

In correspondence with FB, Rabeea Assy, the author of the following article, said

‘I deeply appreciate your interest in my article on plain English, and your favourable opinion of it. Your writings on the subject were very helpful to me and had a significant role in sharpening my ideas and arguments. It is therefore an honour for me to have my paper on your website.’

Rabeea Assy’s own copy of this document, published in the *Journal of Law and Society*, can be downloaded from:

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1906372.

Page 1

Can the Law Speak Directly to its Subjects? The Limitation of Plain Language

by Rabeea Assy*

Can we dispense with lawyers as intermediaries between the law and its subjects? Can laypeople have direct access to the law? For at least three decades, the Plain English Movement has been promoting the use of plain language in legal writing as the way to demystify the law for laypeople. As a result, many governments and private corporations have expended significant resources on drafting and redrafting legislation and legal documents in plain language. The central proposition in this article is that the PEM has exaggerated the capacity of plain language to render the law intelligible and manageable for the non-lawyer. Rather, the Movement has obscured the deeper question of legal complexity by focusing solely on matters of language and style. Using the law effectively requires expertise that goes far beyond understanding the meaning of the words used to communicate it. The article uncovers those complex aspects of the law that cannot be eliminated by mere simplification of language and demonstrates that coming to grips with these aspects requires other specialised skills over and above the ability to penetrate technical language. The paradigmatic illustration of a situation giving rise to the need for such skills is litigation.

INTRODUCTION

Complaints about the excessive complexity of the law are as old as the law itself.¹ When the law is too complex for the public to understand, access to the law becomes largely dependent on access to lawyers. However, many believe that much of the law’s inscrutability is avoidable. A growing body of literature suggests that legal complexity can be addressed by simplifying the language and style of the law. Indeed, the language employed by legislators, judges, and lawyers has been criticised for centuries. ‘Sham science’, ‘spun of cobwebs’, ‘a mass of rubbish’, ‘a

Page 2

* University of Oxford. I am greatly indebted to Adrian Zuckerman, Oscar Chase, Arie Rosen, Han-Ru Zhou, Conrado Hiibner Mendes and Iain Chadwick for their useful comments on earlier drafts. The beloved Sarah Moehr and Tanya Lawrence spared neither time nor effort in helping me revise the final draft. Previous versions of this article were presented at NYU in December 2009 and at Tilburg University in November 2009. I would like to acknowledge the generous financial support of the Oxford University Clarendon Fund and the Modern Law Review Scholarships Scheme. The usual caveats apply. (The published version of this article appears in *Journal of Law and Society* (2011) Volume 38 pp 376-404)

¹ Although it is customary to focus on the last four centuries, such complaints were chronicled long before the 17th century. See in general B. Shapiro, ‘Law Reform in Seventeenth Century England’ (1975) 19 *The American Journal of Legal History* 280, 281; ‘Codification of the Laws in Seventeenth Century England’ [1974] *Wisconsin Law Review* 428, 431–438.

language of nonsense and solemn hocus focus', 'a dark jungle, full of surprises and mysteries', are but a few examples of the pejorative vocabulary that has been used to describe law language.² Thinkers as divergent as Jeremy Bentham and Karl Marx have nonetheless concurred that the language of the law is deliberately obfuscated so as to mystify its content and its institutions and conceal their deficiencies.³

During the second half of the twentieth century, criticism of the law language was seized on by flourishing consumer movements and produced the Plain English Movement (PEM).⁴ The PEM concentrated initially on the intelligibility of governmental forms and consumer documents, but its agenda soon extended to the intelligibility of legislation. The fundamental idea promoted by the PEM is that since the law is addressed primarily to ordinary citizens, rather than lawyers and judges, it should be drafted so as to be fully intelligible to those affected by it. This is to be achieved, the PEM suggests, by drafting the law in plain language, stripping it of its dense, technical and convoluted style.

The idea of making the law speak directly to its subjects has proved so seductive that little critical thought has been devoted to what plain language can or cannot achieve.⁵ Due largely to extensive campaigns promoting plain language in the law in such countries as the UK, the US,

Page 3

Australia and Canada, most English-speaking countries and some others have adopted plain language policies and prepared manuals for drafting legislation and governmental forms in plain language. Not only governments but also private corporations have been convinced by plain English campaigns to expend significant resources on drafting their legal documents, such as insurance policies and the various documents that banks may require customers to sign, in plain language.⁶ This has been due to the growing recognition that people's entitlement to intelligible laws is entailed by ideas of the rule of law, of personal autonomy and of democratic values, as well as by considerations of efficiency.⁷

This article argues that the PEM has idealised and exaggerated the potential benefits plain language could yield and has propagated a false belief that the law could speak directly to its subjects merely by simplifying its language. It sets out to debunk the main arguments made by leading plain English advocates and show that plain language cannot make the law significantly intelligible to laypeople.

The article uncovers those complex aspects of the law that are not eliminated by mere simplification of language and demonstrates that coming to grips with these aspects requires other specialised skills over and above the ability to penetrate technical language. Such skills include the ability to identify

² J. Bentham, *The Rationale of Judicial Evidence* (London: Bowring ed. 1842) Vol 4, Book 8, Ch 17, 290, 294–295; E. Tanner, 'The Comprehensibility of Legal Language: Is Plain English the Solution?' (2000) 9 *Griffith Law Review* 52, 52–53; D. Mellinkoff, *The Language of the Law* (Boston: Little, Brown, 1963) 4, 265.

³ See on this point H.L.A. Hart, *Essays on Bentham: Study in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) 21.

⁴ A review of the emergence of the PEM can be found at P. Butt and R. Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (New York: CUP, 2007) ch 3. It is fair to say that it was David Mellinkoff who fired the first shot in 1963 when he published *The Language of the Law* (n 2 above), an incisive study that has inspired a large amount of literature which, along with the growing popularity of consumer movements, would translate into the PEM. See J. Kimble, 'Plain English: A Charter for Clear Writing' (1992) 9 *Thomas M Cooley Law Review* 1, 8 ('Although the critics of legal writing are legion ... Mellinkoff can fairly be called the intellectual founder of the Plain English Movement'). See also L.M. Friedman, 'Law and Its Language' (1964) 33 *The George Washington Law Review* 563, 563.

⁵ As we will see, the most serious criticism of the PEM can be found in an article by Robyn Penman and implicitly in some of Peter Tiersma's work. Critical albeit brief views have also been expressed by Francis Bennion in short commentaries in newspapers and elsewhere.

⁶ For a detailed account of the intensive activity of the PEM and its influence see P. Tiersma, *Legal Language* (Chicago: University of Chicago Press, 1999) ch 13; Butt and Castle n 4 above, ch 3; R. Penman, 'Unspeakable Acts and Other Deeds: A Critique of Plain Legal Language' (1993) 7 *Information Design Journal* 121.

⁷ For a more elaborate review of these rationales see Law Reform Commission of Victoria, *Plain English and the Law* (Melbourne, 1987) [93]–[107] ('Victoria Commission'); R. Sullivan, 'The Promise of Plain Language Drafting' (2001) 47 *McGill Law Journal* 99, 99–101.

the pertinent legal rules, principles and doctrines, to recognise the relevant facts and classify them into the pertinent legal categories, and to engage in a particular type of interpretation and reasoning.

Page 4

When one understands these complexities, it becomes clear that they cannot be reduced to matters of language and style, and that the aspiration to make the law directly intelligible to laypeople is far too ambitious. Abandoning archaic phraseology and convoluted style in favour of modern vocabulary and user-friendly structure, as urged by the PEM, will not obviate the need for legal services. Instead, these are at best desirable changes in the culture of legal writing that might improve the quality of the service provided by lawyers. The realisation that without lawyers the benefits of plain language cannot be fully realised is the starting point for the quest for more promising ways to enhance access to law and to legal services.⁸

The first section of the article discusses in detail the literature developed in support of the PEM and shows how it has propagated the belief that the law can be drafted clearly enough to be intelligible to laypeople without any loss of precision. It then criticises this belief and demonstrates that the PEM has failed the empirical test. The second section argues that lawyers are indispensable, and substantiates this argument by examining the interplay among details, legal precision and linguistic clarity. It underscores the importance of details to the precise allocation of legal rights and obligations in modern society, and explores the complications created by a detailed body of law, and the kind of expertise that is needed for handling them effectively. The final section shows that to a certain extent the language of the law is bound to deviate from common speech in favour of what might be described as technical or professional language.

⁸ The realisation that lawyers are necessary to obtain justice underlies calls for additional legal aid in civil and criminal cases. See: D. Luban, *Lawyers and Justice* (Princeton: Princeton University Press, 1988) 243–248. Given that the PEM has concentrated on private law matters, the arguments in this article are defended only in that context. The implications of the PEM for the criminal context, vis-à-vis the question of ignorance of law, are therefore not discussed.

