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LEGAL LANGUAGE: THE PASSIVE VOICE MYTH

Abstract

The paper examines whether it is a myth that the passive voice is unnecessarily and excessively used in legal language, more particularly in a statute as a genre. It gives an overview of the attitudes to legal English over time and of earlier research done by both legal professionals and linguists, whose research of the passive voice has resulted in a number of rules as to when the passive voice is justified and when it serves no other function but to give the text the appearance of a legal text. The paper applies three general rules to analyse the use of passives in two pieces of modern legislation in English and the other in Montenegrin which both focus on consumer protection. The results indicate that there is a great degree of similarity between the two languages in the way they use the passive in legal texts. More importantly, all the uses of the passive are justified in both corpora and serve a communicative function. However, it is suggested that more legislation should be analysed in order to arrive at some general conclusions. In particular, it would be interesting to see how content, i.e. area of law, affects the selection of voice in this legal genre.

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Key words

discourse, (plain) legal language, passive, statute, English, Montenegrin.

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Sažetak

U radu se analizira tačnost verovanja da se pasiv bez razloga previše koristi u pravnom jeziku, konkretnije u žanru zakonskog teksta. Prvo se daje pregled stavova prema pravnom engleskom jeziku kroz vreme, a zatim i pregled ranijih istraživanja od strane kako pravnih stručnjaka tako i lingvisti, na osnovu čijih se istraživanja o pasivnom glagolskom stanju došlo do nekoliko pravila o tome kada je upotreba pasiva opravdana, a kada mu je jedina svrha da učini da tekst zvuči kao pravni. U radu se u odnosu na pomenuta tri opšta pravila analizira upotreba pasiva u dva savremena zakonska teksta na engleskom odnosno crnogorskom jeziku na temu zaštite potrošača. Rezultati ukazuju na veliku sličnost dva jezika u pogledu upotrebe pasiva u pravnim tekstovima. Što je još važnije, sve upotrebe pasiva su opravdane u oba korpusa i imaju jasnu komunikacijsku funkciju. Međutim, predlaže se analiza većeg broja zakonskih tekstova kako bi se došlo do opštih zaključaka. Bilo bi naročito interesantno videti kako sadržaj, odnosno oblast prava, utiče na izbor glagolskog stanja u pravnom žanru.

Ključne reči

diskurs, (jednostavni) pravni jezik, pasiv, zakon, engleski, crnogorski.

1. INTRODUCTORY NOTES ON LEGAL ENGLISH

A book on legal reasoning and writing opens with the following words:

The act of writing forces the writer to test thought in order to express it fully and precisely, and thus complex analysis cannot be said to be complete until it becomes written and written well. (Neumann, 2001: xxiii)

The author, a renowned law professor, points to a strong interaction between the linguistic and the cognitive in the legal profession. A written word is not just a lawyer's means to express his/her thoughts on law but also a tool which helps his/her thoughts develop. It seems that written words, describing a complex legal concept or relationship, help lawyers distance themselves from the subject and analyse it more objectively. This may also be true of all other professions. But, apart from linguistics, only the legal profession focuses so much on language in university curricula and teaching material. This alliance has led to a number of debates, from how to write in a proper legal style, over how to simplify legal

language (“plain legal English movement”), to whether linguists can teach legal English at all.¹

Many esteemed members of the legal profession have written books on legal language (see Mellinkoff, 1963; Neumann, 2001; Enquist & Oates, 2001, among others). Thus, Mellinkoff (1963) describes the common patterns of legal texts and criticises some bad examples of such texts:

The language of the law is often unclear – plain “muddy”. This is not to say that the language is devoid of meaning. Simply that if there is any meaning, it is hard to find (Mellinkoff, 1963: 25).

He offers advice on how to avoid such bad examples. For example, he recommends his colleagues to find a remedy for a long sentence in either saying less or putting a period in the middle (Mellinkoff, 1963: 366). Other legal professionals have even designed whole exercise books to help users of Legal English (see Haigh, 2004; Wydick, 1998). Wydick (1998:17) gives the reader simple instructions:

“One way to remedy a wordy, fogbound sentence is to ask yourself: ‘Who is doing what to whom in this sentence?’ Then rewrite the sentence to focus on those three key elements – the actor, the action, and the object of the action”.

