

# The Fall and Rise of English in Common Law

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## 1. Common law - common language?

So intimate is the relationship between English common law and the English language today that many legal practitioners conflate the message and the medium. Leaning toward linguistic relativism, Nik Ramlah Mahmood (1993:175) voiced the doubts of many Malaysian jurists when questioning whether concepts imported from England could ever be rendered adequately in a language other than English. Another Malaysian, the late barrister-politician Karpal Singh, took a more culturalist line in maintaining that concepts alien to common law would inevitably seep in with the introduction of Malay as a vehicle of common law (cited in Mead, 1988:45). In Hong Kong many barristers remain sceptical of the value of Chinese for common law jurisprudence, although those who resist Chinese are united with those who welcome it on one point: that its use may mean the end of common law itself (Ng, 2009:268).

It is thus easy to forget that English law grew out of a trilingual ecology in which English was for centuries interwoven with, and often subordinate to, Latin and French. Interesting enough as an instance of unplanned language shift, the transition of common law from multilingualism to monolingualism is also an excellent example of the array of sociolegal, technical and economic factors that conspire to isolate legalese from language practices in wider society, and it may have some relevance for those seeking to make the law more accessible today, especially in the many postcolonial jurisdictions where it is administered in a language known only to elites.

While offering no new textual analyses, this account of the linguistic ecology of English law highlights and discusses its dynamic multilingualism by drawing on a range of studies from several fields, including forensic linguistics, legal history and cultural studies, and speculates about the multilingual potential of common law in the postcolonial world by hazarding comparisons between the past and the present. Taking a broad diachronic approach, it covers the aftermath of the Conquest, when Norman French and Latin appeared to dominate the Anglo-Saxon that had been used with some rigour in both oral and written law hitherto, down to the 18th century, by which time English had become the default medium of legal discourse and was being exported as a legal

medium to the British colonies. Rather than some kind of linguistic ascendancy paralleling the rise of English political, economic and cultural nationalism, the study finds a nuanced and uneven transition in which the communicative preferences of lawyers were influenced by complex technical and professional factors going beyond mere elitism or obfuscation.

The following section (2) contains a brief overview of the range of studies that may be tapped in a number of fields to construct a richer picture of language use in English law than is possible from analyses confined to a single academic discipline. The article then goes on (3) to discuss the extent to which we can consider common law as a construct in isolation from the language that has come to characterise it. This is followed (4) by an account of the multilingual ecology of early English law and (5) an examination of the emergence of Law French, a language understood by few people other than lawyers that nevertheless survived in an increasingly eccentric form down to the 18th century. The next section (6) looks at the ambiguous role of legislation in the decline of French and also Latin. Some examples are then given (7) of the monolingual orientation that set in once the English language had established itself as the default medium, even when law came into contact with other languages and other legal traditions in the colonies. The article ends (8) with a discussion of the value of reexamining the multilingual origins of English law in order to address doubts about the linguistic adaptability of common law that remain entrenched not only in anglophone societies but also in jurisdictions where English is the preserve of a minority.

## **2. Recovering and reconstructing legalese**

A diachronic approach to legal language shows us that many issues surrounding law in multilingual societies today have arisen at other times. For our purposes, the most relevant studies to date have come from the field of forensic linguistics (known more usually as language and law in North America, where 'forensic linguistics' tends to be applied more narrowly to the analysis of linguistic evidence). However, those writing from an historical perspective constitute a small minority in the field, and so we must also look beyond linguistics to references to language in the work of legal and sociocultural historians and literary scholars.

One of the earliest diachronic descriptions of legalese in the then nascent field of language and law came from Mellinkoff (1963), who drew attention to the interrelationship of Law French, Latin and Anglo-Saxon in the first centuries of common law. Building on Mellinkoff's work, Tiersma (1999) showed how the gradual ascendancy of written over oral law entailed an orientation toward freezing legal discourse into context-free patterns. Taking a more synchronic tack, Bhatia (2001) has also argued that modern legal practice exhibits a marked preference for creating texts that purport to be

autonomous and authoritative. This gives legal writing something in common with scientific texts' "need to hold the world still" (Halliday, 2001:187).

In describing the historical evolution of legal registers — characterised by Gibbons (1999: 1) as more easily recognised than defined — Tiersma (1999) highlighted features such as excessive sentence-length; lexical density (produced through nominalisation and complex noun-phrasing); lexical complexity (using prepositional phrases and binomial expressions); preference for noun repetition over other anaphoric devices; reliance on passive constructions and impersonal nouns ('the court', 'the bench') to impart a neutral tenor; and syntactic discontinuities borne of a desire to keep qualifications close to what they qualify. Thus precision is usually more important than elegance. Bhatia (2001:72) further concludes that sacrificing accessibility for legal certainty is more a function of professional integrity than exclusionism, even though it invariably excludes much of the lay population.