1 THE PLAIN ENGLISH MOVEMENT: A STORY OF A FALSE PROPHET

1.1 What Does the Plain English Movement Seek to Achieve? The Notions of ‘Immediately Intelligible’ Laws and ‘People Affected’ by them

Simply put, the PEM calls for drafting legislation and other legal documents in ‘ordinary’ or ‘plain’ language. Typically, this means avoiding archaic and foreign expressions, using common and familiar vocabulary, simpler grammatical structures, shorter and simpler sentences, substituting active for passive voice, favouring verbs over nouns, and providing a better organised outlook—the latter entailing such features as wider spaces and margins, division into sections and subtitles, definition of technical terms, use of examples, provision of tables of contents, highlighting techniques, and the like.⁹

In what has been described as ‘the most comprehensive scholarly treatment of the topic ever published’,¹⁰ the *Law Reform Commission of Victoria on Plain English and the Law* (‘The Victoria Commission’) states that legislation should be drafted not for lawyers or judges but for its real audience, namely the group of people who are affected by it and the officials who must administer it.¹¹ As it explains:

When Parliament passes a law applying to citizens or to a selected group of citizens, its primary concern is ... with the conduct of the citizens whom it regulates or on whom it imposes burdens or confers benefits. ... the prime aim should be to ensure that those to whom the law is addressed act in accordance with it. *The law should be drafted in such a way to be intelligible, above all, to those directly affected by it.* If it is intelligible to them, lawyers and judges should have no difficulty in understanding it and applying it.¹²

Consequently, the Commission concludes, the language and structure of legal documents

should be improved, not in the hope of making the document intelligible to the average citizen, but in order to make it intelligible—and *immediately intelligible*—to as many of those as possible who are concerned with the relevant activities.¹³

By ‘immediately intelligible’ the Commission actually suggests that the use of plain language should aim at making the law intelligible to its subjects to such an extent that they need no legal assistance. By suggesting this, it presumes that persons who are not legally trained are capable of fully understanding the law and availing themselves of its protections without a lawyer, if only the language is stripped of its unnecessary complexity. However, if the Commission concedes that the law cannot be made immediately intelligible to the *average person*, shifting the focus to the ‘person affected by a given law’ does little to enhance the feasibility of its project. The Commission’s distinction—largely followed by other plain English advocates¹⁴—between drafting for the average person and drafting for *those who are affected* by the law in question is meaningless because both notions fail to embrace the huge diversity of people’s backgrounds, expectations, education, orientations, perspectives, skills, and intelligence. It is unrealistic to accommodate at once all the different and competing needs and interests of the law’s users.¹⁵ Only if the ‘affected group’ were largely homogenous in their reading skills, interests, backgrounds, etc, would it then be meaningful to distinguish them from the general public. In fact, this is rarely the case. The large bulk of

⁹ See e.g. Kimble n 4 above, 11–14; Butt and Castle n 4 above, chs 5–7; P. Knight, ‘Clearly Better Drafting’ (Report to the Plain English Campaign, 1996) Appendix 4.

¹⁰ Butt and Castle n 4 above, 95.

¹¹ Victoria Commission n 7 above, [69].

¹² *ibid* (emphasis added)

¹³ *ibid* [71] (emphasis added).

¹⁴ See e.g. Sullivan n 7 above, 118; and Knight n 9 above.

¹⁵ This point has been conceded at Sullivan n 7 above, 110–111.

legislation targets either the general public (as is true of the laws of contracts, torts, taxes, or real property) or indefinite smaller groups whose members are classified together based solely on their common interest in that law. Having such a common interest does not necessarily mean that the members of the 'affected group' are homogenous in their skills. Take the laws on landlords and tenants, family, elderly people, or corporations. These laws target specific segments of the general public, while nothing about this

Page 7

group membership has any bearing on the comprehension skills of the individual member. In other words, members of an 'affected' group are likely to approximate the same diversity of backgrounds and skills as is found in society at large. Therefore, drafting legislation for the 'affected group' in these examples would be as meaningless as drafting for the 'average person', an idea that was rejected by the Commission.

The Commission's insistence that the law can be understood and effectively used unaided conveys a view widely shared among plain English proponents. One commentator has described the agenda of '[m]ost supporters of plain English' as one that aims at making legislation 'speak directly, *without the need for intermediaries*, to the very people whose lives it affects'.¹⁶ Yet others were even inspired to make a far-reaching claim that legislation is to be drafted for the 'least experienced readers' or 'most frequent unofficial readers' among the group of people affected by that legislation, with the aim of making legislation 'simple', 'understandable' and 'easily understood by laypeople'.¹⁷ Clearly, drafting for the 'least experienced' would amount to drafting for everyone, which is impossible. Nonetheless, the idea that the law can be understood and used unaided has gained such credence as to cast doubt on what may have otherwise been the intuitive notion that lawyers are necessary.¹⁸ For that reason, Justice Nazareth (HK) for example found it necessary to comment on such ideas:

Page 8

It is often observed that legislation should be readily intelligible not only to the lawyer, but also to the layman. That may be the ideal. Regrettably it is also a pipe-dream for all but the most simple matters. Complicated matters are neither easily understood nor explained. ... The sooner such fanciful notions are abandoned the quicker we should be able to get on with the business of achieving such a measure of simplicity and intelligibility as is attainable.¹⁹

Unfortunately, the problem with the debate over the question of the intelligibility of laws is that it is often carried out without carefully defining the *degree* of intelligibility that is sought by using plain language, or the *purpose* for which it is sought. This point is developed in the following sub-section.

1.2 Intelligibility for What Purpose?

¹⁶ Sullivan n 7 above, 101. See also F. Bennion, 'Confusion over Plain Language Law' Com L 08/2007 <<http://www.francisbennion.com>> 4 (last visited 25 May 2010).

¹⁷ See Knight n 9 above, 12. This study was requested by the South African Ministry of Justice to prepare a plain English draft of South Africa's Human Rights Commission Act 1994 with the aim of illustrating how legislation can be 'expressed in a simple, understandable way, which is *easily understood by laypeople*'. This objective was formulated as reflecting 'a need for the type of transformation which will *enable people to participate in the justice system ...*'. Sullivan endorsed the study's objective (n 7 above, 114).

¹⁸ Another example of the far-reaching impact of the PEM's discourse can be found in Sullivan's proposal that the law should no longer reside in the defined text: judges must interpret it according to how laypeople understand it, and to that end judges have to 'receive and assess evidence about the audience' which could come from 'experts in sociolinguistics or related field' or from the audience itself, such as in the form of polls. See n 8 above, 120–121, 124–125. Cf Bennion (n 16 above) who, drawing on Bentham, argues that such suggestions pervert the nature of the law from a command or imperative to a commentary or description.

¹⁹ C.B.E. Nazareth, 'Legislative Drafting: Could Our Statutes Be Simpler?' (1987) 8 *Statute Law Review* 81, 90.

It is crucial to specify what degree of intelligibility the use of plain English can or cannot achieve, or to what end such intelligibility is sought. For example, the degree of legal understanding that is required for enhanced legal awareness or legal empowerment may not be the same as the degree of legal understanding required for a person to draft a contract or a will, and the latter may also not be the same as the degree of understanding required to conduct litigation.

The failure of plain English advocates to discuss and define clearly the limitation of their project, coupled with the strong rhetoric they bring to bear in arguing that the law could and should speak directly to citizens, has attracted criticism that has hindered a more fruitful discussion of the potential benefits of that project. This makes it necessary to explore the limitations of the plain English project and reconceptualise its goals accordingly.

In the following sections, this article argues that, as a matter of general principle, the use of plain English cannot make the law sufficiently intelligible to its subjects so as to enable them to utilise it effectively without legal assistance. Of course, this is not to say that there are no areas

Page 9

of law that are simple enough to be approached without legal advice. Traffic signs or instructions concerning how to return a product and get a refund might be examples in point.²⁰ What is argued, however, is that there are reasons to believe that except in simple cases or for straightforward purposes the law is generally too complex for those who lack legal training. The paradigmatic setting that showcases the limitations of the plain English project is litigation: The inability of laypeople to utilise plain laws without legal assistance can be illustrated by the inability of self-represented litigants to litigate their cases. The argument is not that since plain English does not facilitate litigation, it may not be useful in other legal settings. This could be countered by the observation that the cases that go all the way to trial are predominantly and disproportionately hard and represent a skewed sample of all legal events.²¹ The argument in this article is, rather, that the difficulties posed by litigation to self-represented litigants mirror, sometimes more intensely and on a grander scale, the major difficulties faced by law-users in dealing with their legal affairs.²²

That the law will remain too complex for the uninitiated notwithstanding the use of plain English, as argued here, does not mean that this project is worthless or that plain language cannot improve people's understanding of the law for any significant application. This article argues that the plain English project can still be valuable for two reasons: (1) It can improve the engagement of *represented* people in their legal affairs; (2) It can make the law more precise and more intelligible to *lawyers*. This means that for the non-lawyer to realise the full value of plain

Page 10

English she must be legally represented. These two benefits could be best understood in consumer-based terms, as an attempt to improve the service provided to *clients* and to reduce its costs. By improving the clients' understanding of the law language, whether of the laws pertinent to a given legal matter they are involved in or of private legal documents prepared for them by their lawyers (e.g. contracts, wills), they are made better informed of the legal activity they have undertaken and more involved in the process of decision-making, whether in relation to litigation or otherwise. Enhanced understanding of the law is also important for the empowerment of clients and for protecting them against abuse by providing them with better tools to assess or direct the service provided to them by their lawyers or by the legal system.²³ In other words, the true value of plain

²⁰ Even though, it must be noted, the interpretation of rules as simple as 'no vehicles in the Park' or 'no parking' could be hotly debated. See n 70 below and accompanying text.

