LEGAL DRAFTING

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The technical writing engaged in by members of the legal profession falls into two classes, referred to for convenience as legal writing and legal drafting. Legal writing embraces all kinds of expository writing including that encountered in correspondence, legal opinions and text books on legal subjects, as well as reports of decided cases in which judges set forth their reasons for decision. Legal drafting is the composition of legal instruments such as contracts, deeds, wills and legislation.

In their roles as advocates, lawyers often use language as a tool of persuasion--whether their words are meant to be heard in oral argument or to be read--and this factor introduces a subjectivity and a rhetorical element not found in non-legal writing. This distinction aside, legal writing shares the characteristics of other varieties of technical writing, including a specialized terminology and a preoccupation with precision and clarity. The function of legal writing, as distinct from drafting, is descriptive. It is writing *about* law and legal matters, much as medical writing is writing about medicine.

The subject matter of law, however, itself takes the form of writing. Legal rules and legal transactions are created, recorded and communicated through the agency of language. Written laws and written documents are to the barrister or solicitor what drugs and clinical instruments are to the physician or surgeon. The function of written legal instruments is different from that of other technical writing. It is to create and to give effect to legal obligations, prohibitions, rights and immunities. Rather than describe something, they prescribe or proscribe something.

The way legal provisions are expressed, whether in a contract between two individuals or in a statute that applies to everybody, can have serious consequences. Small differences in wording or grammatical arrangement can produce large changes in meaning and therefore in the impact on people collectively and individually. Once a contract is signed or a statute is enacted, its terms become definitive and binding. It is then too late to say, "That's not what I meant." The drafting process involves finding out what is meant, and matching that to what is said.

The drafting of legislation presents special challenges because of the large number of persons potentially affected and the difficulty of visualizing all the possible or likely permutations and combinations of circumstances, events and transactions to be provided for. The quest for fairness, treating like cases alike and different cases differently, adds to the importance of avoiding gaps in the law or, conversely, of inadvertently overextending the law's reach. When difficulties of interpretation arise, they cannot be resolved by calling up the Minister who sponsored the Bill, the civil servants who formulated the policy or the drafters who produced a legislative text. A final resolution requires resort to the courts with all the costs that that entails for litigants and for society.

We speak of a well-drafted or well-drawn enactment or document, as opposed to well-written one. The word "draft" or "draught," used as a verb, noun or adjective, is a variant of the verb "to draw". Though we still speak of draft horses (able to draw loads) or draught beer (drawn from a tap), "drafting" is now more or less synonymous, outside the legal context, with mechanical drawing of the kind encountered in engineering and architecture. Legal texts can be viewed as blueprints for political, social and economic structures of various descriptions, both large and small. The substantive content of a statute or contract is determined by the policymaker or client, just as that of a physical structure is devised by an engineer. The draftsman (draftsperson, drafter) in both cases then proceeds to translate the concept into a visible and permanent form making use of established drafting conventions and vocabulary.

Legal texts, like engineering blueprints, serve utilitarian goals and so lack embellishment and ornamentation for their own sakes. That does not mean that esthetic considerations are irrelevant in legal drafting. Qualities such as simplicity, economy, symmetry and completeness not only produce a pleasing effect, but further the attainment of the project's objectives by helping the user to grasp its organization and content. On the other hand, stylistic features appropriate to non-technical writing that produce vagueness, ambiguity or *doubles entendres* are even more dangerous here than in other kinds of technical writing. Unfortunately for the drafter, language is inherently ambiguous. Sparing use must be made of adjectives and adverbs which, being relative in nature, are necessarily vague unless defined in the document. (What is a "large" object or a "dangerous" substance?) In the choice of nouns and verbs, preference is given to those which come closest to pure cognitive meaning as opposed to terms with pejorative, sympathetic or euphemistic overtones ("intoxicated" versus "drunk" or "inebriated").

Relationships among logical categories are the determining consideration in forming the grammatical structure of sentences and in grouping and positioning the various provisions within a document. Drafting and reading are both assisted by giving concrete form to conceptual organization. The use of a hierarchy of headings is complemented, at the sentence level, by the parallel indentation and enumeration of grammatically equivalent clauses and phrases. As with a blueprint for a piece of machinery, the relation of the parts to each other ought to be plainly visible. They ought to dovetail at appropriate points with other elements of the legal system. When put into operation, the whole apparatus should function harmoniously with a minimum of effort and pain.

