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**A Legal-Linguistic Approach to the Constantinople
Convention and the Egypt-Israel Peace Treaty**

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Abstract

Interdisciplinarity dominates today's world. Language is a key component of any discipline; law is no exception. This fact has given way to legal linguistics – a field of study that investigates where the language of law meets, or deviates from, the law of language. This paper investigates certain lexical and stylistic characteristics of legal English and applies them to two of Egypt's most important legal documents in its modern history: (1) The Convention of Constantinople (that regulates the use of the Suez Canal) of 1888, and (2) The Egypt-Israel Peace Treaty of 1979.

Keywords: interdisciplinarity, legal linguistics, Convention of Constantinople (CCSC), Egypt-Israel Peace Treaty (EIPT), legal language, leonine agreements, legal obligation

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Linguistics, the scientific study of language, branches out into a galaxy of linguistic disciplines. This includes, but is not limited to, sociolinguistics, computational linguistics and legal linguistics. Mellinkoff's (2004) preface to his classic book begins as follows, "The law is a profession of words. Yet in a vast legal literature the portion devoted to the language of the law is a single grain of sand at the bottom of a great sea." More than three decades later, Tiersma's expansion of Mellinkoff's academic and on-the-job output resembles the view that law comes into existence through language, while warning that, "there has been remarkably little interaction between language experts and lawyers; neither discipline seems to know very much about the work of the other" (Tiersma, 1999, p. 1). With this and the notion of interdisciplinarity in mind, legal linguistics becomes an urgent

requirement for countries in a world governed by legal documents in the form of treaties, contracts, and other forms of legal instruments.

Statement of the problem

The profession of law takes many shapes in today's life, including those of judges, diplomats, lawyers, advocates, solicitors, attorneys at law, jury members, paralegals, jurists, etc., with a common ground for all of them – language. This entails the necessity and importance of an interdisciplinary and gap-bridging approach, in general. In particular, however, this paper seeks to apply this approach to the legal field of treaty drafting.

Literature review

Legal linguistics has become a full-fledged field of study in advanced countries thanks to efforts by many authors, including David Mellinkoff's *The Language of the Law* (2004), whereby the author traced legal English to its historical origins and the developments it witnessed by time; and *Legal Writing: Sense and Nonsense* (1982), wherein Mellinkoff lashed out at the legacy of legal English and its loathsome hallmarks; Peter Tiersma's *Legal Language* (1999), in which the author echoed Mellinkoff and added an overview of reformist efforts aiming at producing the sought-after plain legal English; and Brayan A. Garner's (2002) *The Elements of Legal Style*, in which Garner establishes rules for sound legal drafting in English. Other works of literature include Mattila's *Comparative Legal Linguistics* (2006), wherein she held a contrastive approach between legal English and other European languages; Deborah Cao's *Translating Law* (2007), wherein she dedicated her efforts to how legal texts should be translated; Chris Hutton's *Language, Meaning and the Law* (2009), whereby he looked into legal English in judicial proceedings; Priban's (2007) *Legal Symbolism*, in which he reviewed some characteristics of legal English from a logical perspective; Roger Shuy's *Language*

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Crimes (1993), in which he highlighted several US-based court room cases involving misinterpretations of human linguistic interactions and how such misinterpretations affected the resulting rulings. The 1969 Vienna Convention on the Law of Treaties (VCLT) is a key legal instrument to be observed for treaty drafting.

Some characteristics of legal English

Legal English has many distinctive qualities. Only some of them are addressed herein for brevity and size.

1. Common words with uncommon meanings

A simple way to detect how far legal English is from plain English is to make a list of common words, which are almost known to every interlocutor, with uncommon meanings in legal contexts. The following list suggests non-exhaustive examples:

<i>Without prejudice</i>	without loss/waiver of rights/provisions
<i>Presents</i>	this legal document
<i>Hand</i>	signature
<i>Motion</i>	formal request for action by a court
<i>Prayer</i>	a pleading addressed to court
<i>Save</i>	except (Garner B. , 2009)

Being a legal instrument, EIPT, for example, has several occurrences of these words as in, "... *without prejudice* to the issue of the status of the Gaza Strip..." (EIPT, Art. II).

