

The 'Law and Language Friction': Overcoming the Barriers of Discourse in Supervision

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Abstract: The relationship between law and language requires continuous attention in legal education, specifically supervision. In the journey of every law student, the discipline will demand that they interpret legal texts, write legal opinions, and prepare research reports and theses, which require the use of language. Clear and practical legal language makes a legal argument whole, compelling, and persuasive. However, the language challenges law students because the discourse in legal terminology creates a law and language friction. This friction presents a double-edged sword when students attempt to express themselves using legal language in their research projects, depending on whether they know the limitations and opportunities that the language presents in legal reasoning. The main argument of this paper is that we need to acknowledge the friction in the relationship between the law and language and seek opportunities to confront and overcome this friction through our supervision models and approaches. The research focus of this paper addresses the academic literacy obstacles in the context of postgraduate supervision in legal education. It presents the law and language friction as a positive and a negative factor that law students should confront to communicate effectively in legal writing and for their supervisors to teach effective legal writing.

Keywords: Legal terminology, Supervision approaches, Writing, Legal education, Discourse, Models of supervision

1. Introduction

Legal language is exclusive and peculiar. On the one hand, the law prescribes legal language that deviates from ordinary language, which denotes exclusivity. On the other hand, law adopts ordinary language to determine the scope of legal rules, which is peculiar. It is no wonder why we have textbooks with titles such as 'English for Law Students' (Van der Walt & Nienaber, 2009). The meaning of words shifts in legal language depending on context, field and time. Stierer's (2008) explanation of the daunting experiences of navigating a particular discipline's complex jargon and terminology comes to mind when I think about the role of language in law. Stierer (2008) accurately describes my supervision candidates' predicament. Law students struggle to navigate, adapt and use legal discourse. When a student writes inaccurately, it skews their argument because of a lack of awareness and intentionality to construct legal meaning. It often results in an incorrect statement of the law, even though the language used may be grammatically correct in ordinary English. I refer to this challenge as the law and language friction. In this paper, I explain how I conceptualise the writing challenge experienced by law students as friction. I provide examples of how I address the friction in postgraduate supervision using educational theory on supervision pedagogies and approaches.

2. The law and Language Friction at Crossroads but not at Odds

I first observed the students' challenges with legal terminology and the subtlety of the problem in my undergraduate classes. Students would learn obscure principles, such as that the law regards a company as a 'person' (s1 of the Companies Act 71 of 2008) but does not apply the term 'person' to an unborn baby (*Christian Lawyers Association of South Africa and Others v Minister of Health and Others* [1998] JOL 3617 (T) pp. 17). I call this an obscure principle because of how students react to learning this notion, which seems harsh and contrary to social, cultural, and religious views. This obscurity influences the way students construct knowledge and write about the law during their undergraduate and postgraduate studies. These reactions are not a bad outcome. Instead, the students highlight the beauty and significance of discourse while also showing why academics must grapple academically with discourse from a scholarship of teaching and learning perspective.

Friction occurs when two objects cannot merge and perform smoothly simultaneously. This is particularly true when the two objects rub against each other while moving in opposite directions. Friction causes the two objects to wear each other out, which deteriorates their quality and substance. I imagine the same process happens in students' minds with the law and the language in legal discourse. Language and legal terminology must work together to construct and convey the acceptable correct meaning in law. However, the language and the law conflict and diminish what the student intends to communicate. The students' challenges lie in the lack of awareness and understanding of this friction when they attempt to communicate in academic legal language. Students are susceptible to conflating meaning when legal interpretation is required. For students to confront the friction, they require what Biggs (2012) calls conceptual change to be more strategic about writing law.

Moreover, their supervisors must consider how supervision models and approaches influence how much they can provide support in confronting the friction.

I use conceptual change opportunities to demonstrate how the friction is tackled. I provide access by guiding students to sources and making the friction explicit, but without using discourse (as in this paper) to describe the friction, and I make it explicit that the ways of arguing or producing knowledge are determined by the legal community's way of speaking and conducting legal enquiry. This requires a particular style of writing characterised by the use of authority and critical terms that signify signposts for a specific legal phenomenon. Yet, depending on the supervision model in a supervisory relationship, there may be limited or extensive opportunities for the supervisor and student to address the friction.