²¹ Some commentators describe this phenomenon as the 'selection effect': See F. Schauer, *Thinking Like a Lawyer* (Cambridge: Harvard University Press, 2009) 13, 22–3 (and the literature cited).

²² The discussion in this article is restricted to illuminating the marginal difference between lawyers and non-lawyers. Consequently, it does not address other variables that may bear upon the capacity for effective litigation, such as personal characteristics, articulation and rhetorical abilities, cross-examination skills, strategic and tactical abilities, etc. These are 'advanced' skills that vary amongst both lawyers and non-lawyers, and which are not usually acquired or developed throughout formal legal education

²³ This consumer-based account of the value of the PEM and the centrality of lawyers to its project is also consistent with the nature of the institutions that defend plain English. See Butt and Castle n 4 above, 79, 82,

English lies in its potential to enable clients to maximise the benefits of legal service, as opposed to dispensing with it altogether. Moreover, laypeople benefit from the use of plain English through its capacity to make the law more intelligible to *their lawyers*, as service-providers or ‘suppliers’ of ‘goods’ the quality of which is potentially improved. Redefining the goal of plain English as making the law more intelligible to lawyers does not undermine its value; on the contrary, it makes the project more realistic and more important.²⁴

There might be a third benefit, namely that plain English may serve to reduce the incidence of litigation by enhancing conformity to the law or adherence to legal documents. This proposition might be particularly appealing in relation to certain private legal documents such as wills, consumer contracts, insurance policies, leases, etc. However, for reasons brought below, it is doubtful whether plain English could *significantly* enhance the intelligibility of legal texts,

Page 11

especially legislation, without legal assistance. A more modest proposition might be that plain language could help people understand their rights and obligations sufficiently for ‘ordinary’ circumstances, even if not in the precise detail needed for litigation. But such partial or imprecise understanding of the law is a far cry from the PEM’s promise of making the law directly intelligible. It neither guarantees conformity to the law or to private legal documents, nor prevents litigation. In order for the law to be violated or litigation to become imminent, it suffices that just one party does not adequately understand the law or chooses deliberately to violate it.²⁵

To sum up, the adoption of plain English does not make an untrained person into her own lawyer any more than increasing health awareness obviates the need for medical care or makes medical science more readily accessible to ordinary people. Plain English should only be advocated with the aim of doing away with as many as possible of the linguistic and stylistic defects in legal documents so as to make legal service more valuable for the money.

1.3 Does Plain English Pass the Empirical Test?

1.3.1 Inadequacy of Supporting Data

The Civil Procedure Rules (CPR) offer a good anecdotal example. The CPR have been hailed as a milestone in the drafting of legislation in plain English. They have been described as ‘user-friendly and direct’ and their new forms as ‘clear and well designed’.²⁶ Furthermore, they were drafted by Lord Woolf with an express vision of making the system work for the self-represented and rendering procedure simple and easily comprehensible to the layman and lawyer

Page 12

alike’.²⁷ However, the fact that the CPR now use ‘claim’ instead of ‘writ’, ‘claimant’ instead of ‘plaintiff’, ‘without notice’ instead of ‘ex parte’, ‘witness summons’ instead of ‘subpoena’ and the like, does not necessarily mean that the procedure is now more transparent or easier to use by the unaided. In fact, the new Rules have not rendered self-represented litigants better able to use the English civil justice system effectively and efficiently.²⁸ This example casts doubt on the assertion

86; Kimble n 4 above, 12, 31–58; J. Kimble, ‘Answering the Critics of Plain English’ (1994–95) 5 *The Scribes Journal of Legal Writing* 51, 81–82.

²⁴ In Bennion’s opinion, for example, the challenge of making the law intelligible to lawyers is far more rewarding and therefore should be the primary aim of plain English: F. Bennion, ‘Don’t Put the Law into Public Hands’ *Times* 24 January 1995 <<http://www.francisbennion.com>> 4 (last visited 22 November 2010) and Bennion n 16 above.

²⁵ Another possible reason why understanding the law does not necessarily prevent litigation is that in many cases the dispute is over the *facts*.

²⁶ Butt and Castle n 4 above, 92.

²⁷ Lord Woolf, ‘Access to Justice—Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales’ (1995) 5, 119. See also N. Andrews, *English Civil Procedure* (Oxford: OUP, 2003) 117.

²⁸ See for example R. Moorhead, ‘Access or Aggravation? Litigants in Person, McKenzie Friends and Lay Representation’ (2003) 22 *CJQ* 133; R. Moorhead, ‘The Passive Arbiter: Litigants in Person and the Challenge to Neutrality’ (2007) 16 *Social and Legal Studies* 405. The CPR is not the only example. Butt and Castle

that plain language makes the legal system directly accessible to laypeople without lawyers.²⁹ Even from a broader perspective, despite the large increase in the use of plain English in Commonwealth jurisdictions over the last two decades, there is no indication that this has enabled self-represented litigants to present their cases more effectively or efficiently.³⁰

On the empirical level, the findings are equivocal. Some studies have shown that texts written in plain English are easier to comprehend whereas others have found no significant difference. Take for example the empirical study conducted for the Victoria Commission, which, as mentioned earlier, issued a leading report in the area. This study tested two excerpts from two Australian statutes against their plain English versions and found that the latter made ‘no significant difference in the level of accuracy of the answers given by participants’, who were law students and lawyers. What did improve was the speed at which participants attained a particular

Page 13

level of accuracy: the time needed by law students to read the text was reduced by a third, and the time needed by lawyers was reduced by almost half.³¹ A striking fact in this study, as in many similar studies, is that it was lawyers and law students who comprised the target audience, and not the group of people affected by the legislation’ as enthusiastically advocated by the Commission. As will be explained shortly, it is hard to tell how the laypeople who are mostly affected’ by the examined legislation might have benefited from the plain English versions, but it is a telling fact that the Commission did not follow its own recommendation that the relevant audience should be laypeople not lawyers and judges.

Moreover, even those studies which yielded data that supposedly attested to the benefits of plain English do not provide a solid basis for the claim that it makes the law directly intelligible to its subjects. This can be illustrated by Tanner’s study, in which he considered a passage from a bank guarantee that had been criticised by a court as gobbledygook’, along with two versions of the same passage rendered in plain English, one prepared by the Bank and another by the researcher for the purpose of the study. Again, the vast majority of participants were law students (undergraduates and graduates). Their reading comprehension was tested with multiple-choice questions, with straightforward answers that followed the sequence of information in the passage.³² The average rates of comprehension were as follows: (1) 52.6 percent of the original draft was found intelligible; (2) 62.4 percent of the Bank’s plain English draft; and (3) 68.6 percent of the researcher’s draft. Despite an improvement of 16 percent in the level of intelligibility, the best plain-English result left almost a third of the text unintelligible, even when the questions were relatively easy and the subjects were individuals with some legal education. This led Tanner to conclude that for the particular type of document used in his study

Page 14

(bank guarantee) plain English did not necessarily guarantee successful communication and that it is only a partial solution for making it more comprehensible.³³

However, there is more to be said about Tanner’s study. The study does not address the more important question of whether the use of plain English brings the level of understanding among

report considerable efforts in Australia to simplify certain statutes but conclude that ‘research has shown that more work needs to be done on improving the readability of Australian legislation’ (n 4 above, 98–99).

²⁹ Nor have the CPR made the legal system much cheaper to use. See in general A. Zuckerman, *Civil Procedure: Principles of Practice* (London: Sweet & Maxwell, 2nd ed, 2006) ch 26.

³⁰ See in general C. Cameron and E. Kelly, ‘Litigants in Person in Civil Proceedings: Part I’ (2002) 32 *Hong Kong Law Journal* 313; R. Engler, ‘And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks’ (1999) 67 *Fordham Law Review* 1987. One might think that the problems of the legal system or those faced by self-represented litigants could have been even worse without the use of plain English. This is doubtful. As Justice Nazareth (HK) observes (n 19 above, 92), many of the specific suggestions for simplifying the law language ‘have long been effected in some jurisdictions [and yet] have neither stilled the complaints nor simplified the statute book significantly’.

³¹ Victoria Commission n 7 above, [106].

³² Tanner n 2 above, 59.

³³ *ibid*, 72.

legally untrained people closer to that of the legally trained. The fact that the level of understanding of law students registered a 16-percent increase does not tell us much about the effect of plain English on those with no legal education *compared with* its effect on those who have such training. Because what matters is not only whether participants could answer more questions correctly when plain English was used than otherwise, but also and more importantly whether they could answer a *similar number* of questions *of a similar kind* to those that lawyers would need to answer in the real world. In other words, the crucial question is whether it is possible, by the use of plain English, to reduce the gap between the legally trained and the untrained. What we are left with in such a study is only a speculation that if law students benefited from plain English (albeit not immensely), laypeople might benefit even more. Such speculation is not necessarily well-founded; as will be argued in section 2.2, what makes a text more comprehensible to people who are legally trained may not necessarily make it more comprehensible to those who are not.