While forensic linguists offer analyses of the functions of legal texts in evolving professional and sociolinguistic contexts, the work of legal and cultural historians has added invaluable socioeconomic context to linguistic change. Fisher (1977) examined the emergence of Middle English legalese through Anglo-Saxon's hybridisation with French and its evolution into a flexible language of administration, particularly under the impetus of Court of Chancery clerks as the Crown increasingly shifted responsibility to them in the 15th century. He also painted a picture of resilient multilingualism, rather than simplistic language attrition, in which the expansion of English coexisted with the continuation of law French and Latin as the media of oral and written pleadings respectively well after the 1362 Statute of Pleadings, a measure that ostensibly installed English for law. Ormrod (2003) relies on both social and textual analysis to argue that the Statute could not have intended what it purported to intend and should be read as nationalistic posturing rather than language planning.

Voigts (1996) and others follow Fisher and Ormrod in emphasising the rich bilingualism of the society in which late medieval lawyers worked, with oral diglossia and textual digraphia taken for granted in professional practice. Voigts (1996) constructs the bilingualism of the 14th and 15th centuries as a pan-European phenomenon whereby vernaculars were incorporated into fields such as medicine and astronomy through hybrid texts whose drafters exhibited keen awareness of the symbolic, as well as communicative, potential of different languages. There are interesting parallels here with the ways in which English and languages such as Bangla and Malay may be found on the same page of legal texts in postcolonial common law today.

Cultural and literary, as well as legal, historians have also produced a body of literature describing the reception of English-based common law in the multilingual societies that Britain came

to administer through colonisation.

Analysis of historical language practice in general, and legal language practice in particular, is constrained by reliance on written records that, as we know from studies of medieval England, may be in languages that do not reflect the medium of the conversations recorded. Ng (2009: 75) reminds us that we may never know when Cantonese started to be spoken in Hong Kong's courts as it was absent from records until the 1990s. Even interview data is of limited value if lawyers remember legal details from their past better than linguistic details. Yet spoken language is far from irrelevant in law: indeed it was once a tenet of common law, if not necessarily a working reality, that the law is what is said rather than the record of what is said. Fortunately, historical analysis of policy documents, especially memoranda among colonial officials, may be drawn on to amplify legal documentation. Mir (2006), for example, concludes that vernaculars had an important place in British India once the decision to phase out Persian was made, even though their role was largely oral. Cohn (1996: 68-70) argues that colonial judges were reluctant to rely on potentially untrustworthy interpreters, and while newspaper recruitment notices for interpreters (e.g. *The Singapore Free Press and Mercantile Advertiser*, 1849.3.29) attest to the widespread practice of translating vernacular testimony into English, we also find reports (e.g. *Rangoon Gazette*, 1888) of languages other than English being required of colonial administrators and admitted in proceedings.

### 3. A maddeningly aloof tradition

Narrowly, common law describes the practice developed in the 12th–14th centuries by the English Royal Courts, or *Curia Regis* (the King's Bench, Courts of Exchequer and Court of Common Pleas) of judging common circumstances in a common way regardless of where they arose. By extension the term came to refer to the body of judge-made law emerging from this practice, and contrasted with admiralty, mercantile, ecclesiastical and Star Chamber law, and with statute. It is thus closely associated with case law and the doctrine of *stare decisis* (precedent). More than a century after the administrative merger of common law and equity the latter, evolving from principles developed by the Court of Chancery to fill lacunae in the former, may still be categorised in technical arguments as outside the common law, but for the purpose of this article on the emergence of English-medium law the two will be taken together.

One of the earliest global institutions of knowledge (Ng, 2009: 252), common law has been labelled “one of the world's great legal systems - but one maddeningly hard to know” (Friedman, 1985: 21). Undergoing a millennium of evolution in England and centuries of expansion in British colonies, it is better seen less as a system than as a family of jurisdictions that share historical roots,

ways of reasoning and procedural preferences. Important differences have certainly developed, with the United States departing from Commonwealth jurisdictions sufficiently for America and England to have been described as two countries separated by common law (Gilpin, 2000: 49), yet commonalities such as the central role of legal precedent and adversarial trial procedure still distinguish it from Roman-based continental law.

Cross-border institutional and personal links also preserve the distinct identity of common law. The Judicial Committee of the Privy Council in London is no longer the final court of appeal beyond a handful of Commonwealth polities (Privy Council, 2014), but close collaboration continues through institutions such as the Legal and Constitutional Affairs Divisions of the Commonwealth Secretariat and the Commonwealth Lawyers Association, with constant movement of judges, lawyers, legal scholars and students. Guyanan Cecil Miller was Kenya's fourth expatriate Chief Justice (Mazrui & Mazrui 1998: 109). The Malaysian Bar's Qualifying Board recognises LLBs and bar-calls from Australia, Britain and New Zealand as well as qualifications obtained locally through distance programmes. While little of this collaboration would be possible without the common use of English, the idea of an "international common law family" (Hong Kong Chief Justice Andrew Li, 1998, cited in Ng, 2009: 267) has ideological, procedural and institutional underpinning that goes beyond the mere use of English. Indeed many Commonwealth jurisdictions, including Bangladesh, Canada, Hong Kong, India, Malaysia, Pakistan and Tanzania, use a language other than English in parts of their common law systems. Yet none has abandoned the use of English. Myanmar comes closest to truly vernacular law, but it has long abandoned the Commonwealth and despite the insistence of its Attorney-General (Tun Shin, 2013.2.10) it has arguably abandoned common law as well.