2.1 Models of Supervision – a Dyadic Group Response to the Friction

The dyadic supervision model is conducive to students' ability to manage law and language friction. The dyadic model requires a master apprenticeship approach where one student has one supervisor (Guerin, et al., 2015). Since the friction presents an academic literacy and discourse challenge, the master apprenticeship method of supervision is needed. A single supervisor has sufficient opportunity to demonstrate and model how to know and be in the legal discipline without a clash of ideologies between supervisors.

Models of supervision include panel or team supervision and group models of supervision. Group supervision involves multiple students under one supervisor who runs a project that pulls from each student's research problem (Guerin, et al., 2015). Panel supervision is often called team supervision, which requires one student to receive feedback from multiple academics (Guerin, et al., 2015). Team supervision usually comprises two supervisors in a co-supervision context (Guerin, et al., 2015), which most legal researchers can adopt if they want to deviate from the dyadic model. However, complete deviation is not advisable for teaching supervision candidates how to confront the law and language friction. The best solution may be to begin and end the process with the dyadic supervision model for each supervision candidate and combine it with group supervision approaches through seminars and workshops throughout the students' journeys. Student groups can assist each other in confronting the academic literacy challenge at the core of the law and language friction.

2.2 The Academic Literacy Obstacle

The law and language friction is not an English language problem, nor is it about a misunderstanding of the law. I hold an ideological view of literacy in the higher education context (Boughey & McKenna, 2016). The ideological perspective of academic literacy is that reading and writing are shaped by the social contexts within which they arise, and the ways of arguing or producing knowledge are determined by the legal community, which is different from how a group of scientists or sociologists would construct knowledge (Boughey & McKenna, 2016).

Boughey and McKenna's views confirm that what constitutes a valuable argument or a contribution to the field is determined by the disciplinary context of the law and the specific legal field within which the research of the students exists (Boughey & McKenna, 2016). The postgraduate studies environment also has a socialisation process characterised by the roles and expectations placed on postgraduate students (Carter, et al., 2013). In law, this is seen in the increased expectations of reading more and searching old authorities to trace historical origins in specific subjects to contribute meaningfully to the field. Therefore, it is not the mere difficulty of expressing oneself in English that presents a hurdle for the students' success and contribution to the field. The obstacles are the ways of being that the supervisor ought to model.

2.3 Legal Academic Literacy – is it Unique?

In a legal context, the student should construct arguments using the appropriate interpretation methods considering which primary and secondary sources are acceptable in the field. For instance, an argument not based on court cases or developed in consultation with them will be deemed unfounded. The law and language friction present a legal terminology and social identity obstacle that affects students' writing and construction of knowledge because of the disciplinary context and, sometimes, historical context of the law. This problem can exist in any other discipline. For instance, some concepts and threshold concepts become bottlenecks in undergraduate courses because they prevent the students from understanding scientific and academic meanings simply because the latter is irreconcilable with the ordinary meaning of the words.

In law, knowledge exists within a boundary of principles that restrict ways of creating and constructing arguments, especially in statutorily regulated fields, which prescribe a restricted meaning of terms. Here, the lawmaker ringfences the conversation by ensuring that the interpreter of the law remains within defined boundaries. No other meaning is allowed except that which appears in the context of the legislation. Therefore,

in law, discourse is not developed by the community of practice, but the law is discourse. This detracts from the notion that the community of practice informs the discourse because, in law, discourse is imposed by the lawmaker, particularly, parliament and the judiciary.

Legal writing is embedded in the discipline because the law only accepts objective ways of writing and constructing knowledge. This reminds me of how academic literacy affects a student's proficiency due to cultural, social, and racial backgrounds (Boughey & McKenna, 2016). For instance, an African student may be uncomfortable expressing an argument requiring one to view a company as capable of holding rights and duties. In indigenous law, the notion of a company is non-existent. This explains why a student might struggle to express legally acceptable arguments in an undergraduate dissertation on companies. However, the same candidate can later develop to think critically in a master's thesis that requires her to build arguments about people's identities considering our Constitution, which is rooted in dignity and Ubuntu, an African concept (Le Grange, 2012).