A common response to the criticism that the empirical data does not clearly substantiate the utility of plain language is to refer to Joe Kimble's list of supposedly more encouraging findings on the impact of plain English on comprehensibility.³⁴ However, much like Tanner's and the Victoria Commission's studies, Kimble's data does not weigh in overwhelmingly in

Page 15

favour of plain English.³⁵ Kimble himself admits that 'in some of these studies the level of comprehension remained lower than the revisers might have hoped'.³⁶ Furthermore, none of these studies showed that the uninitiated could understand legal texts as lawyers would or, at least, displayed a level of understanding that could confidently be tested in court. In fact, some of these studies were conducted on law students, lawyers, even judges, rather than on those unversed in the law.

But there are more fundamental reasons to dismiss the findings presented in Kimble's array of studies, as well as the findings of Tanner and the Victoria Commission. The following two subsections argue that the findings of these studies are insufficient because they do not inform us how people in real world situations would perform in a legal setting. This failure results from two fallacies: statistical and methodological.

1.3.2 The Statistical Fallacy

The fact that some studies found that the use of plain English improved the comprehension of participants cannot be of general validity unless it is demonstrated that the sort of legal texts most commonly confronted in everyday life are written in as opaque a style as the texts chosen for these studies (which were apparently extremely impenetrable texts). This has never been empirically shown. No one has shown that the 'gobbledegook' anecdotally described is the sort of language typically used by lawyers in drafting private legal documents or by legislators in drafting legislation. For if it turns out that the language of the average legal text is more intelligible than what is offered in these studies, then we need to search for other explanations of the complexity of such texts than language alone can offer. Peter Tiersma, for example, published a paper in which he sought to rebut some of what he describes as myths' about the

Page 16

language of the law. He concludes, among other things, that it would be a 'gross mischaracterisation' to suggest that the law language is a peculiar or different language unto itself. He maintains that, while it may indeed be a unique genre of formal written language, it is 'much closer to ordinary English than many people seem to think'.³⁷

³⁴ See e.g. Knight n 9 above, 4–5, and the studies reviewed at Sullivan n 7 above, 105–108.

³⁵ Kimble n 23 above, 62–71; J. Kimble, 'You Be the Judge (Again)' (January 2005) *Michigan Bar Journal* 56.

³⁶ Kimble n 23 above, 65.

³⁷ P. Tiersma, 'Some Myths About Legal Language' (2006) 2 *Law, Culture and the Humanities* 29, 48.

More importantly, no one has demonstrated that the language used in the typical legal text (as opposed to what is anecdotally selected) gives rise to litigation, or to violations of the law, that could have been avoided had plain English been used. In other words, no one has shown a *significant* relationship between actual levels of litigation and the failure to use sufficiently plain language.³⁸ With no such relationship demonstrated, we can only speculate about the role of this or that linguistic feature of legal texts in making the law difficult to understand and, in turn, about the impact of any such difficulty on the incidence of litigation.³⁹

In sum, the statistical fallacy lies in the leap from anecdotal accounts of the inscrutability of the law language, which is typically 'proved' by reference to some exceptionally convoluted texts, to the generalisation that legal texts are typically written in such a way. The result of this leap has been that the focus of recent research has been restricted to the sort of language selected for those anecdotal examples, reducing the question of intelligibility to a mere matter of language, structure or style.

Page 17

1.3.3 *The Methodological Fallacy*

There is another fundamental point that largely undermines the capacity of the available empirical studies to substantiate the claim that drafting legal texts in plain English improves the ability of ordinary people to conform their conduct to the law or, more ambitiously, to litigate their cases effectively and efficiently. Put simply, the methodology adopted in these studies was fundamentally misguided.

As described above, empirical studies that have attempted to measure the effectiveness of plain English typically adopted the following methodology: participants were required to answer a number of questions, usually in the form of multiple-choice or 'cloze' tests, the answers to which were *supposed to be found in certain texts provided* to them. Some of these texts would be written in the so-called traditional' legal style and others in plain English. The researchers would then compare the results and see which of these texts enabled the participants to answer more questions correctly.

The main critic of this methodology has been Robyn Penman who faulted it for not testing the comprehension of *actual* users. She argues that legislation should be tested by using more sophisticated testing methods, such as open-ended interviews, rather than multiple-choice or cloze' tests. In her view, the problem of the PEM is that it approaches the question of intelligibility mainly from a text-based point of view, and not from the standpoint of actual users.⁴⁰ Kimble responded by conceding that comprehensibility should indeed be tested on actual users when possible; however, according to him, absent such research we should still infer from the available empirical findings that plain English is more likely to make legal texts more intelligible to actual users as well.⁴¹ However, such a response is beside the point. As Penman

Page 18

rightly insisted, the only valid way to test comprehensibility is to turn to *actual* users, rather than 'pseudo-users'. In her example, to test the comprehensibility of a given childcare statute, we would need to ask people who are affected by it to undertake the process for registering as a childcare provider as described in that law. Only in this way would we test how real users understand a given text.

³⁸ Tiersma n 6 above, 85, arguing that a large number of legal documents does not give rise to disputes over its language, while attributing many disputes over language to strategic choices of imprecise language rather than a failure to be precise

³⁹ Different reasons could account for the general obedience to and understanding of the law other than the intelligibility of its language. For example, it may result from acceptance of general moral notions such as not to lie or to be honest. Furthermore, Lon Fuller argues that in many activities people observe the law not by knowing it directly but rather by following the pattern set by others whom they know to be better informed than themselves. Accordingly, 'knowledge of the law by a few often influences directly the actions of many': L. Fuller, *The Morality of Law* (Yale University Press, 1964) 51. Sullivan (n 7 above, 116–117) refers to a similar phenomenon of 'peer interpreter' in localities.

⁴⁰ Penman n 6 above, 124–126.

⁴¹ Kimble n 23 above, 68–75

I would take this a step further. The fact that the law is by and large text-based does not mean that the ability to use the law depends only on the intelligibility of its text. A study that defines the relevant questions for the participants in advance, provides them with the texts from which the answers should be found, and marks their answers as correct' or wrong', does not test the ability of actual readers to use the law. Actual users of the law, whether in the context of litigation or in relation to private documents (e.g. insurance policies or consumer contracts), are not provided with all the relevant legal texts, nor with the relevant questions that must be answered and surely they are not offered a menu of multiple-choice answers from which to choose. In reality, legal questions and their answers may not be definite or assessed simplistically as correct' or wrong'. Often, their determination may depend on a variety of texts that are not always available to the layperson, including statutes and case law, and on background knowledge of the rules of interpretation and legal reasoning. That is to say, the meaning of legal texts may depend on a context with which the non-lawyer will not be familiar and background knowledge which she does not possess. Without such familiarity and knowledge, someone else will be needed to define what is relevant and what is not, and when this function is performed for the participants by the researchers, they will no longer resemble the actual users of legal texts. In the studies that purported to lend credence to PEM, test-subjects were *given* the relevant legal text and the material facts were *defined* for them, and therefore what these subjects were tested on was their ability to select a correct answer from a specific list. Thus, the subjects were not tested on

Page 19

their ability to identify the relevant issues and form the appropriate legal questions and, on that basis, to distil the material facts from the 'bewildering and infinitely complex continuum of facts and events';⁴² rather, these tasks were *performed* for them by the researchers.⁴³

Litigation gives rise to additional difficulties. The transformation of legal knowledge into effective and efficient litigation in any particular case must deal with an array of important procedural matters, such as choices of jurisdiction, identity of parties (defendants, claimants, third parties), causes of action, etc. Having the skills to address such matters constitutes a necessary condition for effective and efficient litigation—a condition that can be met only by having a general and comprehensive knowledge of the law; only with such knowledge can one know which questions to raise and where to seek their answers.

It follows that to test comprehension levels among actual users of, say, the law of contracts or wills, we would have to take a random sample of laypeople and ask them to make a contract or draft a will, without any further information, that is, without advising them as to what statutes and cases should be examined, where these materials can be found, which provisions are relevant, what questions must be answered, etc. Likewise, to test the ability of laypeople to litigate, we would have to give participants a body of facts, only some of which are material to the question at issue, and then ask them to figure out how they should proceed. This is the only way to test actual users.

Page 20

Having established that plain English has so far failed the empirical test, I will proceed to offer a qualitative analysis of why simplifying the language alone cannot suffice to eliminate the need for legal assistance to obtain effective access to the law.

⁴² N. MacCormick, *Legal Reasoning and Legal Theory* (Oxford: OUP, 1978) 46.

⁴³ For example, in Knight's empirical research (n 9 above, 15–16) potential users of a human rights act were required to identify the sections relevant to a given issue and apply them to a given problem. The legal problems as well as the text from which the answer was to be extracted were *already defined* for the subjects, and the questions posed to them were yes/no questions (with an opportunity to explain their choice). As Knight himself admits at p 34, this does not reflect how real users perform in real life. While the use of plain English in this study resulted in some improvements in the performance of non-professionals and professionals, the overall results were still disappointing and far from achieving the goal formulated in the study, namely, to make the law 'easily understood by laypeople'.