#### 4. A multilingual heritage

The evolution of legal language in England furnishes valuable evidence of the evolution of legal practice itself. While revolutionary in terms of politics and administration, the changes that came in the wake of the Norman Conquest were evolutionary in the case of law. The introduction of new languages into the legal system did not entail the disappearance of English, but rather a series of changes in its status and corpus.

Beyond transforming land tenure and establishing a highly centralised administrative system, William left most of the existing courts in charge of litigation (Cantor, 1991: 68). It is important to note that Old English had been an important language of law for centuries, a vehicle not only of the Germanic oral tradition but also of written law, originating with the Anglo-Saxon codes of Æthelberht (560/589-612) and constituting, along with Irish law, the earliest example in western Europe of law

comprehensively written in a language other than Latin (Oliver, 2002: 25, 41). Although the Saxons lacked a specialist legal profession they did develop specialised legal language.

Evidence for the survival of elements of both Anglo-Saxon law and legalese includes lexis still in use today, such as 'fee' (from *feh/feoh*), 'deem' (from *dōm*), compound adverbs like 'thereunder' and 'thereof' (Mellinkoff, 1963: 40-47), and a significant number of terms in a criminal legal system that has ancient vernacular foundations (Ormrod, 2003: 770), including 'manslaughter' and 'theft' (Tiersma, 1999: 10). Rhetorical practices in modern common law texts such as repetition (Mellinkoff, 1963: 42-43), alliteration and binomial expressions (Tiersma, 1999: 13-15) echo Saxon legal practices that, despite an unusually long tradition of vernacular codification stretching back to the seventh century (Wormald, 1999: 93), were predominantly oral and dependent on memorisation (Mellinkoff, 1963: 42-43).

Three 12th-century Royal Courts, the Court of Exchequer, King's Bench and Court of Common Pleas, are generally regarded as the first common law courts. While they increasingly came under the influence of the aristocracy and gentry rather than the monarchy (Friedman, 1985: 85), a drive for uniformity militated against flexibility (Seipp, 2011: 1013), with rigorous application of rules of pleading and adversarial procedures exposing underprepared litigants and unskilled advocates (ibid: 1014). By the reign of Henry II (1154-89) the Church was losing its role as the paramount arbiter of justice and common law emerged as Europe's only viable alternative to Roman law (Cantor, 1991: 59).

A major innovation was the 15th-century expansion of the Court of Chancery into the largest, most disciplined and most independent Crown office (Fisher, 1977: 877). Subjects petitioned it directly for remedies unavailable in the common law courts, with their rigidly formatted writs. Chancery clerks applied equitable principles influenced by ecclesiastical and Roman law traditions (Friedman, 1985: 26-27), and they did so mostly in English.

The use of juries produced an influential corps of skilled, non-ecclesiastical advocates (Mellinkoff, 1963: 63) who earned their trade by arguing from cases rather than interpreting statutes (ibid: 72). Between the 13th and 15th centuries, an English-influenced variety of Norman French in an increasingly specialised legal register, Law French (Mellinkoff, 1963: 96), was the main language of oral argument for this rising profession (Ormrod, 2003: 753). French was also used for the year books, influential reports of court proceedings published from the mid-13th until the early 16th century (Fisher, 1977: 774), and it began to be used for statutes from the late 13th century (Tiersma, 1999: 23), becoming the main language of legislation within a century (Mellinkoff, 1963: 81).

Retrospective accounts, such as 17th-century Leveller John Lilburn's parliamentary petitions (in Jones, 1953: 317) or Walter Scott's 19th-century novel *Ivanhoe* (discussed in Calvet, 2002: 246),

paint a romantic picture of English steadily prevailing against the colonial hegemony of Norman French. Yet conquest did not “slam the door on English” (Mellinkoff, 1963: 95) and its evolution into Middle English incorporated Latin, French, Greek and even Norse elements into “a vigorous, flexible tongue, fully capable of adapting itself to new concepts of law as it had adapted to new concepts of religion” (ibid: 58).

In law, England was strongly influenced by the Norman practice of using Latin for records (Mellinkoff, 1963: 71). It came to monopolise legal writing for two centuries (ibid: 81), survived in writs as late as the 18th century (Fisher, 1977: 877), and is still used for the name of a number of extant writs, including *certiori* and *mandamus*.

In sum, then, there was complex trilingualism involving several varieties of English (Ormrod, 2003: 753) as well as French- and English-influenced Law Latin (Tiersma, 1999: 25-26) and Law French, a language distinct from the French dialect brought to England by the Normans or the Parisian dialect that was encroaching upon Normandy itself (Mellinkoff, 1963: 81). The practice of word-doubling to accommodate multiple languages extended into legal lexis, with the appearance of Anglo-Saxon/Anglo-French pairs such as ‘wedlock’/‘marriage’; ‘buy’ /‘purchase’ and ‘bequeath’/ ‘devise’ that survive today (ibid: 58) and arguably served to enhance understanding as much as it pandered to prolixity. While court records give us only hints about oral discourse, it is very likely that courtroom code-switching was widespread and may have been linked to the existence of competing terms for the same context in the way that code-switching functions in Bangladeshi, Malaysian and Sri Lankan courts nowadays.

