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A PLAIN LANGUAGE APPROACH TO STANDARD FORM CONTRACTS

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Introduction

"*What do you call a dense, overly lengthy contract that is loaded with legal jargon and virtually impossible for a nonlawyer to understand? The status quo.*"[1] - Harvard Business Review.

You probably have a contract for something you signed this week. Maybe it was for a cell phone plan, or to rent an apartment. Perhaps you agreed to buy a car. Whatever the case, the contract was likely written in legal jargon that's difficult to understand and feel confident about what you're agreeing to. Unless it's so complicated that you needed a lawyer to review it (which many people can't afford), then chances are you felt like there wasn't enough time or information available to make sure that everything was fair and reasonable before signing on the dotted line.

The traditional legal language has often been critiqued for being exclusionary, since only a certain section of society has access to it. Legal nomenclature, as well as the law itself, has been criticized for being archaic. The refusal to stray from standard writing procedures has resulted in legalese that is incomprehensible not just to laymen, but also many lawyers.[2] Legalese requires more time to draft, read, and understand, and yet it frequently falls short of the drafter's main objective of precision. This dissatisfaction with legalese kicked off the "**plain English Movement**" back in the early 1960s.

The movement has been pushing to ensure that contracts are understandable and clear, regardless of your background or education level. The idea is that if people can understand what they're agreeing to when signing contracts, they will be more likely to know their rights and whether something is reasonable from their perspective, rather than having the agreement dictated by one side with better access to lawyers and financial resources than the other party does. The movement goes beyond just improving consumer rights though; social justice advocates see plain language as essential because it helps ensure legal fairness for everyone, not just those who are richer or more privileged.

1 Why It's Time to Kill Legalese. (2018, June 19). Harvard Business Review. https://hbr.org/2018/01/the-case-for-plain-language-contracts
2 Kimble, J. (2006). *Lifting the Fog of Legalese*. Amsterdam University Press.

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Defining Plain English

A term with several definitions and interpretations, Plain English needs to be limited to a common definition in order to proceed with this topic. With no common definition, people may not be able to build a consensus on anything. It is imperative that the standards for Plain English be based on the outcomes it produces, for which we would have to rely on the outcome based definition.[3] Majority of the definitions for Plain English accommodate principles set by the Plain Language International Association which is encompassed under their own definition: "*A communication is in plain language if its wording, structure, and design are so clear that the intended readers can easily find what they need, understand what they find, and use that information*."[4]

Professor Robert Eagleson, a scholar within the domain of plain English defined it as, "clear, straightforward expression, using only as many words as are necessary. It is a language that avoids obscurity, inflated vocabulary and convoluted sentence construction."[5] He further explained that it is neither a simplified form of the English language nor is it 'baby speak'. Plain English language writers persuade their audience to pay attention to the message rather than getting distracted by complicated terminology. They ensure that the audience easily gets the message, which highlights the fact that his definition is based on the outcome as well.

There have been several guidelines issued by organizations across the world, prescribing their own standards of the Plain English language. The variety of these standards, however, does not insinuate vagueness. It highlights the richness and flexibility of the approaches used by the movement instead.[6] Despite the fact that the plainness criteria differ extensively, the movement places a strong emphasis on the readers' minds. It requires that the language be written in such a way that the reader is able to comprehend with ease.

The significance of reducing words and clarity is crucial for plain English, however these two aspects are not adequate. The precision in legal writing forms the third important pillar, when it comes to conveying information through plain English. Precision is needed to cover all possibilities that would become part of a potential legal dispute, in order to provide for recourse. The distinction between plain English and conventional legal language in achieving precision is in the manner in which they

3 Schriver, Karen & Cheek, Annetta & Mercer, Melodee. (2010). The research basis of plain language techniques: Implications for establishing standards. Journal of the international association for promoting plain legal language, 63(1), 26-32.

4 International Plain Language Federation. (2017, May 4). What is plain language? Plain Language Association International (PLAIN). https://plainlanguagenetwork.org/plain-language/what-is-plain-language/

5 Xanthaki, H. (2020). Enhancing Legislative Drafting in the Commonwealth (1st ed.). Routledge. https://www.routledge.com/Enhancing-Legislative-Drafting-in-theCommonwealth/Xanthaki/p/book/9781315759180

6 *Id. at 6.*

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express the terms.[7] In order to achieve accuracy with the traditional legal English, drafters would usually fit a large number of words in lengthy sentences. Sometimes documents may contain verbose words in an incomprehensible sentence structure, while at its worst, documents would be rife with repetition. The Plain English movement maintains that precision can still be achieved with the use of minimum words in a straightforward, clear language.

