

HISTORICAL BACKGROUND TO ENGLISH LEGAL LANGUAGE

ABSTRACT

The article attempts to provide an explanation why the English legal language is so complex and so difficult to understand especially for the lay people. Also mentioned are the attempts that have been made to simplify it. The paper also describes its development throughout history. It maintains that legal English is the result of history and political and social processes ongoing in the given historical period. This language is basically the reflection of the social and political conditions of the given historical period, and each period has left its mark on the current form of the language at issue. It reflects the influence of Anglo-Saxon mercenaries, Latin-speaking missionaries, Scandinavian and Norman war tribes. As it is highlighted further in the text, English has been used in various types of legal documents at different times. Last wills and testaments started to be drafted in English around 1400. Laws were written in Latin until around 1300, in French until about 1485, in English and French for a few more years and exclusively in English since 1489. The paper contains a number of the words and expressions related to law which are used even today and provides their etymology, at least as far the language of its origin is concerned. Also provided are expressions that were replaced with new ones, simpler, more understandable legal terms within reforms.

KEYWORDS: *English legal language, Old English, Latin, Law French, history, social and political development, linguistics*

INTRODUCTION

It is widely known that the language of law, and not only English, is in all its complexity the result of conservatism in the legal profession and its respect for history and tradition. Bázlik and Ambrus (2008, p. 9) state that the language used by lawyers is so difficult to understand that attempts have been made to simplify it. As a result, the Plain English Movement, part of the consumer movement, grew out of the notion that people should be able to understand important consumer documents. The movement was inspired by a revised promissory note introduced by Citibank in the 1970s, and eventually led to a fair amount of plain English legislation. Similar reforms occurred in countries like Australia and the United Kingdom (Tiersma, 1999). In this connection, Vystrčilová (2000, pp. 92–93) notes that “On 26 April 1998, the legal language and traditions that have characterized the British courts for decades were rejected by a new set of regulations published in the 800-page document issued by the Lord Chancellor’s Office. Legal terms of Old Latin and French, such as *writ* or *plaintiff* have been replaced by the so-called „plain legal English“, i.e. simpler, more understandable legal terms”. For instance, by the Woolf Reforms of 1999, almost all civil actions, other than those connected with insolvency, are now commenced by the completion of a “claim form” as opposed to the obtaining of a “writ”, “originating application”, or “summons”; or the party that initiates the civil action before the court has, since the introduction of the Civil Procedure Rules in 1999, been known as a “claimant”, as opposed to a “plaintiff”.

One of the reasons why the English legal language is conservative is the fact that the primary source of English law is the legal precedent, i.e. previous court rulings, some of which may extend over several centuries, and therefore carry linguistic features that, although not used in today’s English, are closely interconnected with the language of law and therefore continue to be cited and used in new documents and laws. This is confirmed by the words of Bázlik and Ambrus (2008: 12) saying that „Even in this millennium it is not unusual for the judge in court or other parties to quote the old records of court proceedings written down in times when English was governed by grammar rules other than those governing contemporary English“.

Therefore, the author’s aim is to highlight the development of this complicated phenomenon, which has gone through different phases of

development as a reflection of the social and political conditions of the given historical period, and each period has left its mark on the current form of the English legal language.

LEGAL ENGLISH

As it has been pointed out above, legal English is indeed the result of the history and political-social process going on at the time. It reflects the influence of Anglo-Saxon mercenaries, Latin-speaking missionaries, Scandinavian and Norman war tribes, all of which left a trace not only on England and its political order but also on the language of its law. For instance, some of examples are Old Norwegian words such as *gift*, *loan*, *sale* and *trust*. Also, the word *law* derived from an Old Norse noun *log*, which meant “something laid or fixed” (Bowen, 2015).

The beginnings of the English language date back to around 450 AD, when Anglo-Saxon, Jute, and Frisian ships were coming from continental Europe to the coasts of England. These German tribes spoke similar dialects, from which a language has been developed we refer to as the Anglo-Saxon or Old English. As Šošková states (Vyšný, Puchovský and Šošková, 2013, p. 201), for instance, The Book of Laws, issued by Alfred the Great, where the customs of all three major Anglo-Saxon tribes are collected and law newly made by the King as well, is written in Old English. Despite the fact that Anglo-Saxons did not recognize the profession of lawyer, a certain kind of legal language was developed, the remnants of which are commonly found in the current legal terminology. These are words such as *bequeath*, *goods*, *guilt*, *manslaughter*, *murder*, *oath*, *right*, *sheriff*, *steal*, *swear*, *theft*, *thief*, *ward*, *witness* a *writ*. In addition to the vocabulary, the Anglo-Saxon influence is also apparent in the existence of *alliteration*, which is still sporadically present in the English legal language. Alliteration is a stylistic literary figure that is created by repeating the same or sound-like sounds. Alliteration is mostly used in poetry, but it is also well-founded in legal writings, as such phrases are easier to remember. For example, even today, the phrase *to have and to hold* is part of many marriage vows. The alliteration in the form of *rest*, *residue* and *remainder* appears in many wills, and further illustrations that remain to this day are *any and all*, *each and every* or *both and beloved*, which, as Tiersma (1999) notes, are loved

by the lawyers. By generating such binomial pairs (a sequence of two or more parallel words or phrases in the same grammatical category), the linguistic demands of the Anglo-Saxon laws increased, resulting in a more complex legal language, and may lead to the view that a complex language is to some extent a reflection of gradually growing and more complex social relationships.