## 5. Dodging les Brickbats: the curious rise of Law French

Out of the multilingualism described above there emerged a growth in the use of French in later medieval law that went against the grain of language shift elsewhere. The very opposite of legal vernacularisation, it calls into question any idea that legal language is destined to follow popular usage.

While French was still preferred by the aristocracy in the House of Lords in the 14th century, the gentry in the Commons and the provincial administrators already favoured English (Ormrod, 2003: 776). Parliament appears to have been opened in English for the first time in 1362 (Fisher, 1996: 37). By the end of the century it had become the main medium of instruction in the grammar schools (Mellinkoff, 1963: 97; Ormrod, 2003: 751). In the 1420s the Brewer's Guild changed its record-keeping from Latin into English (Fisher, 1996: 22), and while there is little evidence of the great nationalist Henry V enforcing use of the language in administration (Fisher, Richardson & Fisher,

1984: xv), the decades surrounding his death in 1422 saw an expansion of English writing (Fisher, 1996: 27), concomitant orthographical and morphological standardisation being reinforced rather than initiated by the spread of printing toward the end of the century (ibid: 129). In the legal domain, however, we have evidence from this period of French being used as far down as the county courts (Ormrod, 2003: 767) and dominating not only in spoken proceedings but also legal records (Brand, 1999: 4).

This anachronistic use of French is frequently ascribed to professional elitism, reflecting perhaps an increase in the social prestige of French in inverse proportion to its popular decline (Mellinkoff, 1963: 100). The growing influence of the serjeants-of-law (elite Crown attorneys) and the influence of the central courts on local legal culture may also have favoured linguistic elitism (ibid: 766-767). More specifically, French served to reinforce the exclusivity of the profession: “What better way of preserving a professional monopoly than by locking up your trade secrets in the safe of an unknown tongue?” (Mellinkoff, 1963: 101). The evidence we have of courtroom code-switching in the decades down to the formal — and even then, incomplete — removal of French evince its degradation into a series of deficiency strategies, as in Pollock’s report (in *A First Book of Jurisprudence*, 1688, cited by Mellinkoff, 1963: 125): of a litigant who “... ject un Brickbat a le dit Justice que narrowly mist”. Yet as late as 1660, opponents of Cromwell’s attempt to do away with the language in *An Act for turning the Books of the Law, and all the Proces and Proceedings in Courts of Justice, into English* used Charles II’s return from France as an excuse to bring it back (Tiersma, 1999: 35).

However, we should ask ourselves how much of this elitism might have been a defence of professional standards, rather than mere self-interested gatekeeping.

Fisher (1977: 873) finds evidence of drift away from written Latin toward written French from 1300, and for Tiersma (1999: 28), the rise of legal French was more pragmatic than elitist inasmuch as it was understood better than Latin by the profession’s aristocratic clients. Its continuance will nonetheless have kept out untrained advocates, but in the view of Elizabethan jurist Sir Edward Coke this was a welcome measure to discourage the public from “bare reading without understanding” of the law (ibid: 28). As oral pleading in civil litigation became more complex, attorneys relied increasingly upon the specialised serjeants (Brand, 1999: 4), forerunners of modern barristers. The French they used, while widely regarded as a bastardised variety (Tiersma, 1999: 28) without any inherent advantages as an expression of law (Mellinkoff, 1963: 105), in time acquired a reputation for precision (ibid: 106). According to Fisher (1977: 886), by 1300 it had attained a business-like clarity that English would not achieve for another century. Ormrod (2003: 776) also finds evidence for French making inroads into Latin in legal writing because of its greater syntactic



similarity to English, indicating the importance of legal translation and interaction between written and oral argument. At the Inns of Court, for example, Latin texts appear to have been explained to pupils through oral French (Mellinkoff, 1963: 113; Baker: 2007: 11).

Inertia will certainly have helped reinforce the continuation of French (Mellinkoff, 1963: 100), but keeping to tried and tested forms may also have been seen as safer, particularly when statutes were brought in to punish drafting omissions and errors (ibid: 114). There may be some relevance here in Jones' (1953: 157) comment about the rapidity of the transition between Middle and Modern English leaving people uncertain about lexicogrammatical and orthographic standards and clinging to the better established rules of Latin and French.

While the prolixity of legal documents may be popularly linked to historical practices of paying scribes by the word, the need for timely, succinct records, especially in the age before cheaper paper replaced parchment, may also have favoured the retention of French well after its disappearance from common parlance. Evidence of scribes' propensity for compressed Latin goes back at least to the Domesday Book (Open Domesday, 2016), and Law French similarly evolved jargon, as useful to insiders as it would have been infuriating to outsiders, that constituted a kind of shorthand (Baker, 1979: 11).