Section 50.10 in the Code of Federal Regulations is a classic illustration of the ability of redrafting in plain English from traditional legal language.

"**S 50.10** Trees, shrubs, plants, grass and other vegetation. (a) General injury. No person shall prune, cut, carry away, pull up, dig, fell, bore, chop, saw, chip, pick, move, sever, climb, molest, take, break, deface, destroy, set fire to, burn, scorch, carve, paint, mark, or in any manner interfere with, tamper, mutilate, misuse, disturb or damage any tree, shrub, plant, grass, flower, or part thereof, nor shall any person permit any chemical, whether solid, fluid, or gaseous, to seep, drip, drain or be emptied, sprayed, dusted or injected upon, about or into any tree, shrub, plant, grass, flower, or part thereof, except when specifically authorized by competent authority; nor shall any person build fires, or station, or use any tar kettle, heater, road roller or other engine within an area covered by this part in such a manner that the vapor, fumes, or heat therefrom may injure any tree or other vegetation."[8]

The above clause could be redrafted as "No one may harm the plants", which in fact would allow for more legal protection rather than listing specific acts.

Tracing the genesis of the Plain English Movement

When the rule of common law was introduced in the United States of America, it brought along the drafting style of old English lawyers. In the year 1817, Thomas Jefferson deplored the drafting style of the lawyers he practiced with and characterised their method as to "*making every other word a 'said' or 'aforesaid' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means...*"[9]

The traditional legal language has often been critiqued for being exclusionary, since only a certain section of society has access to it. Legal nomenclature, as well as the law itself, has been criticized for being archaic. The refusal to stray from standard writing procedures has resulted in legalese that is incomprehensible not just to laymen, but also many lawyers.[10] Legalese requires more time to draft,

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[7] Syafrani, A. (2018). Plain English Movement And Penman's Criticism To Strengthening The Movement. *SALAM: Jurnal Sosial Dan Budaya Syar-i*, *5*(1), 77–90. https://doi.org/10.15408/sjsbs.v5i1.7907

[8] Code of Federal Regulations: 1949-1984. (1976). United States: U.S. General Services Administration, National Archives and Records Service, Office of the Federal Register.

9 Wydick, R. C. (1978). Plain English for Lawyers. California Law Review, 66(4), 727. https://doi.org/10.2307/3479966

10 *Supra. at 2.*

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read, and understand, and yet it frequently falls short of the drafter's main objective of precision. This dissatisfaction with legalese kicked off the "plain English Movement" back in the early 1960s.

David Mellinkoff released his book "Language of the Law" in the year 1963, wherein he stressed upon the need to improve the function and style of the legal language. Although the theme was not novel as illustrated by his bibliography, but it did well to spark the Plain English movement.[11] During the same decade, there was a surge in consumer groups in the West, which were responsible for protecting the rights of ordinary citizens against government entities and corporations.[12] As a result, grassroots organizations devoted to the elimination of bureaucratese, officialese, and legalese have sprung up to help individuals of ordinary intellect comprehend what they were doing when they had to fill out a tax form, apply for housing benefits, or sign an insurance policy.

In the year 1972, President of the United States Richard Nixon decreed that the Federal Register would be written down in layman's terms and the movement gained traction.[13] The first practical application of this drive for 'plain language' in the legal domain emerged from Citibank in 1973.[14] They wrote a 'promissory letter' without the legalese, that is typically used in contracts. The campaign was so well received by the public and the media that some states began asking the federal government to draft laws along the same lines.

Consumer protection, which is at the heart of plain language, has historically had a vein of "anti-legalese" running through it, but few expected someone to try to "legislate the style of society's prose." The Sullivan Act (named after Peter Sullivan) was signed into law by the Governor of New York in August 1977, mandating that some consumer contracts be "written in a plain and cohesive way using terminology with ordinary and everyday meanings."[15] This law was enacted in 10 other states as well.

