

# Acta universitatis palackianae olomucensis facultas iuridica

[Law](#), [Common Law](#)



ACTA UNIVERSITATIS PALACKIANAE OLOMUCENSIS FACULTAS IURIDICA 1 —  
1999 THE LANGUAGE OF THE LAW Characteristics of the courtroom discourse  
Eva Pálková; Introduction In all societies, law is formulated, interpreted  
and enforced: there are codes, courts and constables. The greater part of  
these different legal processes is realised primarily through language. “  
Language is medium, process and product in the various arenas of the law  
where legal texts, spoken or written, are generated in the service of  
regulating social behaviour. "1 In the Anglo-Saxon common law system, a  
discrete legal language has been apparent since post-Conquest England,  
which in many essentials has persisted to the present day. A description and  
explanation of the present-day forms and organisation of the language of  
English needs to begin with a brief account of its origin. The common law  
The institution of English law, as we know it, dates from the Norman  
Conquest. There was English law before the Norman Conquest but there was  
no distinct profession, no centralisation of justice. These things plus a wealth  
of legal concepts the Normans brought with them and gradually established  
in Britain. The written language of the law after the Conquest was at first  
Latin and English. Latin was predominant. By the time William the Conqueror  
died, Latin was the language of formal written documents. It was not  
classical or medieval Latin but law Latin that included many latinised English  
and Old French words. By the fourteenth century, French had taken over  
from Latin as the language of the Year Books (the earliest law reports) and  
statutes, strangely enough when French as a language for communication  
was dying out and the English language was rapidly replacing it. It was not  
until 1650, by An Act for Turning the Books of the Law, and all Processes and

Proceedings in Courts of Justice into English (455 (1650) 11 Acts and Ordinances of the Interregnum) that English became the official language of the law. By that time a host of Old English, Latin, Norman-French and Middle English terms had become fixed in the vocabulary of lawyers. Over the centuries since then there has been 1. Yon Maley: The language of the law, s. 11, in: J. Gibbons: Language and the Law, Essex Longman 1994. 119 a continual process of Anglicisation, but particularly in vocabulary, in the specialised, technical lexicon of the law, the effect of its varied origins is still apparent. It would be a mistake to suggest that the language of the law reached its definitive form in the Middle Ages and has remained unaltered ever since. It has been affected by the great moves of culture and taste that differentiate one period of history from another. Probably it reached its heights in the early eighteenth century. Since then there has been a slow but perceptible process of simplification. Despite these efforts at simplification and clarification, the gap between legal discourse and everyday discourse is still very wide. Present day legal discourse retains its identity as a highly specialised and distinctive discourse type or genre of English. The legal discourse of the legal systems of England, Canada, the United States of America, Australia and New Zealand, which are derived from the English common system, are similar. The expressions of this discourse type are to be found in a variety of legal situations. There is not one legal discourse but a set of related legal discourses. Each has a characteristic flavour but each differs according to the situation in which it is used. There is judicial discourse, the language of judicial decision, either spoken or written, which is reasonably flexible and varied but none the less contains recognisably legal

meanings, in predictable patterns of lexicogrammar. These judicial decisions, collected in reports, make up what is known in the English-derived common law system as case law. There is courtroom discourse, used by judges, counsel, court officials, witnesses and other participants. There is the language of legal documents: contracts, regulations, deeds, wills, Acts of Parliament, or statutes, legal or formal. And there is the discourse of legal consultation, between lawyer and lawyer, lawyer and client. Courtroom discourse — power and constraint Before a case can be decided it must be argued in court before a magistrate, a judge or a bench of judges. The courtroom is the forum whose basic and unavoidable role is to decide, to make a decision, on any issue brought before it concerning the legality of social behaviour, either criminal or civil. The behaviour may invoke either a common law or a statutory rule. The courtroom is for most people a strange and alien setting. Anyone who visits a court for the first time and witnesses a typical day or even an hour's proceedings is usually overcome by a sense of having ventured into an arcane and immensely busy world — particularly if the court in question is a lower, i. e. magistrate's or local court. Some participants are noticeable by their verbal activity (counsel and witness), or by their typical position (judge or magistrate/s), and in some cases by their clothing, i. e. robing (judge, counsel). Others are almost entirely silent (jury). Around them scurry a host of apparently lesser characters, whispering, conferring, taking notes or just listening (court officials). There may be an armed police officer, a reminder of the fact that verbal justice sometimes needs reinforcement. Everyone, except the newcomer — and frequently the witnesses — seem to know what he or she should do. 120 The judge or