The Anglo-Saxon population did not only use Old English as the language of law, but also Latin, which, although already established in England during the Roman occupation, was strengthened only after the arrival of Christian missionaries in 597. Soon, it was not only the language of the Church but also the education and schooling in general. Christianity represented by the Church was synonymous with literacy, and although the population did not understand the Latin language, the Latin laid down a general standard of written communication, which had a tremendous impact on strengthening the legal language.

One of the Latin terms that entered the legal language during this period is the term “clerk” (someone who can write), and the words “cleric” or “clergy” are also derived from that word. For centuries the clergy enjoyed some sort of immunity, for instance, in order for someone to escape the gallows, it was enough to prove one’s education by reading an extract – a verse from the Bible (sometimes also called a “neck verse”).

As far as the relation to English law is concerned, Latin was mostly used as the language of court records and later laws. Because only the scholars and educators mastered the Latin, it never became a language of litigation or disputes. From these times comes the Latin expression *versus* in the case of citation of cases.

Another significant socio-political event that significantly influenced and marked the language situation of the contemporary England was its conquest by the Normans in 1066 when the Norman Duke William, called the Conqueror who made demands on the English throne, defeated England in the battle of Hastings. All the prominent positions of England were occupied by French-speaking Normans, and so French became the language of power and court, and English was used only by lower (broad) levels of the population. Basically, all the words regarding government matters are of French origin. French also became the official language of court proceedings,

which results in the fact that many words commonly used in the legal field today are rooted in this period. They are, for example, terms such as *property*, *estate*, *chattel*, *lease*, *executor*, *tenant*, etc. (Haigh, 2011).

Nonetheless, the Normans continued to use Latin as a language for making formal records and laws, and as said already, Latin never became the language of legal pleading or debate, because the broad levels of the population would not understand it. Latin used as the legal language was called “Law Latin”, and in its vocabulary, it also adopted different terminology of French origin as well as English expressions, in cases where clerks did not speak Latin. As Tiersma (1999) notes, legal maxims, even today, are written in Latin, which gives them a kind of a sense of nobility and authority. The names of the applications for prerogative writs such as *mandamus*, *certiorari*, and the terminology of the citation of cases (*versus*, *ex rel.*, etc.) are still used in Latin (Mičková, 2015, p. 33), perhaps as a reflection of the use of Latin for court orders and court records until the beginning of the 18th century.

Latin, as the language of court records and laws, was replaced by the law governing the use of English in courts of law – *English in the Proceedings in Courts of Justice Act 1730*, in spite of the fact that it has never been the language of court proceedings or debates because the broad population would not understand.

Laws written in French began to appear some 200 years after the conquest of England, i.e. around 1275, and remained in this form until around 1480 and, starting in 1310, almost all laws passed by Parliament were in French. The use of French as the language of court proceedings was linked to the introduction of so called “Royal Courts” – Assizes, by Henry II in 1166. Assizes were run in French, and they were so popular that they slowly pushed English out of court. It was in this linguistically complicated period that lawyers began to use synonyms in which combinations of words derived from different languages appeared: *cease and desist*, *will and testament*, *peace and quiet*, etc. For instance, *cease* is the Latin word, *desist* French, *will* comes from Old English, *testament* is a French word, *peace* is the Latin word, and *quiet* comes from French. Exceptionally, there is a triple combination of words in legal texts, such as, for example, *give, devise and bequeath* (Eng., Fr., Lat.); *rest, residue and remainder* (Eng., Fr., Lat.). The use of these combinations

was intended to ensure a better understanding of the text for all levels of the population and was aimed at terminological clarity.

In time the pleadings changed from oral to written, so the texts were subject to increased scrutiny, and those who did not submit their pleadings in the prescribed form were excluded from the proceedings. Cases have often failed due to minor linguistic inaccuracy. As a result, a new class of professionals – lawyers has emerged. These created legal texts in all three languages. The lawyer became a guarantee of accurate formulation, which was a prerequisite for a successful litigation. This new social group valued its services according to the number of words, so naturally it used words from all the languages then used so that the text would be as “meaty” as possible, but also, so that it would sound learned and therefore mainly Latin terms were used. From this period, the terms *adjacent*, *frustrate*, *inferior*, *legal*, *quiet*, *subscribe*, etc., or phrases such as *ad hoc*, *de facto*, *bona fide*, *inter alia*, *ultra vires*, etc. come, which are still part of the current legal texts.

Interestingly, while the French saw an increase in use for the needs of the English legal system, its use as a society’s everyday language was declining. As stated by Tiersma (1999), in 1272 Eduard I ascended the throne with an English name and speaking English at least as well as French. From this moment on, the French was gradually marginalized to argot used by lawyers, or as a legal French – “Law French”, under which name it is known. In this context, the English historian J. H. Baker (1990) writes that “outside the legal sphere, Anglo-French was in decline after 1300. Even the royal household, the last bastion of French, moved to English at the beginning of the 15th century”.