Chrissie Maher, who lobbied the British government in the early 1970s to amend the language of convoluted forms, gave the movement a boost in England. In 1979, The Plain English Campaign came into effect in Liverpool and its consequence in ostracizing "gobbledygook" quickly expanded owing to several publicity stunts, among which was shredding thousands of official documents

11 Goldfarb, R. L., & Mellinkoff, D. (1964). The Language of the Law. Michigan Law Review, 63(1), 180. https://doi.org/10.2307/1286463

12 Williams, C.. (2004). Legal English and Plain Language: an introduction, 1, 111-124.

13 The Plain Language Action and Information Network (PLAIN). (2000). Revisiting Plain Language. Plainlanguage.gov https://www.plainlanguage.gov/resources/articles/revisiting-plain-language/

14 Williams, C.. (2004). *Legal English and Plain Language: an introduction, 1*, 111-124.

15 V. (2020, August 27). *Plain Language Drafting Movement: Time for Revival in India*. RGNUL Student Research Review (RSRR). https://rsrr.in/2020/04/28/plain-language-drafting-movement-time-for-revival-in-india/

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outside Westminster.[16]

All major English-speaking countries by the mid-1980s, including Australia, Canada, New Zealand, and, by the early 1990s, South Africa, had commenced their Plain Language movements. Furthermore, the campaign is not limited to English; similar projects have gained traction in a number of nations, notably Sweden's Plain Swedish Group (Klarsprksgruppen) and (most recently) Italy's Progetto Chiaro.

Standard Form Contracts

The most prevalent sort of economic contract is standard-form contracts, sometimes referred to as fine print or boilerplate. They are utilised in several billions of annual financial transactions. In the most usual case, the purchaser acquires the product or service and is supplied with the pre-printed form contract that includes conditions such as dispute resolution, warranties, among other things, along with limited room for negotiation.[17] Warranties bundled with consumer items, safety disclaimers on the back of sports tickets, conditions of use and privacy policies for websites, or maybe even photocopying limits in the front of magazines are just a few examples. Almost everyone has unwillingly been made a party to thousands of such standard-form contracts.

The overwhelming majority of modern transactions are handled using conventional agreements supplied on pre-printed forms, with little or no chance to discuss the agreement's provisions. Standard form contracts are expected to account for roughly 99 percent of all consumer contracts.[18] The effectiveness of form contracts is one of the main reasons for their widespread use. Standard form contracts are an important part of modern business since the expenses of creating individual contracts typically outweigh the potential profit from many regular transactions.[19]

The common law system emphasizes the need for agreement between the parties of the contract, for which they have to negotiate upon every term included in the contract. In reality, this does not happen since many private-sector entities employ standard-form contracts. During the laissez-faire economic era in the nineteenth century, standard-form contracts gradually achieved recognition and widespread application. The norms of contract law, on the other hand, were created before the appearance of

[16] Plain English Campaign (UK). (2003). *Chrissie Maher OBE*. Plain English UK. http://www.plainenglish.co.uk/about-us/history/chrissie-maher-obe.html

[17] Bakos, Y., Marotta-Wurgler, F., & Trossen, D. R. (2014). Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts. *The Journal of Legal Studies*, *43*(1), 1–35. https://doi.org/10.1086/674424

18 Ware, S. J. (1989). critique of the reasonable expectations doctrine. University of Chicago Law Review, 56(4), 1461-1494.

19 Stolle, D. P., & Slain, A. J. (1997). Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue. Behavioral Sciences & the Law, 15(1), 83–94.

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standard-form contracts and were based on the notion of a negotiated agreement. Individual negotiation between the parties was the contractual mechanism's cornerstone and a way of securing contractual fairness. Because the feature of negotiation is lacking from standard-form contracts, they do not match to this conception of the contractual relationship. Kahn provides an Orwellian description of the standard-form contract, as a "depersonalized contract which is a one-sided product of an economically superior party imposing rules that favour him, especially exemption from liability provisions". Taking into account the above-mentioned inequalities, it is crucial for the consumer to read through the terms and conditions of such contracts. They establish the legal status of the contracting parties, their rights and responsibilities, and frequently the repercussions of a breach of the terms and conditions, therefore consumers should read these papers carefully.

Problems with traditional Standard Form Contracts

Informed consent is the cornerstone of consumer well-being when it comes to contractual agreements. Informed consent is frequently obtained by explicitly asking customers, through a contract or agreement, if they understand their contractual duties and rights. While this is a test of consumers' reflective ability in regard to their opinion that they have grasped something, it is possible that it is not genuinely gauging whether the consumer has grasped the agreement. In other words, a person may pretend to comprehend the repercussions of signing a contract, but they may not realize the full extent of the ramifications until they are confronted with a specific difficulty stemming from or linked to the contract's provisions.

It has also been argued that it is helpful for the customer to understand the terms and conditions of a contract. Consumers having access to an appropriate amount of information that they can understand and process in the context of the agreement will protect them from suboptimal outcomes such as being forced to make purchase decisions based on peripheral information, like pricing and brand signals. However, it has also been significantly proven that consumers often do not adequately understand the contents of contracts, even if they read them.