The author offers plenty of transformation exercises, together with answers. For example, for the following sentences:

- (1) There are three misstatements of fact in appellant’s opening brief.
- (2) It is not necessary for the witness to sign the deposition transcript until the errors are corrected.
- (3) In approving a class action settlement, it is imperative for the court to guard the interests of class members who are not present.

¹ The longest of the debates, the plain English movement, goes as far back as 1425, when a commission was appointed in Scotland “to see and examine the bulkis of law of this realme ... and mend the laws that needs amendment” (Plain Language and Legislation Booklet, 2006: 1). Among the critics of the legal style in English was even Edward VI who declared in 16th century that he wished “that the superfluous and tedious statutes were brought into one sum together, and made more plain and short, to the intent that men might better understand them” (Plain Language and Legislation Booklet, 2006: 1). More recently, the order to use “plain, intelligible language” in consumer contracts made part of a statute enacted in 1999, The Unfair Terms in Consumer Contracts Regulations 1999 (Regulation 7[1]). The Regulation was the first piece of legislation in the United Kingdom that transposed a directive of the EU. Symbolically, the clause on “plain, intelligible language” served to remind drafters in the UK of this duty at the beginning of this new and intense legislative process.

the following suggestions are given at the back of the book (1998: 119):

- (4) Appellant's opening brief contains three misstatements of fact.
- (5) The witness need not sign the deposition transcript until the errors are corrected.
- (6) In approving a class action settlement, the court must guard the interests of absent class members.

Linguists have focused more on the structure of various genres in legal discourse and established links between linguistic structures and their communicative purposes. Bhatia (1996: 54) points to the significance of 'structural forms' in the study of genre and emphasises the need to select the structural forms that are appropriate to the specific content. In his landmark book Bhatia (1993) introduces two types of move-structures: the linear move-structure (such as moves in a judgement or a directive) and the interactive move-structure (such as moves in legal provisions). The latter structure comprises the main provisionary clause and the qualifications inserted within the structure of the sentence. It is "interactive in the sense that the move qualification typically interacts with several aspects of the move provisionary clause" (Bhatia, 1993: 117).

If we now go back to the structural forms in the sentences above, in (1), we can easily justify its word order without knowing the communicative purpose of the legal genre from which the sentence has been taken. It is obvious that the purpose of the sentence is to point to misstatements of fact and this is done much better by placing the structure 'there are three misstatements of fact' at the beginning of the sentence. In example (2), the focus is on the steps in the procedure and not on the party in the procedure. Example (5) seems to place too much emphasis on the agent. And lastly, rather than giving an authoritative command to the court, as is done in example (6), example (3) stresses the significance of something that the court normally does in this kind of procedures, i.e. "guard[s] the interests of the absent class members".

To sum up, because law uses language to define legal relations that range in importance and complexity from who gets to pick the cherries from the branches overhanging another person's property² to whether or how long one sits in prison, the legal language must be detailed and precise. Naturally, this requires technical legal terms and long sentences with embedded clauses, where the relations among the persons involved are clearly stated. The plain English movement, on the other hand, tries to make legislation simpler for the lay people. These conflicting views have resulted in a number of measures. As mentioned above, some countries have

² Hoffman v. Armstrong, 46 Barb. 337 [1866], affd. 48 N.Y. 201 [1872].

decided to enact guidelines on the use of language in the drafting process. Others have decided to select a number of core provisions and write commentaries in everyday language. Such compilations are often published in the form of a guide.³ The latter solution is practical but does not help change the drafting techniques, provided a consensus is reached on the need for a change. Clearly, linguists and lawyers will have to work on this together. Our paper aims at contributing to this work by offering a reasoned opinion on whether the use of the passive in the legal language needs to change.

In the next section of the paper, we briefly present the analysis of the use of passive structures against their communicative purposes first by modern grammarians, and then by legal professionals.

2. THE USE OF PASSIVE IN GENERAL AND LEGAL ENGLISH

Hewings (2005: 48) summarises the reasons for using passives as follows:⁴

RULE 1: to omit the agent when the agent is not known, is 'people in general', is unimportant, or obvious:

(7) An order form can be found on page 2.