Thus the technical and socioeconomic attractions of French for the legal profession were entwined, making it difficult to extricate arguments about the superiority of a particular language for legal practice from the instrumental and integrative advantages it brings to professionals. Moreover, as Ng (2009: 31) has commented about postcolonial Hong Kong, the capabilities of a language for legal representation are ultimately less important than what practitioners believe it capable of. It is difficult to find clear evidence of lawyers promoting linguistic obscurity solely to strengthen their position. Legalese became increasingly complex in tandem with growing complexity in English law and society and greater reliance on writing (Tiersma, 1999: 38-40), a phenomenon that can be traced back to the Anglo-Saxons (ibid: 16).

It may also be unfair to single out early English lawyers as unusually resistant to English, just as modern Indian and Malaysian lawyers may be no more reluctant to use vernaculars than other professionals. In his survey of writing on vernacularisation between the 15th and 17th centuries Jones (1953) found a preponderance of opinion among the literary and learned in favour of Latin and Greek (ibid: 7), with Italian, Castilian, French (ibid: 13) and even Dutch (ibid: 5) regarded as more eloquent than English. A view of English as crude and homespun, able to raise its game only by borrowing from other languages (ibid: 12-13), yet also plain and honest (ibid: 18), seems to have survived into the late Elizabethan period. The stance did not blind the learned, from the Bishop of Durham (ibid: 10) to translators of Seneca (ibid: 16), to the desirability of vernacular texts, and

indeed the Renaissance saw a growing sense of the need to extend learning to those unfortunate enough to be restricted to English (ibid: 35).

## 6. Language planning and unplanned language change

Scholarship on legal language planning in England has focused upon two enactments: the 1362 Statute of Pleading and the 1731 Courts of Justice Act. Although Calvet (2002: 244) sees 1362 as an abandonment of law and parliament in French, and Fisher (1977: 880) writes of 1731 as the end of common law pleading in French, neither date marked a watershed. To some extent legislation followed rather than led practice, and where it legislated against actual use it may never fully have intended to alter it.

Whereas Fisher (1977: 879) writes of failure to enforce the 1362 legislation, and Mellinkoff (1963: 112) hints at obstruction by the bar, Ormrod (2003: 750) characterises the Statute as the best known but least understood medieval statement on vernacularisation, calling it symbolic (ibid: 763), calculated to increase Crown popularity (ibid: 757), and oozing nationalist rhetoric at a time of wars with France (ibid: 780). Moreover it was ambiguous about the displacement of French (ibid: 772-772) and drawn up by justices who were unlikely to seek the abolition of a language that privileged them (ibid: 757).

Itself drafted in French, like most legislation of the time, the Statute described the language as “trop desconue” (Baker, 1979: 9) and demanded cases in secular courts be “pleaded”, “counted”, “defended”, “answered”, “debated” and “judged” in English (Ormrod, 2003: 772), but did not outlaw written French (ibid: 755). And by declaring that “terms and processes be upheld and observed as they are” (ibid: 773) it left the door wide open for French where advantageous for advocacy.

Rather than being legislated, shift toward English in law seems to have followed the interplay of pragmatism and self-interest in power struggles between a more francophone political centre and more anglophone local elites. The language appeared in petitions to the Crown from 1344 and in responses to royal writs from 1389 (Ormrod, 2003: 751-2). It became the medium of the London Sheriff’s Court in 1356 (Ormrod, 2003: 752). The expansion of county commissions of the peace in the later 14th-century saw the gentry prevailing over the serjeants for control of local criminal cases (ibid: 768), where justices, jurors, clerks and witnesses favoured English (ibid: 771). Mellinkoff (1963: 115) concludes that over the following century the substantive arguments of the barristers, if not the formulaic submissions entered on the court record, were increasingly in English, making proceedings less aloof from the surrounding society (ibid: 119).

The growth of the Chancery, which from 1394 had its own court, was also conducive to the

spread of legal English. Records surviving from the 1420s indicate that most of its proceedings were in the language (Fisher, 1977: 888). The *hospiciae cancellarie* (Inns of Chancery) evolved from offices and lodgings for Chancery clerks into preparatory schools for lawyers. Instructional methods, including composition in French and pleading in English, were adopted by the private tutors at Oxford University who prepared students wishing to enter the Inns of Court (ibid: 892). Thus the Chancery oversaw an English-medium system of education parallel to the Latin of the universities and ecclesiastical institutions. Fisher (1977: 894) emphasises its practical nature, focused on administrative documents rather than literature. Ormrod (2003: 783-785), however, is more cautious about the anglicising impact of Chancery expansion, arguing that the institution had no pressing need to abandon French and Latin, but did have reasons to fear English since it was a key demand of the heretical and sociopolitically destabilising Lollard movement. While legal English did grow, especially under Henry V, its most fertile ground may have been beyond the Chancery and tilled by localised and fragmented strata of the broader political community (Dodd, 2011: 263).