2 PRECISION, REDUNDANCY, AND DETAILS: 'THE GOOD, THE BAD, AND THE UGLY'

The need to simplify the language of the law can be approached in two different ways. One way would be to argue that such language is not well served by retention of certain linguistic and structural patterns that enhance incomprehensibility without contributing to its precision. This argument does not require altering the function of the law or compromising its pursuit of the precise allocation of rights and obligations. Whether stripping the language of the law of its defective linguistic and structural patterns would make the law clear enough for laypeople to use it effectively and efficiently, remains an open question. Another, more radical way to simplify the law would be by de-legalisation; that is, by sacrificing precision on the altar of clarity. In this section, I argue that as a matter of general principle neither suggestion can eliminate the layperson's need for a lawyer as a necessary condition for obtaining effective access to the law.

2.1 The Need for Details

The starting point is that the state must offer its citizens a reasonable means of peaceful dispute resolution; otherwise it cannot legitimately prevent them from taking it upon themselves to protect their own interests and solve their own conflicts.⁴⁴ Conflicts tend to arise out of the collision of interests, so the more sophisticated society becomes, the more conflicts of interest

Page 21

the law needs to cater for. Thus, to prevent conflicts modern societies have to ensure that their laws allocate people's rights and obligations precisely. This allocation is usually resolved in legislation that is enforceable through a judicial system. It follows that any attempt to reduce the law systematically in hopes of reducing the need for lawyers would be self-defeating: it will not reduce the likelihood of conflicts or litigation; rather, it will only increase uncertainty as to the correct allocation of legal rights and obligations. De-legalisation cannot therefore be a general solution for the unintelligibility of law.⁴⁵ Nor could generality be. If the law only stated general principles, it might indeed be easier to read because it would be brief and general but, because it would leave out relevant details that cannot be determined merely by appealing to the general principles, it would provide only limited guidance. As H.L.A. Hart has it, 'In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide'.⁴⁶

In short, the devil that lies in the details cannot be eliminated by eliminating the details; it will still be recreated in litigation. If the details are not found by referring to statutes, the courts will be called upon to determine whether or not a given contingency is captured by the law in question.⁴⁷ Frequent recourse to courts would produce an increased volume of case law, which is usually even less accessible than statutes to the layperson leading to a higher degree of dependence of the law (and of citizens) on courts.⁴⁸

Page 22

⁴⁴ See K.E. Scott, 'Two Models of the Civil Process' (1975) 27 *Stanford Law Review* 937. Luban argues that absent equal access to the legal system the state loses the legitimacy of its monopoly over violence: n 8 above, 244, 255.

⁴⁵ See e.g. Luban n 8 above, 244–245 at fn 20, doubting the extent to which de-legalisation or simplification of the law is possible as a general solution on the long-run

⁴⁶ H.L.A. Hart, *The Concept of Law* (Oxford: OUP, 2nd edn 1994) 126. See also J. Raz, 'The Rule of Law and Its Virtue' (1977) 93 *LQR* 195, 197 ('It is humanly inconceivable that law can consist only of general rules and it is very undesirable that it should'); D. Berry, 'Legislative Drafting: Could Our Statutes Be Simpler?' (1987) 8 *Statute Law Review* 92, 93.

⁴⁷ Nazareth n 19 above, 86.

⁴⁸ Meir Dan-Cohen describes this paradox as resulting from an inverse relation between the determinacy of rules and their accessibility: M. Dan-Cohen, 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law' (1984) 97 *Harvard Law Review* 625, 659–660

2.2 Legal and Linguistic Clarity

When one speaks of the ‘clarity of the law’, one needs to be precise about what is meant—linguistic clarity or legal clarity. Even though these two senses are related, they do not necessarily overlap. For one thing, a text may be clear but so general or so incomprehensive as to make its application to concrete cases open to dispute and argument. A person may comprehend what is written, but not be able to find in the text the answer to his concern because of vagueness, open texture, and borderline factors. Therefore, there seems to be a point up to which the more detailed the law is, the clearer it is likely to be in the *legal* sense, that is, the better equipped it is to resolve legal conflicts in advance or provide guidelines for resolving them.⁴⁹ It is this sense of clarity that is referred to as ‘precision’. From this perspective, the inclusion of details is detrimental only when they fail to contribute to legal clarity (precision, that is) or if they undermine it.

Moreover, the relationship between details and clarity calls upon another distinction between being difficult to read and being unclear. A document may be *legally* clear even if it is linguistically complicated and requires time and effort to read. To say that a text is difficult is not to say that it is ambiguous or contradictory. Shakespeare and Milton may require concentration, but their works are rich in meaning. Thus, clarity may not reflect the same value for lawyers and non-lawyers. For the lawyer, clarity is not merely linguistic—in fact, linguistic clarity (simplicity) is subordinate and instrumental to legal clarity (precision) and must not undermine it.

Page 23

Furthermore, linguistic clarity is valuable for the lawyer only to the extent that it contributes to legal clarity. But how does clarity work for the uninitiated? The Victoria Commission considers the relation between clarity of law and clarity of language in the following passage:

In fact, *precision and clarity are not competing goals*. Precision is desirable in order to minimise the risk of uncertainty and of consequent disputes. But a document which is precise without being clear is as dangerous in that respect as one which is clear without being precise. In its true sense, precision is incompatible with a lack of clarity.⁵⁰

But are clarity and precision really always compatible with each other, as the Commission proclaims? That precision and linguistic clarity are both desirable does not necessarily mean that they ‘are not competing goals’. Nor does the proposition that clear-but-imprecise texts are ‘as dangerous’ as precise-but-unclear texts in causing uncertainty and disputes, mean that linguistic clarity overlaps or is compatible with precision all or most of the time.⁵¹ The insistence of plain English proponents that clarity and precision are not mutually exclusive must rely on an implicit premise that the law can be made clear to the non-lawyer without compromising precision.⁵² It is precisely this premise that has attracted the criticism that the PEM is simple-minded.⁵³ Driven by the conviction that for the layperson precision and clarity *are* competing values, critics of the PEM tend to view the proposition that the law should be made intelligible to laypeople as one that necessarily leads to simplistic laws and compromises precision (‘Dick-and-Jane’ fashion, as it has

⁴⁹ While it is true that inserting more details may sometimes give rise to more disputes over their meaning, the fact that a particular contingency has been extensively litigated does not mean that it should have not been included. It only means that this contingency was not defined precisely enough to prevent misunderstanding. Omitting the contingency altogether would most likely have created a loophole in that text, and so would have resulted in litigation in any case. Of course it remains an open question in each individual case whether or not specific complexities are required for the text to be precise. It is not necessary for this article to discuss in depth the other, general question of how much regulation would be too much or too little, and under which circumstances or regarding which kind of activities de-legalisation might be useful. For specific examples of over-regulation in the area of cyberspace law, see C. Reed, ‘How to Make Bad Law: Lessons from Cyberspace’ (2010) 73 *Modern Law Review* 903.

⁵⁰ Victoria Commission n 7 above, [65]; see also [61]–[66] (emphasis added).

⁵¹ This is for example what Kimble thinks: n 23 above, 53 (‘Most of the time, clarity and precision are complementary goals’).

⁵² *ibid* 53–61.

⁵³ See the review of critics at Victoria Commission n 7 above, [57]–[92]; Kimble n 4 above, 19–27. See also Patrick Mayhew, ‘Can Legislation Ever be Simple, Clear, and Certain’ (1990) 11 *Statute Law Review* 1, 7–8.

been ridiculed).⁵⁴ For these critics, clarity of law inevitably compromises clarity of language, and vice versa.⁵⁵ Plain English advocates have largely failed to respond adequately to this

Page 24

criticism. They have mainly resorted to counter-attack, giving examples of obfuscatory linguistic tendencies, to which they claim lawyers are prone, which do not contribute significantly to precision and may detract from it.⁵⁶ On its face, this is a forceful argument, because unnecessarily complicated language and mere verbosity or repetition are likely to make the law more costly, difficult, and frustrating to use for legal professionals and non-professionals alike. But whether the PEM is correct in suggesting that using plain language could make the law significantly more intelligible to laypeople without any loss of precision is a question that remains to be answered.

2.3 Why is Legal Clarity in Tension with Linguistic Clarity?

This sub-section argues that the commitment to precision prevents the law from speaking directly to its subjects in any meaningful way. If the law is to coordinate the wide range of social and economical activities in which people in modern society may engage, simplicity is bound to be compromised. To set forth precise arrangements for such matters as how to create a legal entity such as a corporation, what taxes to pay, how to enter into a contract, how to transfer ownership of property, and the like, legal texts must be detailed and lengthy.⁵⁷ Under such circumstances, the law-user should be able to use legal rules in a *contextual* way because the law as a whole creates the context in which rules could have a meaning.⁵⁸ To ascertain what a given legal rule means and fully understand its effect and how it operates, it is often necessary to know what other related rules provide and how these rules impact on each other. Some rules may conflict and need to be balanced against each other, a task which has to follow certain principles

Page 25

and rules. Clearly, the more detailed the law, the more intricate the structure with which one must become familiar as a precondition for using it properly.