RULE 2: in factual writing, particularly in describing procedures and processes:

(8) Nuclear waste will still be radioactive even after 20,000 years, so it must be disposed of very carefully. It can be stored as a liquid in stainless-steel containers which are encased in concrete. The most dangerous nuclear waste can be turned into glass. It is planned to store this glass in deep underground mines.

RULE 3: in more formal contexts, where we want to avoid any mention of an agent:

(9) You will be given the questions a week before the exam.

RULE 4: to put the topic (what is already talked about) at the beginning of a sentence (or clause) and a comment on that topic at the end:

³ One such example can be found at:

http://www.privrednakomora.me/sites/pkcg.org/files/multimedia/main_pages/files/2012/09/vodic.pdf

⁴ Examples (7)-(11) illustrating the rules 1-5 are taken from Hewings (2005: 48).

(10) The three machines tested for the report contained different types of safety valve. All the equipment was manufactured by the Boron Group in Germany.

RULE 5: to put long subjects at the end of a sentence:

(11) I was surprised by Don's decision to give up his job and move to Sydney.

The first rule is register-neutral, i.e. the communicative functions described are found in both formal and informal registers. The second rule concerns 'factual writing' and 'processes and procedures' and legal English abounds in such a language. The third rule concerns formal contexts, and, again, legal English is generally perceived as a formal register, with varying degrees of formality. However, these three rules say roughly the same: use the passive when you want to place the focus on the object, i.e. the thing done. The fourth rule concerns the division of information structure in a sentence into topic (what the sentence is about, or what is already known) and comment (what is said about it, or what is not known). In a sequence of sentences, their order may change from one sentence to another to introduce new information while maintaining the link with what has already been said.⁵ For example, in (10) above, the comment 'contained different types of safety valve' may become the topic of the following sentence to give us new information on the safety valves introduced in the first sentence. This pattern is usually found in more formal registers. The fifth rule explains it is much more natural to put long subjects at the end and, more importantly, it is much easier to read. This is important for legal texts where extremely long sentences are more frequent than in other texts. In particular, it is logical to expect that the legal context may require specification of subjects in many situations. This example also fits nicely into the pattern of topic and comment discussed above although the topic in (11) is not something already known, rather it is the thing discussed. It is the reason for surprise that is the new information in the sentence and it is highlighted when placed at the end of the sentence.⁶

As we have seen above, while the passive in everyday language is used mainly when either the agent is unknown, unimportant or obvious or when the agent refers to 'people in general', in the legal language passive has several additional functions. Although the above rules seem to indicate that passives are appropriate for the legal language, many have criticised them as ambiguous. Wydick (1998: 32), for example, illustrates his view on the use of passives in legal English with the following example:

⁵ This pattern is also referred to as *theme* and *rheme*, particularly when used as a cohesive device in a text.

⁶ By the time one has heard all the information about the cause of surprise, one must have forgotten the information that someone was surprised by that.

(12) All improvements of the patented invention that are made hereafter shall promptly be disclosed, and failure to do so shall be deemed a material breach of this license agreement.

As Wydick (1998: 32) puts it, it is not clear from the above provision who discloses improvements and to whom and concludes that the parties will probably have to clarify this in a lawsuit. However, it is possible that the missing information can be found in the subsequent sentences where the legislator could introduce different sanctions for different categories of offenders, one for the offender who has improved the invention, and the other could be the offender who has learned of such improvements and has not made them himself. In this case, the above sentence could serve only to introduce the obligation in general.

Wydick (1998: 33) offers a list of five short and clear rules on when the passive is justified in a legal text:

RULE 1: when the thing done is important, and who did it is not:

(13) The subpoena was served on January 19th.

RULE 2: when you don't know who did it:

(14) The ledgers were mysteriously destroyed.

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RULE 3: when you want to place a strong element at the end of the sentence for emphasis:

(15) When he walked through the door, the victim was shot.

RULE 4: when a sense of detached abstraction is appropriate:

(16) In the eyes of the law, all persons are created equal.