2. Obsolete and old word usage

Old English refers to the language used in England prior to the Norman Conquest and down to nearly 1100, when Middle English stepped in from 1100 to about 1500 marking the advent of Modern English. Although Modern English owes much to its two predecessors, legal English still holds in high esteem of practice many Old and Middle English words. A good example of this is *pronominal adverbs*: a type of adverbs occurring in a number of Germanic languages formed to replace a combination of a preposition and a pronoun by transforming the latter into a

locative adverb and the former into a prepositional adverb, while joining them in reverse order. Mellinkoff suggested an exhaustive list of them as follows:

Aforesaid and *forthwith*, the *Here* words: *hereafter*, *herein*, *hereof*; *heretofore*; *herewith*, *said* and *such* as adjectives, *Thence* and *thenceforth*, *there* words: *thereabout*; *thereafter*; *thereat*; *thereby*; *therefor*; *therefore*; *therein*; *thereon*; *thereto*; *theretofore*; *thereupon*; *therewith*, the *where* words, especially *whereas* used in recitals, and *whereby*, *witness*, in the sense of testimony by signature, oath, *witnesseth*, meaning to furnish formal evidence of something, the Old English present indicative, third person singular verb form. (Mellinkoff 2004, p. 13)

This attribute of legal English is present in the Treaties. For example, JIPT uses *such* as an adjective, “2. Any *such* dispute which cannot be settled...” (Art. 29 §¹ 2).

Said is used in legal documents as an article or demonstrative pronoun. CCSC reads, “The Egyptian Government shall, within the limit of its powers resulting from the *Firmans*, and under the conditions provided for in the present Treaty, take the necessary measures for insuring the execution of the *said* Treaty” (CCSC, Art. IX), where *said* can be easily replaced with *the* or *this*. *Said* can be also used as an ordinary adjective. A variant from of *said* is *aforesaid*. Clearly, it is another form of *said* with the same meaning because anything *said* must have been said before or “afore” (Tiersma, 1999).

3. Ambiguity and vagueness

According to Lavery (1923), legal English is plain ‘muddy’; that is, often unclear. This does not mean that it is devoid of meaning, but rather has meanings that are hard to

¹ This legal symbol stands for *section*.

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figure out. This holds particularly true when it comes to legal documents such as insurance policies that are full of legal traps affording insurers the luxury of legal misinterpretation by clients and, therefore, fewer payable damages. However, ambiguity is sometimes useful: it may serve as a tool to condone established, annoying and negotiation-stumbling facts, as the case is with the infamous *the* of the UN Security Council Resolution No 242, thus serving as a negotiation tool. Approaching this characteristic of legal English, it is useful to define the concept of ambiguity first and then find out what makes ambiguity a diplomatic one. Linguistic ambiguity, according to Pechar (2005, p. 155), is “a pattern of language the meaning of which cannot be discerned with certainty.” The *dangerous* item in “flying plane may be dangerous” can be either *flying* or the *plane* itself. The use of *the* here can turn this sentence into a non-ambiguous one: “flying *the* plane can be dangerous”. Further, ambiguity may arise out of non-linguistic factors such as ignorance of facts, possible meanings or views, which may add insult to injury.

Ambiguity can be of a diplomatic nature when relevant to diplomatic texts/documents. In other words, a diplomatic ambiguity assumes an important diplomatic role. International peace agreements serving as good examples in this respect. A treaty-maker, by introducing deliberate ambiguity to a diplomatic instrument, hopes for makeshift meeting of conflicting demands of parties to an agreement. A good example here is the aforesaid UN Resolution 242 the drafting of which tried to satisfy Arabs’ demands of Israeli withdrawal from all territories occupied during the 6-Day War on one hand, and the Israeli demands to keep a room for a reconsideration of the pre-6-Day War borders between Israel and its Arab neighbors, on the other. Resolution 242 ambiguity “was a result of an application of a number of principles that seemed to be difficult to reconcile at the time of adoption of 242: the principle of inadmissibility of the acquisition of territory by war and the principle of the right to

live within secure and recognized borders free from the threat of neighboring countries.” (Pehar, 2005, p. 162). Due to the sheer brevity of the Resolution, with brevity being another quality of legal English, UN SC 242 did not define the party or parties which should take which steps, nor did it specify the parts of the territories occupied in June 1967 for purposes of territorial reconsideration.