magistrate(s) occupies a dominant, focal position, usually (in England and Australia) sitting under an insignia-topped canopy which marks their position as a representative of sovereign justice. The opposing parties, each represented by counsel, face the judge or magistrate ("the bench"), each occupying a delimited area and space of table. Of the chief participants, only counsel move freely in the inner space of the court. If there is a jury, its members sit together on one side. Many observers have seen a metaphor here of trial-as-battle where two opponents seek to secure supremacy over each other, each represented by his champion, the counsel, whose task it is to joust before an impartial audience (the judge or/and jury) and secure a decision. There must be a winner. The underlying institutional structure, which allows such a metaphor to be made is the adversarial system of common-law trial proceedings. The European, i. e. continental system, is differently structured, employing what is called an "inquisitorial" system. The oral trial is the centrepiece of the adversary system and the rules, which regulate the oral proceedings are essentially verbal: they are the rules of evidence and other exclusionary rules which constrain the semiotics of the situation. These are the rules which are implied by the adversary system and which are intended to make it not only workable but equitable. They stipulate what must be said, what may be said — and of course by whom and in what order. The ideational, interpersonal and textual meanings of this discourse type are strictly constrained. Perhaps the most common perception, and criticism of courtroom discourse concerns the inequalities of power which underlie these rules of speaking, and which are symbolised in the physical layout and trappings of the courtroom itself. All participants in

the process are to some extent constrained but differentially. The situation is essentially hierarchical, extending from the judge or magistrate, at the top and most powerful, through the counsel to the witness who is commonly seen by critics of the trial process as being powerless. Power is exercised primarily by those who have the most right to speak and to choose, control and change topics. The judge has greatest power: his rulings on evidence and procedure are decisive. Conventionally, however, in a trial or even in a lower court, the judge or magistrate intervenes minimally through the examination process (whereas in the inquisitorial model, it is the judge who asks questions). The elicitation of the relevant facts in the case is achieved by counsel questioning the defendant or plaintiff and the witnesses, who are constrained to answer questions only and not volunteer information. Counsel control topic management: they choose and pursue and change topics, subject always to the laws of evidence and considerations of relevance. Silence is an option which the common law system allows, but its legal and psychological strategic force is equivocal. In the counsel-witness dyad, counsel and witness directly to each other, but neither party is speaking exclusively or even primarily to each other. The jury (or the judge in a nonjury trial) is the non-interactive participant, the indirect but crucially important target of the exchange of meanings. The essentially discursal nature of court proceedings has led to the rise of another, perhaps more powerful metaphor than that of the trial as battle that is the 121 metaphor of trial as story-telling. The initial impetus in this area came from Bennet and Feldman's pioneering study (1981) in which they claimed that in a criminal trial a jury interprets the evidence presented to it from the opposing sides

and constructs a story. That is to say the jury accepts from the opposing versions or “stories” of the event placed before them a single story which fits with their everyday knowledge of what people are likely to do and should do. It is true that in many cases, counsel, particularly defending counsel, may be more concerned to throw doubt on the prosecution story than to construct an alternative version. The trial-as-story metaphor, despite a certain vagueness about the linguistic and discoursal criteria for storiness, has proved to be a very fertile and valuable one and has been the framework around which a great deal of analysis and comment has been made of courtroom language from writers in law and linguistics. Courtroom discourse

Courtroom discourse is spoken and interactive. The adversarial nature of the trial process is the immediate determinant of its structural elements: the different stages which structure the proceedings. These ensure that for each witness there will be an examination-in-chief, by his own supportive counsel (this is called direct examination in USA) a cross-examination, by the adversarial counsel, and then a re-examination from the supportive counsel, if he thinks it necessary. Each counsel typically, in a trial of any weight, will open his case, by a summary, an opening address, and will close the case, after all his witnesses have been examined, by a closing address. In a trial before a jury (all criminal trials and some civil proceedings) there will be as well a summation or direction from the judge, directed to the jury. These different stages are obligatory elements of the generic structure. There may be as well other optional kinds of interactive episodes, for example judge to counsel, judge to witness, counsel to counsel, judge to jury. Although each stage is crucial to the overall process, the examination stage is usually

perceived to be the core of the trial process. It is the stage which has attracted the greatest attention from those legal and linguistic observers concerned with the distribution of power and with forensic strategies.