RULE 5: when you want to muddy the waters, e. g. if you do not want to state outright that your client knocked out the plaintiff's teeth:

(17) The plaintiff's teeth were knocked out.

The rules are very clear and practical (Rule 5 in particular) and show that lawyers can recognise the communicative functions of the linguistic structures.

Enquist and Oates (2001: 71-76) offer almost identical five rules. We will list the two that are partly related to Wydick's Rules 1 and 3 above:

RULE 1: when you want to keep the focus of the writing where it belongs:

(18) A mistake can also be attributed to Lakeland Elementary School for believing the price of the playground equipment included installation. (Enquist & Oates, 2001: 75)

RULE 2: when it provides a stronger link between preceding and subsequent sentences or clauses:

(19) Under the Revised Code of Washington, Title 62A, contracts for the sale of goods are regulated by the Uniform Commercial Code. The UCC outlines the requirements for a valid contract for the sale of goods and various steps necessary to the contract's performance. (Enquist & Oates, 2001: 75)

All of the above rules illustrated by examples (7)-(19) above could be summarised as follows:

Rule 1: use the passive to place emphasis on the thing done;

Rule 2: use the passive in the pattern of theme and rheme for greater cohesion in the text;

Rule 3: use the passive to introduce a longer part of the sentence (subject, object, prepositional clause, etc).

In the next sections of the paper we will analyse the two legal texts, one in English and the other in Montenegrin, both on the topic of consumer protection, to see whether their use of passives complies with the three broad rules above.

For the purposes of this paper, we use the term 'passive' in a very broad sense. It will include constructions with 'be' + past participle, 'reflexive' constructions, and adjectival participles in post-nominal positions, normally called reduced restrictive relative clauses.

3. LEGAL DRAFTING AND CONSUMER PROTECTION LEGISLATION IN THE UK AND MONTENEGRO

As indicated in section 1 above, the rule to use "plain, intelligible language" in consumer contracts made part of a statute enacted in 1999, which best illustrates the efforts of the British legislator to make legislation as accessible as possible for an average citizen. In Montenegro, however, there is no such tradition. The Law School in Montenegro does not offer courses in legal drafting or legal language. Students are shown examples of earlier or existing legislation to illustrate an area of law that they study in individual courses, such as administrative law, tort law, criminal law, etc. Later, a small portion of those who are involved in the legislative

drafting perpetuate the models they have been exposed to through education and in-service training. This means that the drafting practices have not changed much over time because in most cases educators and mentors at workplace have been exposed to these identical examples. There has been no linguistic research into the language of law as used in Montenegro.⁷ As for the plain language movement, no survey has been done on whether the legal community in Montenegro is familiar with the concept.⁸ One possible channel of influence could be through the transposition of international regulations into national legislation. The EU directives, for example, are transposed directly and this is often done by copying the relevant provisions word for word. In addition, any legislative drafting always includes the analysis of comparative legislation. It can be expected, therefore, that legal texts will become ever more similar in the future in terms of both the concepts expressed and the linguistic means used. The same is expected of the two corpora selected for our analysis.

Our English corpus is composed of a part of the UK's 1987 Consumer Protection Act whereas our Montenegrin corpus is the Consumer Protection Act from 2013.⁹ The selected parts in both corpora total 6,860 words each. Recitals, definitions of terms, procedural, enacting provisions, or names of articles and article numbers have been excluded from both corpora.

3.1. The structural patterns

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We have first compared the structural patterns in the two acts to see whether they are relevant to the use of the passive voice. The analysis has shown that in the UK's legislation individual articles often begin with a short introductory clause and then expand into several paragraphs, each devoted to a different objective

(20) If the Secretary of State considers that for the purpose of deciding whether

- (a) to make, vary or revoke any safety regulations; or
- (b) to serve, vary or revoke a prohibition notice; or
- (c) to serve or revoke a notice to warn,

he requires information which another person is likely to be able to furnish, the Secretary of State may serve on the other person a notice under this section,

or a condition:

⁷ Still, linguists in Montenegro have done limited research on legal English and legal translation.

⁸ This comment is based on the author's personal communication with the faculty of the University of Montenegro Law School.