Moreover, law-users should become familiar with rules of interpretation and be prepared to deal with situations that are not directly captured by existing legal rules as well as instances of ambiguity, open texture and borderline cases. Furthermore, the volume of detail and the complexity of the subject matter create inevitable complications that make the task of understanding the law more than just reading and understanding the words of a particular legal text. For a law-user to develop a legal theory applicable to her circumstances, she must be able to *identify* which specific legal texts are relevant to her circumstances and which particular parts of these texts capture those circumstances. To do that, she needs to be aware of the different sources of law, primarily statutes and case law, and how they intersect.⁵⁹ The law-user also needs to know how to treat precedents, how to distinguish between a dictum and a ratio, and how to analogise or distinguish between cases as needed. These are important issues that have been so immensely cultivated in legal literature that they cannot be

⁵⁴ Kimble n 4 above, 19.

⁵⁵ See e.g. Bennion n 16 above; Berry n 46 above, 97; Luban n 8 above, 244–245 fn 20

⁵⁶ Knight n 9 above, 7; Victoria Commission n 7 above, [66]; Kimble n 4 above, 19; Butt and Castle n 4 above, 89.

⁵⁷ To avoid length on the one hand and over-generality on the other, one ends up using compressed language that, given the density of information, is unlikely to be any plainer to the layperson, and not even to the jurist. See Nazareth n 19 above, 89. For empirical data on the harmful effects of lexical density see Tanner n 2 above, 58, 62–63.

⁵⁸ On the importance of context to the understanding of the law, vis-à-vis the works of Wittgenstein and Hart, see T. Endicott, 'Law and Language' in J. Coleman and S. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: OUP, 2002) 946–950

⁵⁹ For a description of further logistic and application difficulties see Sullivan n 7 above, 100–103.

made straightforward or bypassed simply by breaking the law into short and elegant clauses, free of technical terms, or presented in a user-friendly style, as the PEM proposes.⁶⁰

Of course, the extent of the difficulties the law-user may encounter will vary from one situation to another, depending on the factual and legal complexity of the case in question. Still more difficulties arise when a case goes to court, due to the intertwined nature of procedural and substantive laws. The process of litigation is governed by a set of rules of procedure that facilitate the process of investigating and determining a case, including rules on jurisdiction,

Page 26

joinder of parties, standing, pleadings, service, disclosure, expert evidence, cross-examination, appeal, etc. Furthermore, the trial is governed by a set of evidence rules having to do with the kind of evidence that is admissible and for what purposes, types of evidence (documents, physical objects, oral testimony), the distinction between direct and opinion evidence, questions of weight, etc. To be able to use this procedural and evidentiary apparatus, one needs to know which substantive legal rules are pertinent. Comprehensive knowledge of substantive law is necessary to determine the criterion for legal relevance, i.e. which specific substantive rules govern the situation, which, in turn, will determine the criteria for factual relevance, i.e., out of 'the totality of acts and events in the world those which it is worth averring and offering to prove ...', which facts need be pleaded and proven.⁶¹

It is important to note that the observance of procedural and evidentiary rules should not be downplayed due to the fact that they are instrumental and subordinate to the final disposal of the case. In other words, they should not be treated as mere technicalities that have no merit on their own. Many of these rules aim at protecting important rights and interests. For example, the law on disclosure involves a balance between the right to obtain knowledge and equal footing on the one hand, and the interest in reducing costs, the right of privacy, or some other privileges, on the other. Likewise, the law on service involves important considerations such as the right of claimants to commence legal proceedings seeking a remedy as opposed to the right of defendants to be duly notified of actions against them.⁶²

Page 27

To conclude, the argument often made by plain English advocates that complexity in subject matter does not call for complicated, convoluted language⁶³ should be taken only to discourage unnecessary complexity and obfuscation. It should not play down the complications created by detailed and sophisticated laws.

2.4 Can the Law be Detailed without being Complex?

One might argue that a law can be merely detailed without being complex. For example, the law of contracts could include lists of all that has been or could be considered as 'acceptance', 'offer', 'frustration', etc, so that the law-user need only navigate one text that contains all the details she needs. Jeremy Bentham, for example, criticised the common law as an illegitimate usurpation of the legislative power and as giving uncertainty in volume'.⁶⁴ A fan of codification, Bentham believed

⁶⁰ For a brief review of different views on adjudication, interpretation and legal reasoning, see J. Penner, 'Legal Reasoning' in J. Penner, D. Schiff and R. Nobles (eds), *Introduction to Jurisprudence and Legal Theory* (London: Butterworths, 2002) 649. A more elaborate discussion of the distinctive features of legal reasoning can be found at Schauer n 21 above.

⁶¹ MacCormick n 42 above, 47.

⁶² It is worth noting that the English rules of evidence and procedure used to have a bad reputation. Bentham famously presented them as irrational, excessively complex and mainly used by lawyers and judges to exact fees from litigants: see Bentham n 2 above. However, such criticism is no longer prevailing in contemporary literature. See R. Park and M. Saks, 'Evidence Scholarship Reconsidered: Results of the Interdisciplinary Turn' (2006) 47 BCLR 949.

⁶³ R. Eagleson, *Sydney Morning Herald*, 20 January 1985, 8, endorsed by Victoria Commission n 7 above, [72].

⁶⁴ Bentham n 2 above, 291.

that the law could be broken down into clear, discrete parts that could be comprehended and remembered by ordinary citizens.⁶⁵ With regard to procedure, he thought that a court should resemble a domestic tribunal' and its proceedings should follow a model of natural procedure'. That is, courts should adjudicate matters in a manner similar to the way a father, or a householder, settles disputes among children or servants: as envisioned by Bentham, courts would be informal and flexible settings in which judges enjoy a wide discretion that is not confined by rules of evidence and procedure.⁶⁶

However attractive such ideas might be, they are impractical. For one thing, if in every document each legal concept or definition is to be deconstructed into all the possible variations or contingencies that fall within its scope, we will end up with a huge mass of information that

Page 28

runs counter to the simplicity promised by the PEM.⁶⁷ For another, the idea of a completely self-contained code is theoretically infeasible. As H.L.A. Hart observes, it is impossible for any rule to foresee and therefore capture all the possible circumstances in which the rule may be invoked. There will always be situations that cannot be settled by simply appealing 'to linguistic rules or conventions or to canons of statutory interpretation, or even by reference to the manifest or assumed purposes of the legislation'.⁶⁸ Furthermore, according to Hart, the scope of legal rules is dynamic; they evolve by being adapted, adjusted, restricted, qualified, or otherwise, to meet the needs of future cases.⁶⁹ It follows that their scope is neither fixed nor confined to the linguistic meaning of the words that convey them. Whether rules even have a clear 'core' and whether the described problems are typical only of the 'fringe' of rules is a controversial matter.⁷⁰

This point can be further illuminated by G.E.M. Anscombe, who challenges the very existence of what she calls 'brute facts'. She argues that it is impossible to articulate an exhaustive description of all the circumstances that, theoretically, could impair the normal description of a certain action as such. In her example, if somebody asks the grocer for a quarter of potatoes and the grocer in turn delivers the potatoes to that person with a bill, it may not be correct to infer that that person 'owes' the grocer the amount of the bill until we have excluded other possible scenarios, for example that the described exchange was being simulated by actors rehearsing a

Page 29

scene. Likewise, that the grocer 'supplied' the potatoes may not be inferred from the fact that the grocer left them at that person's door unless we specify that this happened in the absence of other circumstances, such as the grocer's subsequently having sent someone else to collect the potatoes. Accordingly, Anscombe concludes that 'every description presupposes a context of normal procedure, but that context is not even implicitly described by the description', and that there is always 'a further special context for each special context, which puts it in a new light'.⁷¹

Thus we are led to conclude that it is impossible to create a self-contained code and that legal knowledge cannot be exhausted by the language of legal rules. This is why, as the European

⁶⁵ *ibid* Ch 27, 422; Mellinkoff n 2 above, 262.

⁶⁶ For a good account of Bentham's theory of adjudication see G. Postema, *Jeremy Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) ch 10.

⁶⁷ See e.g. Tiersma n 37 above, 50 and Schauer n 21 above, 28. Sullivan presses this point, arguing that the risk of being blinded by the mass of details may be alleviated by access to Internet and electronic publications. She thinks that more use should be made of examples, tables and indexes, overviews, flow charts, Q&A forums, preambles, purpose statements, and explanatory notes. Furthermore, definitions and references should be entered as hyperlinks so that locating and navigating the statute book would require no more than the ordinary web surfing skills 'developed by citizens in searching for good vacation spots or downloading music': n 7 above, 102–103, 112. Such solutions are far from satisfactory because they are likely to yield only a partial knowledge of this or that provision of the law, taken out of context.

⁶⁸ H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: OUP, 1983) 103.

⁶⁹ Hart n 46 above, 120–132. See also Schauer n 21 above, 28–29.