There were also economic, social and technological reasons for the expansion of English into areas previously monopolised by French or Latin. The devastations of overseas military campaigns and the Black Death (1348-1350) advanced the relative position of the English-speaking classes (Mellinkoff, 1963: 111). For Jones (1953: 33), the Reformation was a doubly powerful engine of vernacularisation since, in transferring religious authority from Church to Bible, it produced demand not only for scriptural translations but also for expository works. In the later medieval period, vernaculars began to replace Latin in written texts across Europe (Voigts, 1996: 813) and the spread of printing is likely to have accelerated this, just as it propelled the standardisation in English spelling and lexicogrammar initiated by Chancery clerks (Fisher, 1977: 882). Printing also increased emphasis on written documents. As Tiersma (1999: 37-39) points out, when records of proceedings became more widely available, the record itself was what came to matter, not the memories of those present. Legal documents got wordier as clerks started charging by the page (Tiersma, 1999: 41), a practice that may also have encouraged the use of binomial expressions. “Synonym for its own sake became an ornament of the age in which the legal profession matured” (Mellinkoff, 1963: 121). By the 16th century French no longer monopolised law books (ibid: 132).

Textual evidence further indicates that the later Middle Ages were a period of intense bilingualism as vernaculars moved into written domains. Nearly half the scientific texts produced in England between 1375 and 1500 were bilingual (Voigts, 1996: 819). Hybrid works on cooking, astronomy and medicine from the late 14th century suggest a digraphic relationship (ibid: 818), with Latin or French used for theory and religion and English for practical instruction (ibid: 815-816), a register-indexed hybridity evoking contemporary Malaysian judgments that reflect the languages

used at different stages of the case (Powell, 2008). Rather than directing Latin, French and English at separate audiences, some texts employed proficiency- rather than deficiency-related strategy in targeting bilingual readers (Voigts, 1996: 821).

By the time of the 1731 Courts of Justice Act, French appears to have been hardly worth legislating against (Mellinkoff, 1963: 132) and its provisions for excluding French and Latin from writs, pleadings, rules, orders and indictments may have been driven more by lay hostility to legalese in general (ibid: 132) than any specific problems deriving from foreign expressions. When finally implemented in 1733, amendments were appended to protect those using 'Court Hand' or non-English expressions (ibid: 135). As with 1362, then, the symbolic and political value of targeting foreign language did not translate directly into an agenda for making law more accessible or for interfering with the way lawyers conducted their business.

## 7. English law and colonial contact

In contrast to its centuries of trilingual practice, the export of English law to North America and beyond came at a time when English was already established as the default legal medium and seems to have entailed minimal adaptation to other languages. Even in the former French colonies of Louisiana and New France, the result of legal contact was less the emergence of common law in a language other than English than tolerance for a legal tradition other than common law, whether practised in English or French.

In some ways it might be said that impromptu law in English, rather than the law of England, was the main legal export of the early colonisers. Given that a 1683 Pennsylvania measure is the single example we have of legislation specifically prescribing English for proceedings, its use seems to have been unquestioned (Reinsch, 1899: 431). Despite their formal establishment under royal charters indexing 'the laws of England' (Stoebuck, 1968: 397), the first colonists relied heavily on summary judgments, ad hoc interpretations of the simpler elements of common law, and innovations that made no mention of the laws of England (Reinsch, 1899: 399). This departure from traditional law was further influenced by widespread antipathy toward lawyers and their opaque language (Tiersma, 1999: 44). The Mayflower had not carried a single lawyer to Plymouth Colony (Stoebuck, 1968: 404), where prejudice against the legal profession was especially strong (Reinsch, 1899: 413). Massachusetts resisted the appeal of cases to England (Reinsch, 1899: 414) and the production of written laws that might limit judges' discretion (ibid: 404). In turn, London seems to have been reluctant to interfere in local legal affairs (Stoebuck, 1968: 420).

With the sociopolitical and economic development of the colonies, however, adoption of the

more sophisticated laws of England grew, as did the number of lawyers (Reinsch, 1899: 399), while the Crown became more interested in centralising administration (Stoebuck, 1968: 407-408). South Carolina adopted all the common law and statutes in force in 1712 unless inconsistent with local customs (ibid: 442). Pennsylvania incorporated the common law and statutes as of 1777 (ibid: 422). Courts throughout the colonies began to use a basic version of common law and equity that included the citation of English cases (ibid: 417). Moreover nearly half the signatories of the Declaration of Independence were lawyers (Tiersma, 1999: 44), and although many revolutionaries desired a new legal system for a new nation (Cantor, 1991: 73), in general English law continued as long as it did not conflict with the Constitution (Michaels, 2012: 82) and indeed survives until today as persuasive, though not binding, authority (ibid: 82). Tiersma (1999: 45) suggests a linguistic reason for this conservatism: fear of the ambiguity and deception that might come in the wake of wholesale changes to legal texts and terms.

Although Dutch law and legal terminology briefly survived the incorporation of New Amsterdam (Tiersma, 1999: 46), the only extended contact between English settlers and non-English law in the United States was in Louisiana, but the main result was accommodation of French law through translation into English. The 1808 *Loix de l'Etat de la Louisianie* was translated soon after the colony was absorbed in 1812 (Louisiana State University, 2012), while the 1825 Civil Code incorporated French and Spanish customs (Billings, 2001: 35). Although lawyers needed a command of two legal traditions they did not need a command of French, thereby facilitating the absorption of practitioners from other states (ibid: 29-30).