⁹ Zakon o zaštiti potrošača Crne Gore („Službeni list R. Crne Gore“, br. 26/07) (Consumer Protection Act of Montenegro, published in the Official Gazette of the Republic of Montenegro, No. 26/07).

(21) In any civil proceedings by virtue of this Part against any person (“the person proceeded against”) in respect of a defect in a product it shall be a defence for him to show

- (a) that the defect is attributable to compliance with any requirement imposed by or under any enactment or with any Community obligation; or
- (b) that the person proceeded against did not at any time supply the product to another; or
- (c) that the following conditions are satisfied, that is to say [...].

This drafting strategy makes reading much easier, but most articles are still composed of several independent paragraphs. Our analysis has shown that there is no specific pattern in the way the voice is used in these differently structured articles. The position of passives has therefore not been taken into account in this analysis.

The same has been proved true of the Montenegrin legislation. Some of the patterns identified in the selected provisions include the following:

- the first paragraph sets forth the general rule and the second paragraph provides additional information which specifies the conditions for the rule or explains the rule and its application in greater detail, as in Article 7 of the Act:

(22) Član 7

Proizvodi namijenjeni potrošačima moraju biti sigurni po život i zdravlje potrošača i životnu sredinu.

Proizvodi moraju odgovarati zdravstvenim, higijenskim, ekološkim i drugim uslovima u skladu sa zakonom, važećim standardima, tehničkim i drugim propisima.

(Article 7¹⁰)

Products intended for the consumers must be safe to the life and health of consumers, and to the environment.

Products must comply with the health, sanitary, environmental, and other requirements in accordance with law, applicable standards, technical and other regulations.)

- the first paragraph sets forth the rule and is followed by a series of paragraphs in which more specific rules are provided for different situations (different types of product, packaging, business entities, etc.). One example of this structure is found in Article 13 of the Act:

¹⁰ The translation of selected articles is taken from the official translation of the statute provided by the Consumer Protection Agency of Montenegro, with minor changes made by the author of this paper.

(23) Član 13

Trgovac je dužan obavijestiti potrošača o važećoj cijeni proizvoda koja mora biti vidno istaknuta.

Važeća cijena se ističe na robu ili neposredno pored robe, kao i na robu u izlogu.

Na proizvodima koji su prethodno upakovani [...] mora biti istaknuta ...

Na robu u rasutom stanju važeća cijena ističe se ...

Važeća cijena usluge ističe se ...

Važeće cijene izražavaju se u ...

(Article 13

Trader shall notify the consumer about the current price of the product which must be visibly indicated.

The current price shall be indicated on the goods or immediately adjacent to the goods, as well as on the goods in the display window.

When the goods are previously packed [...] shall be indicated ...

On bulk goods, the current price shall be indicated ...

The current price of a service shall be indicated ...

Current prices shall be denominated in EUR.)

The analysis¹¹ has shown that the passives are spread evenly throughout the text, which means that their position is irrelevant to our analysis.

3.2. Quantitative analysis of the passives in the English corpus

Out of 6,860 words in English corpus, 578 words are verb phrases. This means that one verb phrase carries around twelve other words. Of the 578 verb phrases, 374 (around 65%) are active and 204 (around 35%) are passive. The dominant use of active verbs implies that the reader gets clear information on who does what in the set of legal relations described.

We have analysed the passives in relation to the three general rules stated in section 2 of the paper and the results are as follows:

¹¹ In our quantitative analysis we have analysed the introductory, or 'main', paragraphs separately from those which include specifications. In the former, 37.72% of the verb phrases were in the passive, whereas the paragraphs which include specifications contained 40% of verbs in the passive. This clearly shows that the share of the passive structures in both types of paragraphs is almost identical (around 40%).

3.2.1. Rule 1: use the passive to place emphasis on the thing done

Out of the 204 passive verb phrases in the text, 184 (90%) illustrate this rule. Passives are very often used in the definitions of key terms, as in:

(24) In this section “the relevant time”, in relation to electricity, means the time at which it was generated, being a time before it was transmitted or distributed, and in relation to any other product, means ...

The passive is also used to distinguish between different events or different negative effects of an event. In the following example, the passive is used to introduce more information on the possible causes of death.