⁷⁰ See discussion at Schauer n 21 above, 151–158, vis-à-vis the famous Hart-Fuller debate. This is further complicated given the unclear boundaries between matters of law and fact. For an incisive discussion see A. Zuckerman, 'Law, Fact or Justice' (1986) 66 *Boston University Law Review* 487.

⁷¹ G.E.M. Anscombe, 'On Brute Facts' (1958) 18 *Analysis* 69, 70–71.

experience shows, codification has not made the law directly intelligible to its subjects, nor litigation cheaper, more expeditious or more straightforward for self-represented litigants.⁷² This is also why other scholars did not take Bentham's ideas on this subject seriously. For example, H.L.A. Hart, while lamenting that there is still a significant amount of unnecessary complexity in the law, suggests that it is quite unreasonable to adopt Bentham's ideas:

... it may be quite plausibly urged that our society has grown so much more complex since Bentham's day that it is absurd now to call for radical simplification of our law and legal proceedings, or to hold out even as an ideal the natural simplicities of the cottage and family life.⁷³

For similar reasons, Lon Fuller asserts that the expectation that 'the dutiful citizens will sit down and read [all the laws]' or that every citizen should be educated 'into the full meaning of every law that might conceivably be applied to him' is 'foolish' and 'absurd'.⁷⁴ He substantiates

Page 30

his claim by reporting an observation of communist Poland in 1961 which attempted to make the law directly clear to the worker and the peasant and instead inflicted severe harms on the system as a whole, rendering the application of laws by the court more capricious and less predictable.⁷⁵

In summary, for the law to be precise it needs to be detailed and it cannot be reduced to general principles or concise texts that could be easily understood by the uninitiated. The law-user must take into account a whole system of detailed legislation, case law, rules of interpretation and legal reasoning, and this requires expertise, particularly in litigation, where the law-user must, at various junctures in the process, make important decisions that call for a nuanced knowledge of both procedure and substance.

3 IS IT POSSIBLE TO AVOID 'TECHNICAL LANGUAGE'?

To better understand why laypeople find it difficult to understand the law language it is of vital importance to look into the relationship between technical language and common speech. Undoubtedly, the deviation of the law language from ordinary speech enhances its unintelligibility. Yet it would be a mistake to condemn that deviation without carefully examining its nature. This section argues that the technical nature of the law language has been misconceived by plain English advocates.

Page 31

3.1 In What Ways is the Law Language Considered Technical?

The technical character of the law language is said to deviate from ordinary speech in two ways.⁷⁶ The first involves the taxonomy of what are usually referred to as 'common' versus 'uncommon' expressions. Arguably, Anglo-American law language makes use of 'common' expressions while ascribing to them meanings in the law different from their ordinary ones, such as: *action* (as law suit), *cause of action*, *piercing the corporate veil*, *cross-examination*. Furthermore, the law language

⁷² It is not surprising, therefore, that in many European countries self-representation is formally prohibited. For a general review see S. Chiarloni, P. Gottwald and A. Zuckerman (eds), *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford: OUP, 1999); Mayhew n 53 above, 10.

⁷³ Hart n 3 above, 32. Hart also remarks that even when Bentham 'flirted' with the idea of 'everyman his own lawyer', he did not really believe that lawyers can be disposed of. According to Hart, what Bentham did believe, however, was that the need for lawyers' service and its cost could be largely reduced if 'the artificial encrustations of the law and its procedure were cut away' (30).

⁷⁴ Fuller n 39 above, 49.

⁷⁵ *ibid*, 44–46. When Lon Fuller prescribed clarity as one of eight fundamental prerequisites for the validity of law, he had in mind clarity as precision, not clarity for the layperson. This is why in his opinion matters of clarity invoke questions of the delegation of the task of clarifying the law from the legislature to the judiciary. Furthermore, this understanding is implied in his treatment of open-ended standards such as 'good faith' and 'due care' as 'honest vagueness', preferable to 'specious clarity' (63–65).

⁷⁶ This description is mainly based on Mellinkoff n 2 above, ch 2.

uses ‘uncommon expressions’—formal and archaic English, Latin, and Old French terms—either to convey a specific meaning in the law for which the expression serves as shorthand (such as *habeas corpus*, *alibi*, *amicus curiae*, *mens rea*, *in rem*, *in personam*, *res judicata*, *res gestae*, *bona fide*, *affidavit*, *estoppel*, *without prejudice*) or merely to convey the ordinary meaning of that expression without imparting any additional legal implication (such as *prima facie*, *versus*, *inter alia*, *in re*, *aforsaid*, *forthwith*, and the *here- there- and where-* words).⁷⁷ While uncommon expressions are merely unintelligible, common expressions may be confused with their common meanings without signalling to the uninitiated the need to enquire into their specialised meanings.

The second taxonomy relates to the degree of precision of legal expressions. This is the distinction between ‘terms of art’ and ‘argots’ as suggested by David Mellinkoff, who defines a ‘term of art’ as a technical expression that has a well-defined specific meaning in the law that the uninitiated may not understand even while recognising it as the mark of a speciality. Examples include *felony*, *alibi*, *agency*, *landlord and tenant*, *dry trust*, *fee simple*, *dictum*, *ex parte*, *inter parte*, *contributory negligence*, *injunction*, *res judicata*, *stare decisis*, *tort*, *voir dire*. Yet not every legal expression is specific enough to qualify as a term of art. Hence the ‘argots’, which Mellinkoff takes mainly to include expressions that are not technical or specific enough to qualify as terms of art, or that are merely

Page 32

professional slang—such as *cause of action*, *due care*, *inferior court*, *issue of fact or of law*, *raise an issue*, *alleged*, or *pierce the corporate veil*.⁷⁸

Based on these distinctions, the typical argument proffered by plain English advocates is as follows.⁷⁹ It starts by reciting Mellinkoff’s famous sentence that the law language should agree with ordinary speech unless there are reasons to deviate from it.⁸⁰ It then submits that, while the use of technical expressions can sometimes be useful, such utility cannot legitimise the excessive departure of traditional law language from ordinary language because ‘terms of art’ are ‘but a tiny part of any legal paper’, the rest of which can be written in Plain English.⁸¹ In other words, the deviation of the law language from ordinary speech can be justified only in those very few instances in which a term of art is more apt, and potentially more useful, than what ordinary speech has to offer. In all other cases, law language should conform to ordinary English capable of being understood by laypeople.

3.2 Technical Language Redefined

The described perception of technical language is too narrow. It views the technicality of the law language only through the lens of ‘terms of art’. While the distinction between terms of art and argots might have some linguistic value, when it comes to evaluating the effect of language on the level of comprehension of the uninitiated it is of little use. A broader definition of technical language is needed to explain the unintelligibility of the law language. Such a definition is offered by Peter Tiersma who includes under technical language any expression that has a meaning

Page 33

peculiar to the law and unlikely to be known to the layperson, regardless of whether it is a term of art, argot, or otherwise.⁸² The advantage of this definition is that it ties ‘technicality’ to the expression in question being used by the profession because, in the specific context, it conveys more information than the mere words constituting that expression, even when, as Mellinkoff would have

⁷⁷ Cf Hart as cited by Bennion n 24 above, 5

⁷⁸ Mellinkoff n 2 above, 16–19

⁷⁹ See e.g. Kimble n 4 above, 10, 18, 20–21; Victoria Commission n 7 above, [80].

⁸⁰ Mellinkoff n 2 above, preface and ch 13.

⁸¹ Kimble n 23 above, 55. Kimble mentions some estimates of the number of terms of art: fewer than 50 according to one view, 100 according to another and, according to a third, 3 percent of the words of real-estate sales contracts. According to Mellinkoff (n 2 above, 388) there is only a ‘distinctive nubbin of precision’ achieved by the use of terms of arts and some of the law’s argot, and that ‘small part ... is almost lost in any given square foot of the law language’. Mellinkoff mentions 52 terms of art (17).

⁸² Tiersma n 6 above, 106–110.

complained, it is not completely precise. Thus understood, technical expressions are typically incomprehensible to laypeople because their legal meaning is not contained or exhausted in their linguistic meaning; accordingly, the use of ordinary words would not dispel their unintelligibility. Their legal meaning can be grasped only by possessing specialised knowledge of the legal context in which these expressions operate. This may include legal doctrines, rules, case law, conventions, practices, and some other information to which these expressions allude. When commentators defend the law language as being precise, they do not have perfect or theoretical precision in mind, but rather a higher degree of precision achieved by the law language. This broad definition of technical language better explains why the following phrases are less likely to be properly understood by the uninitiated, even though they may not be considered as terms of art:⁸³ *judge/forum-shopping, piercing the corporate veil, cause of action, due care, inferior/superior court, an issue of fact or of law*. The translation of these expressions—as with foreign expressions such as *habeas corpus* or *res judicata*—into ordinary English would be insufficient to make them fully intelligible, because their incomprehensibility lies in the fact that they refer to a legal rule, practice, concept, or doctrine that lies outside their linguistic meaning, even if this expanded meaning is not sufficiently precise to produce a term of art. As explained earlier, the CPR serve as a good example of an instance where the translation of Latin and archaic words into contemporary language did not make English civil procedure much easier or cheaper to use.