Understanding is key in the reading process, and thus comprehension. If the reader finds the material incomprehensible, it will be ignored. Only if the reader comprehends what he or she reads will information be transferred to his or her long-term memory. Once it is in memory, they can use their acquired information to do cognitive tasks such as problem solving. It is important in text presentation that everyday vocabulary is used, and that the text is organized in a neat manner. In the case of a consumer transaction, the process of entering into a formal agreement begins with the reader being exposed to a written document, such as a contract or purchase agreement. Once the reader is made aware of the document's existence, he or she must agree to its terms in order for a binding contract to be formed. This is most often done by signing one's name on the dotted line.

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A consumer may decide not to read a paper if it appears to be overly complicated. This usual reaction, obviously, has major consequences for the vendor. If a buyer signs a small print contract without reading it, he or she may be agreeing to terms they don't comprehend. However, if they refuse to accept the terms, they will lose access to some perks. Many organizations, as you may have seen, use small print contracts that are written in a lot of technical jargon. Because the technique is so common, terms like "buyer beware" are frequently placed onto these contracts to protect the corporation from litigation. In short, legal documents violate the most important principles for making documents easy to comprehend. The documents are full of difficult vocabulary and are poorly structured grammatically. Legal documents seem difficult to read, with poor organization and very small type. However, all this is actually by design. If a document is painless to read, there is a better chance that it will be painless to understand as well.

The majority of commercial contracts are extensive, poorly designed, and filled with needless and unintelligible verbiage.[20] Negotiating a contract should not take a long time. Business executives should not need to consult an attorney to read a contract that they are responsible for enforcing. We should ideally live in a world where plain English is used to write contracts and potential business partners can discuss them without their attorneys and read, comprehend, and sign a contract. An ideal world where ambiguity is no longer a source of conflict.

A Plain English approach to Standard Form Contracts

Contracting in plain English isn't a novel phenomenon. It's a movement that began many years ago since President Nixon mandated the use of "layman's terminology" in the Federal Register in 1972.[21] President Jimmy Carter issued an executive order six years later requiring that federal rules be "as plain and straightforward as practicable."[22] In 1998, the Clinton administration went a step farther by requiring federal agencies to utilize plain English.[23] During that same year, the Securities and Exchange Commission of the United States produced A Plain English Handbook for persons preparing security disclosure forms, which is still in use today. The Plain Writing Act was approved by Congress in 2010 and signed by President Barack Obama, with the stated goal of "supporting straightforward government communication that the public can understand and use."[24] As Obama's

[20] *Supra. at 1.*
[21] *Supra. at 13.*
[22] *Executive Order 12044—Improving Government Regulations*. (1978, March 23). The American Presidency Project. https://www.presidency.ucsb.edu/documents/executive-order-12044-improving-government-regulations
[23] Barron, D. (2014, February 1). *Plain English: It's the Law*. The Web of Language. https://blogs.illinois.edu/view/25/109299
[24] Siegel, J. (2010, October 18). *Obama Signs "Plain Writing" Law*. ABC News. https://abcnews.go.com/WN/obama-signs-law-understand/story?id=1190284 1

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administrator of the Office of Information and Regulatory Affairs noted, "Plain language can make a huge difference" by saving money and making it "far easier for people to understand what they are being asked to do." Guidance was issued on plain language that remains in effect by the agency that was responsible for administering the law.

The application of Plain English language in standard form contracts can result in apparent efficiency gains for both, the legal practitioners and contracting parties. Standard form contracts drafted with the use of Plain English are easier to read and help save time. Lawyers reviewed counterpart copies of the same contract, one written in plain English and the other in conventional language, in a study for the Law Reform Commission of Victoria. The time it took to comprehend the plain English version was between 33% and 50% less than it took to comprehend the conventional form.[25]

Furthermore, because plain language publications are easy to comprehend, there are less questions regarding interpretation. Many firms and governmental entities claim to have saved significant amounts of money by converting their standard-form contracts to plain English in the United States and elsewhere. Professor Joseph Kimble conducted a recent assessment in the United States and found several examples of significant cost reductions as a result of the adoption of plain language documents.[26]

A vast number of studies have been conducted, analysing the differences in comprehension of legal documents when written down in traditional legal language and plain English language. Almost all of them have proved the fact that documents written with the use of the plain English language are easier to read and understand in comparison to the traditional legal language. The most significant ones are briefly described below.