Haigh (2009) is of the opinion that ambiguity “should be distinguished from mere vagueness. Vagueness arises when the language used is imprecise or non-committal, and may sometimes be intentional (for example, in order to avoid giving a specific commitment on a particular issue)” (Haigh, 2009, p. 67). In this sense, the above quoted problems of the US SC 242 infamous *the* and the proposed commitments under Annex III of EIPT (provides for certain measures of rapprochement, even normalization, between Egypt and Israel without the simplest clarification on the necessary means to achieve it) are, to Haigh, examples of intentional vagueness rather than ambiguity.

4. Constantly litigated words

There are words and phrases commonly used in legal English documents that result in litigation: *best efforts/endeavors* and *forthwith* or the like. The phrase *best efforts/endeavors* marks another means of pushing (the interpretation of) commitments into the future to reach an immediate settlement. This phrase is supposed to request a party or parties to exert efforts for a given end, but it also suggests a compromise in which no party concerned is ready to accept clear-cut obligations. The problem with this phrase is the lack of objective criteria to judge the *best efforts /endeavors* that are exerted/should have been exerted. Consequently, “the Law Society of England and Wales has warned solicitors against giving a ‘best endeavors’ undertaking” (Haigh, 2009, p. 71).

Projecting this to EIPT, the phrase *best efforts* has been used three times (Ann. 1, Art. VI § 1; Ann., App. 1, Art. III § 2;

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and Ann., App. 1, Art. VI § 4). *Forthwith* is problematic because it is too open-ended and elusive to be objectively defined timewise. Undoubtedly, a *forthwith* enforcement of debt repayment may mean a matter of hours or as soon as necessary finance is made available, while a judge's sentence of imprisonment against a criminal can only mean immediately, unless of course the indicted is a fugitive!

5. Shall

In plain English, *shall* is typically expressive of the future, and is traditionally reserved to the first-person pronouns; *I* and *we* as *will* usually fits in well with other pronouns. This typically applies to British English. In American English, *shall* is almost obsolete, and therefore *will* takes up all pronouns. As far as the legal lexicon is concerned, *shall* is commonly affirmed as a non-marker of futurity, but rather as of a commanding or obliging nature. In other words, it can be replaced with *must*. There are other senses of *shall* in legal writing. In a sense, it may not be suggesting a command or an obligation, but rather a declaration. A well-known example for this case is the introductory sentence of almost any law or act which traditionally reads, "This Act shall be known as the Civil Code of Egypt..." In other words, any person, be they biological or legal, *should* use that very title when referring to this Code. But, can any such person be jailed for not duly referring to that Act? Clearly, *shall* is not a commanding tool here.

Black's Law Dictionary (Garner B. , 2009, p. 1002), the world's most authoritative legal encyclopedia, defines *shall* as follows,

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance and its ordinary signification, the term *shall* is a word of command and one which has always or which must be given a compulsory meaning as denoting obligation."

Article 1 of EIPT reads, “The state of war between the Parties *will* be terminated and peace *will* be established between them upon the exchange of instruments of ratification of this Treaty.” The italicized occurrences of *will*, to a legal linguist, mean no obligation. This very notion applies to almost all provisions requiring Israel to do something. Consider § 2, Art. I of EIPT, “Israel *will* withdraw all its armed forces and civilians from the Sinai behind the international boundary between Egypt and mandated Palestine, as provided in the annexed protocol, and Egypt *will* resume the exercise of its full sovereignty over the Sinai.” Again, the very basic obligations or actions to be fulfilled so EIPT can have any meaning and effect are drafted in a very non-legal way. *Will* does not legally bind any party to do anything, not to mention the un-factual meaning behind *mandated Palestine* – it is actually occupied, not mandated. If *will* suggests futurity, it still marks no definite time for action, unlike *is/are* going to.