This tendency to absorb and translate French laws rather than adapt English laws to the French language was also found in Canada and elsewhere. A royal proclamation imposing English law on New France following its cession in 1763 went against established policy (Hogg, 1992: 34) and was repealed in the face of local opposition by the 1774 Quebec Act, which restored French civil law, while confirming the use of English common law for criminal prosecutions (Finkelstein, 1986: 26). In Mauritius, the 1810 *Acte de Capitulation* allowed the inhabitants to retain French laws following the island's transfer to Britain, with the gradual introduction of English laws and practices resulting in a mixed system that included Napoleonic law in English rather than English law in French (Gunputh, 2013: 58). Similar practices of incorporating local laws, rather than adapting English law to other languages, can be found in former Dutch colonies such as Ceylon (Nadaraja, 1972: 181-184). In South Africa the 'common law' essentially means the Dutch-Roman laws imported by the Afrikaners, even after they came to be administered mostly in English (Louis Harms, [Former Deputy President, Supreme Court of South Africa], p.c. 2013).

In sum, by the 18th century English common law had acquired a remarkably monolingual

outlook for a system that grew up multilingually and tolerated the continuation of the non-English laws it came into contact with. Although oral legal traditions in Australia and Africa were not accorded anything like the respect given to Dutch and French law, in India, where William Jones first developed his theory of the common origins of Indian and European languages while serving as a judge (Cohn, 1996: 75), administrators looked (though largely in vain) for a body of local Hindu and Muslim law that would avoid the need to import English law (ibid: 61). Several local historians (Rahman, 1998, in Pakistan, Mir, 2006, in India) acknowledge colonial officers' support of local languages to ensure efficient legal proceedings. However, this stance never amounted to the comprehensive development of vernacular legal texts, which has been very much a postcolonial phenomenon.

### 8. Reappraising the multilingual potential of English common law

While the main purpose of this paper has been to emphasise the complex multilingual evolution of English common law, a secondary intention has been to question how entrenched its current monolingual orientation is and consider what lessons might be drawn from its history for the introduction of languages other than English into the common law tradition.

Anyone lacking legal training, however comprehensive their command of English, is bound to feel distanced by the particularity of English legalese. Some of this comes from obvious 'foreignness', such as the use of Latin expressions (*mens rea*, *res ipsa loquitur*). Some of it is from more subtle esotericisms, such as patterns of post-nominal modification carried over from French (*attorney general*; *fee simple*) and adjectives and adverbs carried over from Middle English (*aforesaid*; *herewith*). If legalese is seen as a language in itself it could plausibly be argued that comprehensive vernacularisation will merely produce new legalese, such as common law Malay or common law Bangla, in which case the law would not be much more accessible to lay users than if it remained in English. While changing many features of legal language, such as the positioning of modifiers and provisos, may risk changing the law's substance, however, other features are amenable not only to plain language reforms but the use of other languages. Indeed the evolution of English legalese gives us clear evidence that it is far from static, and archaisms and words from languages no longer spoken by the general public can be reduced over time.

The history of English legalese also shows us that its particularity is not necessarily the result of exclusionism. Even at the height of British colonialism the view that the law should be understandable to lay participants was prevalent (Mir, 2006: 395), and in any case the aim to obfuscate and mislead is hardly the preserve of lawyers alone. Historically, the exclusivity of common

law English has often come from technical and professional constraints that are reinforced by narrow interpretation on the part of the courts. One key, then, to more accessible law is more flexible court procedures that focus on the intention of legislation and case law in their sociopolitical contexts rather than the wording of texts alone. A notorious case from Hong Kong in the early days of the introduction of Cantonese there (*Tam Yuk-ha*, 1996) was ridiculed by opponents of language reform as an example of someone convicted in one language being acquitted in another, yet it was resolved easily enough by the relevant ordinance in both English and Chinese being amended in accordance with the intentions of its drafters. It is only right that language change – whether within the parameters of Plain English movements or undertaken to make postcolonial national languages vehicles of national law – proceed cautiously under the assumption that rewording may end up changing the substance. But this does not mean change is undesirable.

It is questionable, however, whether enactments from on high are the best means of producing language change. In the case of England, change generally came in spite of legislation rather than because of it. Postcolonial legal systems may not have the luxury of centuries of evolution to enhance accessibility, but if legislation has stronger political than communicative motivations, its effects on legal practice may prove limited, as in the many Indian states that have struggled to move beyond nationalising rhetoric to the comprehensive implementation of language reform.

Finally, the fact that English law was multilingual for as many centuries as it has been monolingual should help assuage fears about the bilingualism that is unavoidable if language reformers are to resist discarding the baby along with the bathwater. Short of pursuing comprehensive legal transplant, with all its potential dislocations, legal language shift entails extended periods when old languages are used alongside new. Code-switching, diglossia and digraphia are inevitable, just as they were in medieval England. With their abhorrence of ambiguity, the prospect of bilingualism sends shudders down the spines of many jurists. Yet conflicts and clashes between languages also have the power to expose ambiguities and inadequacies that may otherwise continue to lurk in dark spaces.