Attempts to abolish French as the language of court proceedings have failed. The possible reasons for preserving Law French after it was rejected as a living language can be perhaps explained by several facts, on the one hand, it allowed for more accurate communication, especially with its broad professional vocabulary; there was a danger that laymen would read legal texts without the necessary professional guidance; in the conservative profession; and in the likely efforts of lawyers to justify the amount of service charges and to monopolize the provision of legal services (Tiersma, 1999). If nothing else, according to the author quoted, these facts reflect the conservatism of the profession at a given time.

A significant interference with the use of Law French was the adoption of the Act in 1362, *The Statute of Pleading*, which provided that all court proceedings must be held in English (but recorded in Latin). As stated by Tiersma (1999), this law condemned French as “unknown in the Empire” and complained that the parties in question “have no knowledge or understanding of what is said to their advantage or against them by their representatives or other applicants”. The law required all applications to be “*pleaded, shewed, defended, answered, debated and judged in the English Tongue*. It is a paradox that the law itself was written in French. However, the representatives of the legal profession completely ignored this statute. R. Haigh (2011) states that “English was adopted for different kinds of legal documents at different times. Wills began to be written in English in about 1400. Statutes were written in Latin until about 1300, in French until 1485, in English and French for a few years, and in English alone from 1489”.

Complaints against the use of Law French began to appear more frequently, and, as Tiersma (1999) points out, Thomas Cranmer, the first Protestant Archbishop of Canterbury, recalled in 1549 that “I have heard suitors murmur at the bar cause their attorneys pleaded their cause in the French tongue which they understood not”. Around a century later, Puritans took the power, executed the King, and in 1650 adopted a law that provided for all case reports and books of law to be written exclusively in English. However, in 1660, after the restoration of the monarchy, this statute was abolished and the language situation returned to the old track. Lawyers began to use Law French again and continued to do so for several decades.

Since French was the dominant language of the legal profession for the entire centuries, it has had a tremendous impact on the legal language. A huge number of legal terminology is of French origin, of which we mention at least the basic ones, which are also used in current practice: *appeal, attorney, bailiff, bar, claim, complaint, counsel, court, defendant, demurrer, evidence, indictment, judge, judgment, jury, justice, party, plaintiff, plea, plead, sentence, sue, suit, summon, verdict* and *voir dire*.

From the point of view of grammar, French had a short-lived influence on the English language, but its remnants continue to exist in official and legal terminology, where the position of substantive and adjective has

been changed, e.g. *attorney general*, whereas in English, as well as in other Germanic languages, the word order is the opposite, i.e. the adjective precedes a substantive, e.g. German *Generalanwalt* – literal meaning *general attorney* – principal legal advisor to the government (in the UK). Similar terms are, for example *heir apparent*, *court martial*, *body politic*, *fee simple absolute*, *letters testamentary*, *malice aforethought*, *solicitor general*, etc.

Law French also allowed the creation of words with the ending *-ee* to indicate the person who is the recipient or the object of the act, e.g. *lessee* – tenant (*asylee*, *condemnee*, *detainee*, *expellee*, *tippee*, etc.) in contrast to e.g. *lessor* – landlord.

As time went on, French of the lawyers began to be limited, and it was often the case that more and more English words appeared in the French text. There is a notorious case in England dating back to 1631, when the sentenced person cast a piece of brick into a judge. The record from the proceedings stated that: “*he ject un brickbat a le dit justice, que narrowly mist*”. However, the judge did not consider it funny and sentenced the convict to amputation of his hand and for the “*immédiatement hange in presence de Court*” (Tiersma, 1999).

Such French-English formulations ended in 1731 when the Parliament definitively banned the use of French in court proceedings, that is to say, 600 years after England’s Norman Conquest and 300 years after the French ceased to be the official language used also by the English Royal Court.

To document the reality of the impact of the three languages used at the same time on current legal English, let us give an example of a *force majeure* clause: *Neither party shall be liable to the other for failure to perform or delay in the performance of its obligations caused by any circumstances beyond its reasonable control*. The sentence contains 28 words, 17 of which come from Old English, 7 from Old French and 4 from Latin. From the words of Old English, 9 is prepositions (e.g. *the*, *to*, *for*, *in*, *by*). All important legal terms (e.g. *party*, *liable*, *obligations*, *reasonable*, *perform*) come either from Old French or Latin. Speaking by R. Haigh’s words (2011), if we use analogy with a computer, English is a “hardware” that gives the sentences a grammatical structure, while French-Latin terminology is a “software” that is a carrier of the legal meaning.

CONCLUSION

Finally, it should be noted that the current form of the English legal language is not an artificial creation of lawyers with the aim of monopolizing the profession, or creating a monopoly for the provision of legal services. This language is the natural result of various socio-political, linguistic and cultural influences, as well as of the gradual increase in the complexity of the entire English legal system.

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