The end products of legal drafting may be categorized in a number of ways. A basic distinction is that between rules and commands. Some examples will illustrate:

> A contract for the sale of land shall be in writing. (Statute)
>
> The party of the first part will keep the premises in good repair. (Contract)
>
> I devise and bequeath all my property to my wife. (Will)
>
> This Court sentences the accused to imprisonment for fifty years. (Court order)

The first two examples are rules. They are expressed to govern the conduct of persons. A rule may be of general application, in the sense that persons to whom it applies are unidentified. The persons governed by such a rule are those who, by force of circumstance or by conscious choice, are brought within its scope. Such rules include most (but not all) of the provisions found in statutes, regulations and other descriptions of enacted law. On the other hand, the rules contained in contracts, leases and licences have application only to the named parties who have submitted themselves to the terms of such documents.

The second pair of examples are commands. The author of a command purports to perform some act rather than to govern somebody's conduct. In the terminology of linguistics, a command is a performative utterance, a statement that accomplishes something concurrently with the conveying of information. The thing accomplished is not a physical act, the tools being mere words, but a conceptual one. Property changes hands by the execution of a will; the right to sue is relinquished in a settlement

contained in a court order; a declaration of bankruptcy realigns the rights of creditors. Commands operate at a particular instant in time and represent some discontinuity in the legal status quo. In their most familiar guises their effect is limited to specific, identified parties. Examples are found in judicial orders, property conveyances, wills, declarations, affidavits and notices.

The distinction between rules and commands has consequences for grammar and composition. However, in practical effect they are really different manifestations of a single phenomenon. A rule is an expression of some ongoing obligation, right or other legal condition while a command expresses and brings about a change in such a condition. Consider the following examples.

(1) A licensee may sell cigarettes to minors.

(2A) Smokers World, Inc. is hereby authorized to sell cigarettes to minors.

(2B) The Commission hereby authorizes Smokers World, Inc. to sell cigarettes to minors.

Example (1) is in rule form, while examples (2A) and (2B) are in command form, but the effect is the same. The command form draws attention to the act of authorizing and, when in the active voice, to the author of the command. This is appropriate where the parties affected have direct contact with the author, as in the case of a particular dispute before a court or other decision-making body. It is less appropriate where the provision is made by a legislative body addressing the community at large, in terms that are unlimited as to time and are capable of applying to more than one set of facts. In the statute book, it is sufficient for the fact of enactment and the identity of the author to be expressed at the beginning of each Act:

> "Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:"

The substantive provisions that follow then go on to deal in rule form with the rights and obligations of Her Majesty's subjects, while Parliament recedes from immediate view.

Just as every rule is given life by some originating command, the converse also holds true. Every command effects a legal change of continuing effect either by modifying a regime of rules or, more often, by

affecting their applicability. When a court issues a decree of divorce, the rules of law that govern the relationship of spouses cease to apply to the parties affected. A conveyance of property attaches to the new owner all the legal rights and obligations that go with ownership, expressed in the general law as a series of rules. In both examples, the legal regime governing individual conduct has been altered.

What are the grammatical distinctions between rules and commands? Commands operate at a single moment in time. Hence they generally employ the present tense. In the active voice, the subject is the author of the command.

We order the appellant to pay costs of the appeal.

I now pronounce you man and wife.

The Council hereby adopts the bylaw.

The undersigned agree to the following terms.

The first person can be used where the command is given orally or where the context makes clear the identity of its author. It may be unnecessary to draw attention to the author, in which case the passive voice can be used. In legislation, where there is an exacting clause such as that quoted above and most provisions are in rule form, commands invariably are in the passive.

The accused is convicted and sentenced to 30 days.

March 29th is hereby declared to be Dominion Day.

Section 178 of the said Act is amended by deleting the word "security".

The National Regulatory Authority is hereby established.

Rules, unlike commands, operate continuously over a time span subsequent to their enactment. From the perspective of the rulemaker, a future modal form of the verb would seem called for. However, from the perspective of those who must observe or apply the rule in given circumstances at a given time, the present tense would seem appropriate. The verb forms that have come to predominate result from the unique function of rules themselves.