In a study of medical-consent forms, readers were able to properly answer 2.36 questions out of 5 on the original form; on the updated version, they were able to correctly answer 4.52 questions out of 5, a 91 percent improvement. Furthermore, the average reaction time decreased from 2.65 to 1.64 minutes.[27]

Plain language enhanced understanding by 140 percent in one test, from 15 percent to 36 percent, and by 31 percent in another test, from 50.5 percent to 66 percent, in another research of various legal documents that primarily focused on the comprehension of standard form contracts.[28]

Professor Joseph Kimble in his research paper titled, "Answering the Critics of Plain Language"

[25] Eagleson, R. (1991). *Plain English — A Boon for Lawyers*. The Second Draft.
[26] Kimble, J. (2012). Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law (1st ed.). Carolina Academic Press.
[27] Kaufer, D. S., Steinberg, E. R., & Toney, S. D. (1983). Revising Medical Consent Forms: An Empirical Model and Test. Law, Medicine and Health Care, 11(4), 155–184. https://doi.org/10.1111/j.1748-720x.1983.tb01731.x
[28] Masson, M. E. J., & Waldron, M. A. (1994). Comprehension of legal contracts by non-experts: Effectiveness of plain language redrafting. Applied Cognitive Psychology, 8(1), 67–85. https://doi.org/10.1002/acp.2350080107

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conducted his own experiment with the use of a standard form contract.[29] He sampled the independent contractor agreement that was routinely used by the Michigan State Agency. He conducted his knowledge-based assessment, in order to check comprehension of the plain language format on a total of 65 people. This demographic was broken down into two categories, 27 of whom worked in Michigan State Agency itself while the other 38 participants were law students. The results of this test were as follows.

Test of Contract on State-Agency Staff

	Original	Plain Language
Overall % of correct answers (accuracy)	53.6	78
Average minutes to answer all questions (speed)	14.8	12.4

[30]

Test of Contract on Law Students

	Original	Plain Language
Overall % of correct answers (accuracy)	65.6	81
Average minutes to answer all questions (speed)	15.7	12.6

[31]

The above results clearly indicate the positive effect of using plain English language in a standard form contract. For the agency staff that participated in this study, there was 45.5% increase in the accuracy i.e., the comprehension of this contract along with 16.2% rise in the speed of their assessment. With respect to the law students who were part of this experiment, they reported a 23.5%

[29] Kimble, J. (1994). Answering the Critics of Plain Language. The Scribes Journal of Legal Writing, 5(1), 51–62. https://heinonline.org/HOL/LandingPage?handle=hein.journals/scrib5&div=7&id=&page

[30] Kimble, J. (1994). Answering the Critics of Plain Language. *The Scribes Journal of Legal Writing*, *5*(1), 51–62. https://heinonline.org/HOL/LandingPage?handle=hein.journals/scrib5&div=7&id=&page

[31] *Id. at 30.*

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increase in comprehension and a 19.7% decrease in time taken to complete the assessment. These results go on to show that a standard form contract written down with the help of plain English has significantly increased the comprehension and savings in time.

The applications of implementing plain language with standard form contracts seem promising. Some firms have already started employing this writing style and gaining from it. The implementation of plain language contracts at GE Aviation's digital services has resulted in a 60% decrease in negotiation time than the legalese versions, along with positive customer feedback.[32] The experiments mentioned in the above sections have also proved to deliver efficiency gains due to the influence of the plain English movement.

The benefits of standard form contracts in plain language are twofold. First, they make it easier for people to understand what they're agreeing to. This means that people can make better informed choices about what's right for them. As a result, they're also more likely to be satisfied with the products and services they purchase, which in turn should reduce complaints and disputes. This helps businesses too by reducing the costs associated with defending disputes and building customer satisfaction.

Second, plain language contracts help people understand their rights and obligations so that when a problem does arise, people are better able to resolve it efficiently themselves or at least know when to seek legal advice. If the contract is clear on each party's rights and obligations from the outset of their agreement it will be much easier for them to identify any breach of contract as soon as it occurs and work together towards a resolution (or at least know whether or not a breach has occurred).

Conclusion

A primary goal of the Plain English Movement is to make contracts easier for people to understand. Legal drafting has changed as a result, with drafting becoming more focused on making contract language accessible to lay people for whom the contract is intended. The Plain English Movement is also a social justice issue in the sense that it can help disadvantaged groups. As discussed above, many people are required to sign contracts and agreements without fully understanding them. These groups may face issues such as language barriers, literacy issues, or accessibility concerns. Eliminating the use of overly complex language in standard form agreements can protect these individuals from exploitation by making sure they understand what they are signing.

[32] *Supra. at 1.*