(25) Where a person’s death is caused wholly or partly by a defect in a product, or a person dies after suffering damage which has been so caused.

In many sentences, the passive is used to introduce the legislator’s statements on how something is to be interpreted:

(26) It is hereby declared that liability by virtue of this Part is to be treated as liability in tort for the purposes of any enactment conferring jurisdiction on any court with respect to any matter.

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We have identified a large number of passives (44, or 24%, out of 184 in this category) that serve as post-nominal modifiers in the form of past participles. They are considered reduced restrictive relative clauses in the passive voice and for this reason are included in the analysis. Their usage is both economical and very effective as it shortens the sentences, and summarizes the concepts for the readers. Such examples include the following:

(27) [...] that the person proceeded against did not at any time supply the product to another...

Thus, in (27) ‘the person proceeded against’ stands for ‘the person who is proceeded against’. Some additional examples that illustrate this claim can be found below:

(28) [...] in relation to a request made by that person.

(29) [...] growing crops and things comprised in land by virtue of being attached to it.

(30) [...] does not satisfy the standards connected with such a procedure.

(31) A suspension notice served by an enforcement authority in respect of any goods shall...

3.2.2. Rule 2: use the passive in the pattern of theme and rheme for greater cohesion in the text

We have identified only two series of sentences in the corpus where the passive is used in the pattern of theme and rheme. They contain only 3 passive verbs, or 1.47%, in the total of 204 passives. In example (32) below, the passive in 'the loss or damage shall be regarded' allows the drafter to place this part of provision immediately after the mention of 'loss or damage' in the previous clause and achieve clarity and cohesion:

(32) In determining for the purposes of this Part who has suffered any loss of or damage to property and when any such loss or damage occurred, the loss or damage shall be regarded as having occurred at the earliest time at which a person with an interest in the property had knowledge of the material facts about the loss or damage.

In example (33), the rheme opens with 'shall be awarded', and forms part of the theme in the subsequent clause 'the amount which would fall to be so awarded' for the rheme 'does not exceed £275':

(33) No damages shall be awarded to any person by virtue of this Part in respect of any loss of or damage to any property if the amount which would fall to be so awarded to that person, apart from this subsection and any liability for interest, does not exceed £275.

3.2.3. Rule 3: use the passive to introduce a longer part of the sentence (subject, object, prepositional clause, etc)

We have identified 17 (8.3%) passives that illustrate this rule. In most cases, the subject of the passive sentence, i.e. the real object of the action, is an 'application', 'request', 'notice' and the like, and is usually already known. The longer part which follows introduces new information:

(34) An application under this section may be made to any magistrates' court in which proceedings have been brought [...] for an offence in respect of a contravention in relation to the goods of any safety provision ...

(35) [...] that request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and ...

Many passives are used at the beginning of a long clause to introduce a number of more specific rules. For example:

(36) An application under this section may be made

- to any magistrates' court in which proceedings have been brought [...],
- for an offence in respect of a contravention in relation to the goods of any safety provision, or
- for the forfeiture of the goods under section 16 below;
- where no such proceedings have been so brought, by way of complaint to a magistrates' court, or [...]

In example (37) below the passive in the first part introduces a prohibition, and the second, longer part offers more information on the prohibition itself:

(37) A notice may not be given under this section in respect of any aspect of the safety of goods, or any risk or category of risk associated with goods, concerning which provision is contained in the General Products Safety Regulations 2005.

As illustrated by examples 24-37 above, the passives identified in the English corpus serve different functions, none of which is merely to give the text the appearance of a proper legal text.

3.3. Quantitative analysis of the passives in the Montenegrin corpus

The selected clauses of the Montenegrin corpus have a total of 6,860 words, of which 509 are verbs. This means that a single verb carries around 13 other words in the sentence. Of 509 verbs, 313 (61.49%) are active, and 196 (38.50%) are passive. In this corpus too, we have analysed the passives in relation to the three general rules from section 2 of the paper and the results are as follows:

3.3.1. Rule 1: use the passive to place emphasis on the thing done

Most uses of the passive illustrate this rule. More specifically, out of 196 passive verbs, 172 (87.75%) are in the passive voice to place emphasis on the activity rather than the agent. This is done for some of the reasons illustrated by the

extracts which follow. In (38) below, for example, the agent is obvious but the passive serves to create a sense of impersonality and detach the grantor from the warranty, which gives this document a greater legal power. In other words, although it is the grantor that sets forth the conditions of the warranty, once formulated, the warranty continues its life as an independent document which is not subject to negotiations with the customers.