Some would argue that the whole document has a binding nature, so spotting such trivial matters is actually a waste of time. If this is true, another fact is equally true that treaties among countries *add to* as much as they are governed by the International Law. Should a dispute arise with respect to such linguistic features of EIPT, the Israeli *devil’s advocates* would further their irrefutable argumentation in this respect. This is further affirmed by the fact that when it comes to Israeli rights or Egyptian obligations, the binding legal *shall* is used. For example, § 1, Art. V of EIPT, reads,

Article V. 1. Ships of Israel, and cargoes destined for or coming from Israel, *shall* enjoy the right of free passage through the Suez Canal and its approaches through the Gulf of Suez and the Mediterranean Sea on the basis of the Constantinople Convention of 1888, applying to all nations. Israeli nationals, vessels and cargoes, as well as persons, vessels and cargoes destined for or coming

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from Israel, *shall* be accorded non-discriminatory treatment in all matters connected with usage of the canal.

Bowers (1989, p. 80) points out that *shall* is generally “used as a kind of totem, to conjure up some flavor of the law.” Another argument may be put forth that *shall* may not be used with performatives or declaratives. True, but only when performative or declarative verbs do imply the sense of binding, such as *abide by*, *adhere to* and *comply with*, or *acknowledge*, *represent* and *warrant*, respectively. A further argument may be put forward that *shall* is not required to precede the subject matter verbs - those directly concerned with the subject matter of a given legal instrument. Again, this is true, but such verbs would thereupon be used in the present simple tense preceded with the performatively-acting *hereby*.

Other adroit draftspersons interpret the use of *will* by only one party to a multi-party agreement as an expression of supremacy in order to leave the binding *shall* to the weaker party and for the stronger party to find legal gaps to be elusive with its contractual obligations (Sabra, 2007). Thus, using *shall*, unlike *will*, would suggest an equal state of negotiation power. A legal document with strong and weak parties is dubbed as *unequal* or *leonine*. Sabra (2007) highlights three main reasons not to use *shall* in a legal document:

- I. A word used several or many times must have a consistent meaning to avoid misinterpretation.
- II. A multi-sense word is useless to a legal linguist. Projecting this rule to *shall*, it would be therefore crossed out of any legal document. Garner (2002) lists eight senses to *shall* and its negative form.
- III. Sound legal drafting requires consistent use of the present simple tense. The future sense of *shall* should be avoided in legal documents.

Dickerson (1986) defines a good legal drafter as a person, *inter alia*, of consistency. Legal linguists, however, agree that no two words should be used to indicate the same meaning in one written unit (e.g., a paragraph), especially when one of them is used with another sense in the larger written unit (e.g., a treaty). To the contrary of this rule, *shall* and *will* are used to indicate the same meaning of futurity in the following quotation, “Meetings of the Joint Commission *shall* be held at least once a month. In the event that either Party or the Command of the United Nations Force requests a special meeting, it *will* be convened within 24 hours” (EIPT, App. to Ann. I, Art. IV, § 4). *Shall not* is seriously avoidable as it can either mean that the subject has a duty not to do something, or that the subject does not have a duty to do that thing.

The use of legal *shall* has two approaches: (1) The American approach that goes for restricting the use of *shall* to one single sense: has a duty to, thus aiming at avoiding misinterpretations and inconsistent use of words. They also restrict the use of *shall not* to one single sense: has a duty not to, provided that the subject is a natural person as *must not* must be used with legal persons (Sabra, 2007); and (2) The Australia, Britain and Canada (ABC) draftspersons’ approach that calls for the outright elimination of *shall* and replacement thereof with *must*.