For students to use certain language correctly, they must learn new meanings for ordinary terms that they have used for their whole lives. Students must demonstrate their learning by looking at the world with different eyes (Biggs, 2012; Boughey & McKenna, 2016). The law and language friction is not a problem that is inherent in the individual student (Boughey & McKenna, 2016). It is apparent in all the students' writing at various degrees and stages of development. All the students I have supervised have had to confront the friction between law and language.

3. Manifestations of the law and Language Friction

The supervisor is responsible for raising the importance of avoiding ordinary language and adopting academic language and legal discourse. As a supervisor, I must remind students that language use is shaped by the specific terminology used by the writer due to their awareness of the context within which they speak (Boughey & McKenna, 2016). The context of law determines the intention, language, and scope, which creates a tight space for students to navigate when expressing a legal argument that overlaps with a personal view.

Students tend to use emotive language instead of legal discourse to express themselves. It is difficult for students to separate personal opinions from legal arguments because the law affects society and human behaviour. In postgraduate supervision, the subject matter of the students' theses is often a touchy one for them. Thus, friction is inevitable in students' legal writing and research. There may be several ways in which this problem arises. I only discuss two forms in which the law and language friction manifests in my observations.

3.1 Positive Friction

A positive manifestation of friction is where the clash between the law and the language is visible and detectable in the student's writing. The term 'positive' is used in its dictionary sense in the latter statement, which refers to a presence rather than an absence of friction. Due to a lack of awareness of the strategic word choices required for law, students end up with what seems like an ignorant explanation or conclusion about the law or what law ought to be. Despite the presence of friction appearing as an obstacle, it is also positive. Now, I use the term positive in its ordinary sense to refer to a good outcome. Therefore, the visible presence of friction is good because it allows students to grow in knowledge production and helps them identify that there is a way of constructing knowledge in law. Supervisors and their students should not be discouraged by the appearance of friction.

Some of the legal terms we use have ordinary meanings. For instance, the word 'doubt' refers to a state of uncertainty. When used as legal terminology, 'doubt' distinguishes a criminal law burden of proof standard from the burden of proof in civil cases. When a student writes about civil laws and refers to a principle requiring 'no doubt' about the facts, the student unintentionally engages in a criminal law discourse. The outcome is that the language distorts the legal meaning of the written text and, technically, results in an 'incorrect' statement of law. This is a classic case of language and law having to move together in the same direction to create a crisp argument, but instead, the language went in the opposite direction than the law when the student constructed meaning.

3.2 Negative Friction: The Flight Instead of Fight Response

The second form of the law and language friction is negative, where a student is afraid to enter the 'friction zone' and instead opts to regurgitate the law as is, without any criticality. The avoidance reduces the value of the knowledge that the student advances because it omits critical thinking. Criticality requires a student to analyse and pick out ideas and theories that emerge from the works they have read (Stierer, 2008) to present them in a way that gives insight into the development and practice of law. However, with negative friction, the

student ends up with rudimentary content, often taking the legal text out of context, resulting in incorrect legal arguments.

The student's approach is caused by the fear that they will encounter the law and language friction and fail to construct an appropriate argument based on the law. The negative form manifests in students who have previously tried to evaluate the law in past experiences critically and had their ideas turned down as purely 'wrong' instead of being told that their construction should engage legal discourse with precision.

The law and language friction is inevitable and sometimes necessary to develop the law and the student's ability to produce legal knowledge through evaluation, critiquing and interpreting legal texts. Decided court cases frequently illustrate how this issue can be resolved when the court dissects the legal interpretation of a rule, word or phrase. The courts usually choose between an ordinary literal meaning or flexible contextual and purposive meaning. The courts must find a socially responsive solution and method of interpretation to construct the legal meaning of the language used in a particular statute. A conceptual change is required for students to demonstrate this 'way of knowing'. (Biggs, 2012) Students must intentionally consider how they use language to express their meaning in law. The strategic language choices influence the argument to determine the appropriate application of the law (Boughey & McKenna, 2016).