The functions of legal rules are four in number: (1) compelling, (2) forbidding, (3) enabling, (4) relieving. The legal sentences that express these norms typically employ the auxiliary verbs "shall", "shall not", "may" and "need not" or their equivalents. In fact, every sentence found in a piece of legislation or other set of rules employs one of those auxiliaries or is equivalent to one or more sentences that do.

In a so-called state of nature, where people were free of any external restraints on their conduct, there would be nothing compelled and nothing forbidden. The appearance of rules begins with the imposition, by some authority, of requirements to do certain things and to forbear from doing certain others.

Parents *shall* care for their children.

People *shall not* kill each other.

Given the existence of such "injunctive" rules, occasions may arise when it is necessary to make exceptions from them.

Parents *need not* care for their adult children.

A person *may* kill another in self-defence.

In the absence of some "shall" or "shall not", a "need not" or "may" would be superfluous. From this perspective the auxiliary "shall" is seen as the basic morpheme or linguistic element encountered in the drafting of rules in English. This is a natural extension of its earlier use in other contexts.

English and other languages in the Germanic family employ a number of modal auxiliary verbs to express various subjective states of mind. Most of them have application in referring to the future. We are not always in a position to make a pure prediction and to say what "will" happen at some future time. More often what we want to express is a conjecture (what "may" or "could" happen), an opinion (what "should" occur or "ought" to be done), a prediction subject to a condition (what "would" happen if...), a suggestion (what "can" or "might" be done), and so on. The auxiliary "shall" (like its German counterpart "sollen") long ago took its place as the means of expressing the imposition of an obligation by someone in authority. The power relationship could be that of parent to child, husband to wife, master to servant, officer to subordinate, clergy to faithful or deity to mortal.

You/he/they *shall* go at once.

You *shall* do what you are told.

Smith *shall* deliver the order.

She *shall not* set foot in this house again.

Thou *shalt not* kill.

Every such pronouncement could be punctuated for effect by "I say so", implying that the will of the speaker is all the justification necessary to insist on compliance. Implicit in each statement is the ultimate availability of some means of enforcement. It is not a major leap from such an injunction, delivered orally and in person, to one put into writing and adopted by some formal procedure. The injunctive effect is simply generalized. It will apply over and over for as long as it remains in effect.

No person *shall* kill.

Every parent *shall* support his children.

A policeman *shall not* use excessive force.

The non-legal use of "shall" now has an antique ring to it, perhaps because it smacks of Victorian authoritarianism in an era when the legitimacy of conventional authority is under permanent attack. Today the imperative mood is about as far as most authority figures care or dare to go.

I would like you/him/them to go at once.

Do what you are told (please).

Have Smith deliver the message.

She is not to set foot here again.

Formal Rules are in a class by themselves, however. Because they are anonymous and impersonal, politeness and tact are not an issue. Moreover, the legitimacy of rules continues to enjoy relative acceptance. Whether in a legal enactment or a club constitution, rules are usually made by persons who can make some plausible claim to the right to "rule". The formalities of adoption, especially if they allow for debate and criticism, add to the

legitimacy of the result. (The identification of the maker and the act of adoption in an "enacting clause" thus has more than symbolic importance.)

Though "shall" may sound stilted or high-handed in everyday discourse, it remains a useful means of signalling the binding effect of injunctive rules. Moreover, it succeeds in conveying a sense of ordination or "laying-down" that is absent in, for instance, "Thou must not kill."

Every father *must* support his children.

Every father *is required to* support his children.

Every father *is obliged to* support his children.

Every father *has to* support his children.

Each of these examples, if accompanied by appropriate sanctions, could constitute a binding and effective rule. However, each is also capable of merely describing the effect of a rule imposed elsewhere. Every father "must" or "is required to", for instance, because the Family Law Act says he "shall". We would never employ "shall" merely to *report* an obligation, except by quoting the rule in which it appears. Each of the alternatives, moreover, is capable of expressing an exhortation short of a binding injunction. (Some even more equivocal formulations are "is supposed to", "had better", "ought to" and "should".) "Shall" alone *necessarily* expresses both the imposition of the obligation and its binding nature. Its virtual disappearance from general usage, if anything, enhances its recognition value as a distinctive feature of legal and legislative language.

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