6. Archaism

Another characteristic of legal English is archaism. It may take a lexical form as highlighted under 2 above, a larger structure as the case is with *shall + structures*, and/or the form of obsolete yet unchanged references as found in several occurrences in CCSC. Like no other legal instrument, CCSC is still well in force and binding to all countries of the world despite the references therein to *His Imperial Majesty* (that is, the then Ottoman Sultan), Khedive (that is, the ruler of Egypt at the time of conclusion), and *firman* (Ottoman decree or law) (CCSC, para.

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1). Those terms are legally effective while they no longer exist in the first place. We now have a president of the republic rather than a Khedive of the kingdom, a law or legislation rather than an externally imposed *firman*.

EIPT provides for the zoning of Saini and southernmost part of Israel into four zones with specific (de)militarization requirements as established under Ann. 1, Art. II (Zone A), Ann. 1, Art. III (Zone B), and Ann. 1, Art. IV, § 5 (Zones A-D). Considering the current situation of military operations in Saini, such zoning no longer stands, but the underlying carrier (that is, EIPT) is still operational and binding.

Conclusion

Legal English has some distinguishing qualities from plain English at the lexical, semantic and structural levels. It is known for using common words with uncommon meanings, modal verbs that indicate a sense of obligation, and complex sentences such as the preambles of legal documents. Draftspersons can manipulate legal documents into a given party's interest and at the expense of another. To avoid conflicting interpretations of commanding words and structures, the researcher calls for the adoption of a *definitions* section at the beginning of any legal document. Archaism is another quality of legal language as law tends to be overconservative in style. The factual changes to EIPT have not led to its termination because politics has upper hand to law in our world. Besides, international law adopts the legal principle of *succession of states* that ensures, even enshrines, archaism in international relations-governing legal instruments. This explains why the Arab *Republic* of Egypt still assumes the legal duties of the once Ottoman-territory royally governed Kingdom of Egypt in respect of the Suez Canal. Further, the original parties to CCSC were the then leading European Powers: Austria – Hungary, France, Germany, Italy, the Netherlands, Russia, Spain, Turkey and Great Britain. If the law of power and the power of law conflict, the first often prevails.

References

- Affairs, M. o. (2020, January 2). *Ministry of Foreign Affairs*. Retrieved from Ministry of Foreign Affairs: www.mfa.gov.eg
- Aust, A. (2002). *Modern Treaty Law and Practice*. Cambridge: Cambridge University Press.
- Bowers, F. (1989). *Linguistic Aspects of Legislative Expression*. Vancouver: University of British Columbia Press.
- Cao, D. (2007). *Translating Law*. Bristol: Multilingual Matters Ltd.
- Dickerson, F. R. (1986). *Legislative Drafting*. Connecticut: Greenwood Press.
- Garner, B. (2009). *Black's Law Dictionary*. New York: Thomson Reuters.
- Garner, B. A. (2002). *The Elements of Legal Style*. Oxford: Oxford University Press.
- Haigh, R. (2009). *Legal English*. Abingdon-on-Thames: Routledge Cavendish.
- Heikki-Mattila. (2006). *Comparative Legal Linguistics*. Surrey: ASHGATE.
- Hutton, C. (2009). *Language, Meaning and the Law*. Edinburgh: Edinburgh University Press.
- Lavery, U. (1923). Punctuation in Law. *American Bar Association Journal*, 3-9.
- Mellinkoff, D. (1982). *Legal Writing: Sense and Nonsense*. Minnesota: West Group.
- Mellinkoff, D. (2004). *The Language of the Law*. Oregon: Wipf & Stock Publishers.
- Pehar, D. (2005). *Diplomatic Ambiguity: Language, Power, Law*. Saarbrücken: Lambert Academic Publishing.
- Priban, J. (2007). *Legal Symbolism*. Surrey: ASHGATE.
- Sabra, M. (2007). *?usu:l-s syaghat-l qanuniyah [Foundations of Legal Drafting]*. Cairo: Sabra Translation and Copyrighting.
- Service, S. I. (2020, January 1). *State Information Service*. Retrieved from State Information Service: www.sis.gov.eg
- Shuy, R. (1993). *Language Crimes*. New Jersey: Blackwell.
- Tiersma, P. (1999). *Legal Language*. Chicago: The University of Chicago Press.