Part of my role as a supervisor is to help the student reach the desired level of writing in legal discourse. This requires a supervision approach that allows the student to manage the law and language friction to resolve the challenging transition from the primary discourse that is shaped by socio-economic realities to the academic discourse shaped and determined by the law and its community of practice (Boughey & McKenna, 2016).

4. Supervision Framework: From old Ways to Scholarly Ways

When academics begin supervising for the first time, they often draw from our own experiences as supervision candidates (Guerin, et al., 2015). I have been through the master-apprentice model of supervision three times as a postgraduate student. Each of these supervision experiences was linear and functional, which Lee and Murray (2015) describe as "brainstorming, drafting, redrafting, editing, release" through a series of tasks with which the student complies. I would pitch my research topic to the supervisor, we would brainstorm the focus of the paper, and I would draft and submit my work for feedback until the final product was ready for examination. In law, postgraduate supervision comprises dyadic, one-on-one relationships by default (Guerin, et al., 2015), which often lend themselves to linear-functional supervision approaches. Consequently, when supervising students, I use a similar linear-functional approach.

Throughout the supervision process, I advise students on areas where the law and language friction adversely affect the student's argument. I show students how to read the legislation definitions through the lens of judicial precedent, where our courts have demonstrated the methods of interpreting words defined in and not defined in legislation. This equips students to practice law as our courts interpret it because there are instances where our discourse is informed by legal rules. The next stage is a criticality exercise that requires the student to judge the outcomes of their legal interpretations. At this stage, the student should use discourse to contribute to the field and suggest new ways of thinking about legal problems. These ways can be facilitated by the positive law and language friction as it reveals the inconsistencies between law, legal reasoning and societal realities affected by laws.

I started reflecting on the effectiveness of this approach when I first read about Lee's (2007) supervision framework. It helped me move beyond an apprenticeship perspective of teaching in the context of supervision to reimagine supervision from a developmental perspective. Pratt (2002) describes the apprenticeship perspective as using performative learning as students adopt the language and practices of a specific social group, which in this case is that of legal researchers, and how they approach legal research. The distinguishing factor of the developmental perspective is that it focuses on what the student knows and how the student changes their mind about what they understand through the learning process. As a result, the developmental approach uses a series of questions to develop student thinking and writing processes. Questioning has proven to be a valuable tool to develop student writing. The more questions I pose to the student, the more the layers of their arguments are revealed. This style ensures appropriate legal discourse. However, it can only be effective through a combination of supervision approaches and not just the functional approach.

4.1 Soothing Friction Through a Supervision Framework

Lee's (2007) supervision framework outlines various approaches supervisors can adopt to guide students through their research projects effectively. A good framework pairs effective approaches with effective

supervision models. Central to Lee's perspective is the idea that supervisors should navigate between different supervisory modes depending on each student's specific needs and circumstances. This adaptability is crucial in addressing the friction that arises from the complex interplay of law and language during the writing process. The friction in law and language necessitates shifts in supervisory approaches and an appropriate supervision model.

4.1.1 First, the functional approach

Initially, a functional approach is employed in supervision. It involves setting clear tasks and objectives to start the supervision process, particularly during the research proposal phase (Lee, 2007; Lee & Murray, 2015). In this stage, supervisors provide structure through tasks such as drafting the proposal, suggesting readings, and handling administrative matters. The focus is on helping students define their project, develop research goals, and select appropriate methods. This structured guidance ensures that student gains a clear understanding of their research intentions.

As students progress, the supervision approach must evolve. In the advanced stages of the proposal phase, and after the proposal has been accepted, a shift towards critical thinking is essential (Lee, 2007; Lee & Murray, 2015). At this point, students are encouraged to go beyond the current legal standards and consider how the law ought to be to contribute meaningfully to their field. This involves engaging with statutory interpretation methods and critically assessing the implications of legal texts. The aim is to challenge students to think deeply about the law's theoretical underpinnings and practical application.