Page 34

The question is now this: can the content of technical expressions (as defined here) and what they represent be made more accessible to the uninitiated who wishes to discover their meaning? It is perhaps possible to make them *more* intelligible, but not intelligible enough so as to enable laypeople to fully understand the law and, when necessary, litigate their cases. As argued in section 2.4, it is not reasonable to bring into every legal document all the relevant premises, definitions, statutory rules, or case law that are required to fully understand it, at least not without running the risk of generating a massive amount of information that is too unwieldy to be intelligible. But it is not only that. The following sub-section explains why there will always remain a gap between the language of the law and ordinary language.

3.3 Legal Concepts versus Words: The Inevitability of Specialised Meanings

So far I have used the common distinction between the law language and ‘ordinary’ language. However, it is time to offer the following caveat. Arguably, there is nothing out of the ordinary in the law language. Just as in the so-called ‘ordinary’ language words may take on different meanings in different contexts,⁸⁴ the law language may be simply one example of a context in which certain expressions take on different or unique meanings. Thus, distinguishing such meanings from so-called ‘ordinary’ meanings may be biased. For example, the expression ‘contract’ and its components ‘offer’ and ‘acceptance’ may mean different things to different people: for some, verbal agreements would qualify as a ‘contract’ whereas for others only written ones would deserve that name. Likewise, individuals may disagree as to the degree of particularity and specificity required to render their agreement a binding contract, or whether agreements can be inferred from certain actions or omissions. Similarly, people may disagree on

Page 35

what counts as ‘consent’ for the purpose of sexual intercourse, or whether ‘possession’ includes situations in which the object is not physically possessed. Thus, if the law is to provide a unified meaning of what constitutes a ‘contract’, ‘consent’ or ‘possession’, it must inevitably deviate from one ‘ordinary’ definition in favour of another.⁸⁵ Therefore, there will always be a gap between the

⁸³ As classified at Mellinkoff n 2 above, 16–17 and Tiersma n 6 above, 107

⁸⁴ ‘Few words have fixed significations like the pure numbers of mathematics’: S. Potter, *Our Language* (London 1959) 104. See also the examples discussed at B. Hunt, ‘Plain Language in Legislative Drafting: An Achievable Objective or Laudable Ideal?’ (2002) 24 *Statute Law Review* 112, 116–117, and R. Posner on the ‘Plain-Meaning Fallacy’ in *The Problems of Jurisprudence* (Harvard University Press 1993) 262–269

⁸⁵ Tanner (n 2 above, 57) gives the example of the word ‘guarantee’. In the context of bank loans this term usually means that the guarantor becomes liable for paying the debt if the debtor falls short of doing so.

meaning of certain concepts in the law and their meaning in other contexts and, in turn, contrasting the law language to ‘ordinary’ or ‘common’ speech must only be understood as noting that expressions may have certain meanings in the law that are different from other meanings they may have in non-legal contexts.

Moreover, when speaking of the law language, regard must be had for what might be described as ‘conceptual thinking’.⁸⁶ By this I mean not only thinking beyond the physical objects and the ‘core’ meanings of words (e.g. ‘damage’ as tangible or physical injuries or damage already incurred), but also recognizing that legal expressions contain more than their dictionary-based linguistic definitions and that such contents cannot be captured without reference to how they were developed in the law. Conceptual thinking is not necessarily a unique feature of the law language or professional languages in general. Phrases such as ‘my word is my bond’, or concepts of ‘good name’ or ‘good faith’, for example, may well be used in daily life. However, such common usages are generally utilised on an intuitive or abstract level, whereas in the law, concepts (e.g. ‘causation’, ‘foreseeability’, ‘duty of care’, ‘liability’ etc) tend to be developed systematically by reference to certain doctrines, principles, and rules that reside outside their linguistic scope (e.g. retribution, deterrence, restitution, joint liability, vicarious liability, etc). In

Page 36

other words, legal concepts form a sophisticated apparatus that non-lawyers cannot capture merely by appealing to their abstract or intuitive perceptions of such concepts. To capture this apparatus one must embark on a comprehensive study of the law and of the specific way in which its concepts developed.⁸⁷ The sophistication of this apparatus is particularly evident when the drafter deliberately resorts to such inherently vague legal concepts as *abuse of discretion*, *adequate*, *excessive*, *due process*, *habitual*, *improper*, *malice*, *negligence*, *reasonable time/person/care/speed*, *undue influence*, *usual/unusual*, *substantial*, *sound mind*, *ordinary*, *normal*. Often, these concepts are employed to leave room for later interpretation that would take account of legal policy and normative considerations, allowing these expressions to evolve on a case-by-case basis, thus deviating from their ‘raw’ or ‘core’ ordinary meanings, so to speak. The construction of such concepts is less related to the *words*—say, contract, will, or consent—than to the legal *concepts* of these words, thus creating a gap between ordinary and legal speech. This gap is created not because lawyers have more expertise in the normative spheres or in public policy than laypeople but, rather, because they know which normative considerations have been acknowledged by the law in relation to this or that concept, or which considerations are likely to be acknowledged by the court in the light of past experience.

The gap between the law language and ‘ordinary’ language becomes even wider when one recognises that some legal concepts do not deal directly with human behaviour and therefore cannot be said to have any ‘ordinary’ meaning that the layperson can appeal to. Some expressions are created by the law and they require some specific legal knowledge to decode them and apply them successfully, such as ‘distributable net income’ or the ‘corporate veil’.⁸⁸ In the latter example, it may not suffice to explain to the layperson that piercing the corporate veil

Page 37

roughly means imposing personal liability on shareholders, without explaining to her certain tenets of corporate law such as the justification for the principle of corporate liability, and the interests protected by piercing the corporate veil. The same holds true for ‘contributory negligence’, the application of which may well require sufficient knowledge of the principles of retribution and deterrence, notions of reasonableness, and the relevant legal and social policies. The laws of

However, Tanner suggests that a layperson might think that it means no more than that the person assuming this role is required to make sure that the debtor pays the loan.

⁸⁶ For a discussion of the difference between words and concepts see J. Raz, ‘Can There Be a Theory of Law?’ in M.P. Golding and W.A. Edmundson (eds), *The Blackwell Guide to the Philosophy of the Law and Legal Theory* (Oxford: Blackwell Publishing, 2005) 324–328.

⁸⁷ It might also be arguable that conceptual thinking is used more frequently and on a larger scale in the law than in daily life, but pursuing this proposition is not necessary for this article. See Schauer n 21 above.

⁸⁸ Friedman n 4 above, 566.

procedure and evidence provide many similar examples. Take the phrase *res gestae* which serves only as an allusion, a label attached to a certain doctrine, namely, that a statement made following a criminal act in such proximity as to be part of the act itself is admissible as evidence notwithstanding the exclusion of hearsay. The proper application of this doctrine requires knowledge of the principles of evidence law, hearsay, reliability, admissibility and weight of evidence, etc.

What these examples show is that the technicality of the law language cannot be reduced to a linguistic matter. The law language is underpinned by a body of theories, doctrines, principles, and rules—knowledge of which is necessary to fully account for the meaning and scope of legal concepts and to use them effectively and efficiently in court. This explains why one study found particularly poor comprehension levels of legal concepts amongst non-professionals despite the ‘translation’ of these concepts into plain English.⁸⁹ While the content of the law language may not surpass the faculties of laypeople and may be made more accessible, it cannot be made intelligible enough without engaging into comprehensive legal training. One may accept that with sufficient application non-lawyers can grasp legal concepts and complex legal subjects, yet acquiring a sufficient understanding in each individual case would call for a disproportionate investment of effort such that it would be more efficient to hire a lawyer.

Page 38

CONCLUSION

This article has debunked the most fundamental premise underlying the PEM, namely that the law could be made directly and usefully intelligible to its subjects by adopting plain language. It has demonstrated the flawed methodology and insignificant statistical relevance of the empirical studies often presented to show the benefits of plain English. Furthermore, this article has explained the ways in which lawyers remain necessary to the person who wishes to obtain sufficient understanding of the law and use it effectively. This has been achieved by explaining the importance of details to the precise allocation of legal rights and obligations and illuminating the tension between details, legal precision and linguistic clarity. It has been shown that a detailed body of law creates various complications whose effective handling requires a special expertise. The need for expertise has been further substantiated by explaining the technical nature of the law language and its inevitable departure from so-called ‘common speech’. Litigation has been introduced as the paradigmatic example of situations where the need for expertise exceeds whatever increased understanding may result from the plain English project.

The article has suggested two possible alternative rationales for the undertaking advocated by the PEM. Promoting the use of plain English may clarify the law for lawyers and thus improve the quality and efficiency of their legal service. A plainer law language may also enhance the capacity of laypeople to evaluate the service provided by their lawyers and by the legal system. Be that as it may, the resort to plain English must not be advocated as a means of enabling the law to be fully understood by the lay user unaided, for that is a goal which, as this article has shown, is simply unattainable.

Website: www.francisbennion.com

Doc. No. 2011.004.NFB

Journal of Law and Society (2011) Volume 38 pp 376-404

For full version of abbreviations click ‘Abbreviations’ on FB’s website.

⁸⁹ Knight n 9 above, 38.