *Auschwitz vor Gericht* (1995) C H Beck, Munich
- Whorf B L *Language, Thought and Reality* (1956) MIT Press, Cambridge, Massachusetts
- Wiechers M 'Administrative Law and the Benefactor State' 1993 *Acta Juridica* 248
- Williams J M *Style: Ten Lessons in Clarity and Grace* (1985) Scott, Foresman and Co, Boston
- Wodak R (ed) *Language, Power and Ideology: Studies in Political Discourse* (1989) John Benjamins, Amsterdam/Philadelphia
- Yambi J 'Literacy and development in Africa: the case of Tanzania' in Verhoeven (ed) *Functional Literacy* (1994) John Benjamins Publishing Company, Amsterdam/Philadelphia 291
- Zimmermann R 'Latin for Lawyers' (1986) 228 *De Rebus* 605

INDEX OF CASES

Jaga v Dönges N.O. and Another 1950 (4) SA 653 (A)

Smith Ex Parte 1982 (1) SA 601 (C)

Barnard Ex Parte 1982 (2) SA 70 (N)

Friedgut Ex Parte 1983 (2) SA 336 (T)

University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (A)

Lynn and Others Ex Parte 1987 (1) SA 797 (N)

Natal Law Society Ex Parte 1987 (2) SA 44 (N)

University of Cape Town

INDEX OF STATUTES

Divorce Act 70 1979 s4(1) - (4)

Black Administration Act 38 1927 s 23(10) as amended in GN R200 1987: regulations 2(b), (c), (d), (e)

Law of Evidence Amendment Act 1988 s1(1), (2), (3) and (4)

University of Cape Town