## References

- Baker, John H. (1979) *Manual of Law French*. Amersham: Avebury.
- Bhatia, Vijay (2001) The power and politics of genre. In Burns and Coffin (eds.), *Analysing English in a global context*, 65-77. London: Routledge.
- Billings, Warren M. (2001) A course of legal studies. Books that shaped Louisiana law. In Fernandez and Billings (eds.) *A law unto itself? Essays in Louisiana legal history*, 25-39. Baton Rouge: Louisiana State University Press.
- Brand, Paul (1999) *Observing and recording the Medieval Bar and Bench at work. The origins of law reporting in England*, Selden Society Lecture delivered at Lincoln's Inn, London, July 6th, 1998. London: Selden Society.
- Calvet, Louis-Jean (2002) *Linguistique et colonialisme* [Linguistics and colonialism.] Paris: Payot.
- Cantor, Norman F. (1991) *Inventing the Middle Ages: the lives, works and ideas of the great medievalists of the*

- twentieth century*. New York, NY: Morrow.
- Cohn, Bernard S. (1996) *Colonialism and its forms of Knowledge: the British in India*. Princeton.
- Fisher, John.H. (1977) Chancery and the emergence of standard written English in the fifteenth century. *Speculum*, Vol.52, No.4, 870-899.
- Fisher, John, H. (1996) *The emergence of standard English*. Lexington: University Press of Kentucky.
- Fisher, John, H., Malcolm Richardson and Jane L. Fisher (1984) *An anthology of Chancery English*. Knoxville: University of Tennessee Press.
- Friedman, Lawrence (1985) *A History of American Law*. New York: Touchstone.
- Gibbons, John (1999) Language and the Law. *Annual Review of Applied Linguistics* (1999), 156-173.
- Gilpin, Alan (2000) *Dictionary of Environmental Law*. Cheltenham: Edward Elgar.
- Gunpath, Rajendra Parsad (2013) The professional and vocational training of lawyers according to the Anglo-Saxon model in a mixed legal system — the case of the Republic of Mauritius. In Izabela Kraśnicka & Magdalena Perkowski (eds.) *How to become a lawyer*, 57-74. Berne: Peter Lang.
- Halliday M.A.K (2001) Literacy and linguistics: relationships between spoken and written language. In Burns and Coffin (eds.) *Analysing English in a global context*, 181-193. London: Routledge.
- Jones, Richard Foster (1953) *The Triumph of the English Language: A Survey of Opinions Concerning the Vernacular from the Introduction of Printing to the Restoration*. Stanford University Press.
- Mazrui, Ali and Alamin M. Mazrui (1998) *The power of Babel: language and governance in the African experience*. Nairobi: EAEP.
- Mead, Richard (1988) *Malaysia's National Language Policy and the Legal System*. New Haven: Yale.
- Mellinkoff, David (1963) *The language of the law*. Boston: Little, Brown & Co
- Mir, Farina (2006) Imperial policy, provincial practices: Colonial language policy in nineteenth-century India. *Indian Economic Social History Review*, 2006, 43, 395-427.
- Nadaraja, T. (1972) *The legal system of Ceylon in its historical setting*. Leiden: Brill.
- Ng Kwai Hang (2009) *The Common Law in Two Voices. Language, Law and the Postcolonial Dilemma in Hong Kong*. Stanford University Press.
- Nik Ramlah Mahmood (1993) Language and legal education in Malaysia —past and emerging trends. In Khaw Lake Tee (ed.) (1993) *Legal Education in Malaysia Quo Vadis?* 134-146. Kuala Lumpur: Universiti Malaya.
- Oliver, Lisi (2002) *The Beginnings of English Law*. Toronto: University of Toronto Press.
- Open Domesday (2016) Online copy of *Domesday Book* accessed 2016.12.12 from: [www.opendomesday.org](http://www.opendomesday.org)
- Ormrod, W.M. (2003) The use of English: Language, Law, and Political Culture in Fourteenth-Century England. *Speculum*, Vol. 78, No. 3 (Jul., 2003), pp. 750-787.
- Privy Council (2014) Website of the Judicial Committee of the Privy Council. Accessed 2012.10. 26 from <http://www.jcpc.gov.uk/about/index.html>
- Rahman, T. (1998) *Language and Politics in Pakistan*. Karachi: Oxford University Press.
- Reinsch, Paul Samuel (1899) English common law in the early American colonies. *Bulletin of the University of Wisconsin 1899*, 396-456. Madison, WS.
- Seipp, David J. (2011) Trust and fiduciary duty in the early common law. *Boston University Law Review*, vol. 91, 1011-1037.
- Stoebuck, William B. (1968) Reception of English Common Law in the American Colonies. *William and Mary Law Review*, vol 10.2, 393-426.
- Tiersma, Peter (1999) *Legal Language*. University of Chicago Press.
- Tun Shin [Attorney-General of Myanmar] (2013.2.10) The rule of law in Myanmar: perspectives and prospects. *New Light of Myanmar*, Vol.X, No.6, p.1. Accessed 2013.3.3 from: <http://www.burmalibrary.org/docsMA2013/NLM2013-02-10.pdf>
- Voigts, L.E. (1996) What's the Word? Bilingualism in Late-Medieval England. *Speculum* Vol. 71, No. 4, 813-826.
- Wormald, Patrick (1999) *The making of English law: from King Alfred to the twelfth century*. Oxford: Blackwell.