Counsel: And I suppose it would be fair to say that as they came to recognise the extent of your knowledge about overseas drugs, so they became more and more interested? Witness: No, that would be incorrect. They already

knew where I stood, much prior to July of 1982. Counsel: You say that their own intelligence was sufficient to let them know how important you were before you spoke to them? Witness: They had been following me... Counsel:

Is that right or not? His Honour: Just a moment, Mr. B I am allowing the witness to answer that question. 122 Counsel: His Honour: Counsel: His

Honour: Counsel: His Honour: Witness: With respect, Your Honour... I am allowing him to answer it. I am asking that my objection be noted. Every objection that you have ever made in this case has been noted, Mr B. I must be allowed to make it, with respect, or it does not go down. Would you say

what you were saying, Mr C? They had been following me, monitoring telephones that I was associated with since 1979. In this exchange, the

counsel, Mr B wants to explore the nature of the relationship between the witness and the Australian Federal Police (" they"). He asks a question about the extent of the Australian Federal Police's intelligence about his activities, phrasing it in the form most favoured by cross-examining counsel: a

declarative with a rising tone which seeks confirmation, not information, as a response. When the witness fails to provide a straight confirmation or denial (Yes or No) he seeks to curb the answer. But the judge intervenes and allows the witness's account. That is " They knew of my involvement because they



had been following me. " It is an implicit explanation, which the judge allows presumably because of its potential relevance to the issues. This exchange shows that to give an account of the facts, as here, is to provide a version of events. Here each party to the exchange is stressing different aspects of the witness's involvement with the Federal Police: the witness stresses what the police did (" they had been following me... "), the counsel stresses interaction between police and witness, what was shared knowledge and what the police did on behalf of the witness, (" to let them know how important you were even before you spoke to them. ") These meaning choices (police as actors versus witness as actor and sayers) are tactical, consonant with the version of events that each is expressing). Counsel: Witness: Counsel: Witness: Counsel: Witness: Counsel: Witness: Counsel: Witness: Counsel: Witness: After having given those documents to Mr H, did you see Mr H again? Yes, I did. When was that? About the second or third week of June. Did you have a conversation with him regarding M? Yes, I did. What did you say? I said to him, " There seems to be some holdup with the M money. The chap didn't turn up. I'll have to wait for the weekend and go out and see M. " Then Mr H said something to you? That is correct. After that meeting with Mr H, when was the next time that you saw him? In July of 1983. 123 Here the pattern of question and response is quite different. The exchanges are congruent and cooperative, and the counsel and witness together build up the story they are presenting. This sequence is intended to establish for the benefit of the judge and jury a sequence of events in an illegal conspiracy. Counsel is not permitted to " lead", to ask questions which presuppose indefinite polars (" Did you then say something? ") and open

information seeking questions ("What did you say?"). The witness responds with the required information, in the desired sequence. His experience as a witness is revealed in the easy and appropriate way in which he quotes conversations, that is in direct, as against indirect, reported speech, thus conforming to evidential requirements. The question "then Mr H said something to you?" is answered only by confirmation. He does not elaborate unless his counsel gives him the prompt, e. g. "What did he say?" The sequence has all the signs of a carefully rehearsed performance. These examples show the relevance of the story-telling model to the description of courtroom discourse and how the different structures of examination create different interactional contexts in which the stories can be told.

**The characteristics of the courtroom discourse**

The text provides a general description of the discourse situation, showing the important relationship between institutional functions, purposes and goals and institutional roles in the Anglo-Saxon common law system. The courtroom discourse is spoken and interactive. The adversarial nature of the trial process is the immediate determinant of its structural elements: the different stages which structure the proceedings. These ensure that for each witness there will be an examination-in-chief, by his own supportive counsel /this is called direct examination in USA/ a cross-examination, by the adversarial counsel, and then a re-examination from the supportive counsel, if he/she thinks it necessary. As well, each counsel in a trial of any weight will open his case, by a summary, an opening address, and will close the case, after all his witnesses have been examined, by a closing address. In a trial before a jury (all criminal trials and some civil proceedings) there will be as well a

summation or discretion from the judge, directed to the jury. The European, i. e. continental system, is differently structured, employing what is called "inquisitorial" system. System of justice where the judge investigates the case and produces evidence. 124 K PROBLEMATICE DŮLE Bhatia, V. K.: Language of the Law, in: Language Teaching, 20, 4, 1987. Bhatia, V. K.: Applied discourse analysis of English legislative writing. A Research Monograph, Birmingham 1983. Gibbons, J.: Language and the Law, Essex: Longman 1994. Goodrich, P.: Legal Discourse, Macmillan 1987. Bix, B.: Law, Language and Legal Determinacy, Oxford, Clarendon Press 1993. Knapp, V.: Velké právní systémy, C. H. Beck Praha 1996. Swales, J.: Genre Analysis. English in Academic and Research Settings, Cambridge 1990. 125