4.1.2 Critical thinking approach as a central stage

Recognising nuanced legal issues through critical thinking is crucial to addressing the law and language friction. Supervisors need to scrutinise the terminology and language that students use as legal research requires precise and deductive reasoning. Students may adopt common meanings of legal terms that could distort their arguments at this stage, which results in positive law and language friction. However, if the supervisor does not detect the positive friction at this stage, they might have to enquire whether it is manifesting negatively. If the latter is found, the supervisor must alert the student to shift the friction from negative—absent on paper but present in the mind and triggering avoidance—to positive, which is present and confronted through critical thinking. Therefore, a critical thinking approach should be employed to prompt students to examine the rationale behind their choices and engage with the theoretical frameworks underpinning their research (Lee, 2007). This approach is intended to lead to knowledge production that aligns with legal discourse.

4.1.3 Enter the enculturation approach

In addition to critical thinking, an enculturation approach is crucial during this phase (Lee & Murray, 2015). Enculturation involves providing feedback that encourages students to view their work from the perspective of external reviewers or peers. This approach helps students understand how the disciplinary community might judge their arguments and how to present their research within the established legal discourse. Effective enculturation requires supervisors to guide students in articulating their arguments in legal terms, balancing technical legal language with more accessible language as needed. This approach fosters the development of sophisticated legal discourse skills essential for academic writing in law.

The critical and enculturation approaches help students manage the friction inherent in legal writing. As Lee and Murray (2015) highlight, a critical thinking approach encourages students to engage in inquiry-based learning, which is pivotal for constructing and understanding knowledge. Students can move from merely replicating existing knowledge to making original contributions by identifying and addressing gaps in their arguments. This process is iterative, as students may encounter and address friction at various stages of their research.

4.1.4 Using the dyadic model to facilitate adequate supervision to emancipate students

A dyadic supervision model, where the supervisor and student engage directly, can effectively manage this friction. In such a model, supervisors can provide individualised feedback and support, which helps students confront and overcome challenges related to law and language (Guerin, Kerr, & Green, 2015). This model allows a more nuanced understanding of the student's difficulties and facilitates targeted interventions to address specific issues. The supervisor can begin with the functional approach, then move into critical thinking as a central approach. They can also incorporate enculturation while repeating the process throughout different stages of the supervision journey.

Conversely, group or panel supervision structures might not always be conducive to effectively managing the law and language friction. In group settings, students may feel isolated or judged, which can exacerbate anxiety and hinder their ability to engage with critical feedback (Watts, 2010). Team supervision involving multiple supervisors can also present challenges, such as conflicting approaches or intellectual divisions, which might affect the student's morale and sense of direction. Given the complex nature of legal research and the need for precise and critical analysis, a one-on-one supervisory relationship often provides a more supportive environment for addressing friction.

Detecting and addressing friction in postgraduate supervision requires a careful and inclusive approach. Supervisors need to make the writing and language challenges explicit and provide clear guidance on managing and overcoming these challenges. The dyadic supervision model allows for modelling effective strategies for addressing friction and fostering conceptual change in students (Guerin, Kerr, & Green, 2015). This approach facilitates the transition from a functional to a critical and emancipatory mode of supervision, helping students develop the skills necessary for advanced legal academic writing.

As students become more proficient in managing the law and language friction, they often exhibit responses characteristic of an emancipatory approach. This stage involves students becoming more confident in their ability to engage with and critique legal discourse, leading to a more sophisticated understanding of their research field (Lee & Murray, 2015). The emancipatory approach supports students in integrating their learning and applying it to their research, fostering their growth as independent scholars.

5. Conclusion

Soothing the friction through a supervision writing framework involves a dynamic and adaptable approach that moves through functional, critical, enculturation, and emancipatory modes as needed. This process helps students navigate the complexities of legal writing and overcome challenges related to the law and language friction. Effective supervision requires a careful understanding of the various supervisory approaches and their nuanced applications in the context of supervision models. By addressing the friction constructively, supervisors can facilitate students' development and enhance their contributions to legal research. The problem is that the friction is so subtle and undetectable. It requires the supervisor to adopt a criticality posture.

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