(38) *Davalac garancije dužan je da ispuni obaveze utvrđene garancijom.*
(The warranty issuer shall meet the obligations set forth under the warranty.)

Similarly, examples (39) and (40) illustrate the same rule:

(39) *Zabranjeno je davanje ličnih podataka o potrošaču trećim licima, bez prethodnog odobrenja potrošača, ako zakonom nije drukčije utvrđeno.*
(It is prohibited to disclose personal data of the consumer to third parties without previously obtaining consent of the consumer, unless otherwise provided for by law.)

(40) *Potrošač nema pravo na raskid distancionog ugovora, ukoliko drukčije nije ugovoreno.*
(The consumer shall not be entitled to terminate a distance contract, unless otherwise specified in the contract.)

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In some articles with a broad range of possible agents, the agent is not indicated because listing the agents would expose the drafter to the risk of leaving some possible agents out of the list. This could have negative legal consequences. For example:

(41) *Proizvodi namijenjeni potrošačima moraju se čuvati na način i pod uslovima utvrđenim zakonom.*
(Products intended for the consumers must be stored in the manner and under conditions defined by law.)

The above provision in (41) imposes an obligation on everyone involved in the chain, from the manufacturer to the consumer. This includes a very long list of segments: production, storage, transport, wholesale and retail trade, catering, and many others, all the way to the consumer. It is almost impossible to think of all the potential agents, and leaving some of them out may have serious legal implications. For example, if the drafter does not include school cantinas in the list, then anyone violating the provision in such establishments may say they are not covered by the law and therefore be under no obligation to observe it.

Of the 172 examples discussed under this rule, 27 (15.69%) are the examples of reduced restrictive relative clauses in the form of the past participle used for post-nominal modification, as in the following:

(42) [...] ispunjavaju uslove predviđene garancijom.
 ([...] meet the requirements set by the guarantee.)

In the above example, the participle replacing the restrictive relative clause 'that are set by the guarantee' serves to shorten the sentences while leaving no place for ambiguity as to the interpretation of the nominal. This is illustrated by the following examples:

(43) [...] o kontinuiranoj dostavi hrane, pića i ostale robe namijenjene svakodnevnoj upotrebi u domaćinstvu ili na radnom mjestu potrošača.
 ([...] on continuous supply of food, beverages and other goods intended for everyday use in the household or at the working place of the consumer)

(44) Zabranjena je reklama namijenjena maloljetnim licima i reklama u kojoj nastupaju maloljetna lica, ako podstiče ponašanje koje ugrožava njihovo zdravlje, psihički ili moralni razvoj.
 (Any advertising intended for underage persons and advertising involving appearance of underage persons shall be forbidden if encouraging the conduct that is detrimental to their health, psychical or moral development.)

3.3.2. Rule 2: use the passive in the pattern of theme and rheme for greater cohesion

Several provisions have been identified where the passive is used for greater cohesion through the pattern of theme and rheme. They include 11 passives, or 5.61% of the total number. Thus, in (45a) below, the focus is on the duty imposed on traders (the theme). The noun 'isprave' (documents) in the same sentence is the rheme, which becomes the theme in (45b). This proximity can be achieved through the use of passive in 'The documents ... shall be issued'.

(45a) Trgovac je dužan potrošača upoznati sa svojstvima ponuđenog proizvoda [...] predati propisane isprave, kao i isprave koje je obezbijedio proizvođač.
 (The trader shall inform the consumer about the properties of the product that is offered [...] hand over the prescribed documents, as well as the documents provided by the producer.)

(45b) Isprave iz stava 1 ovog člana izdaju se u skladu sa tehničkim i drugim propisima i moraju biti napisane čitko i jasno.

(The documents referred to in paragraph 1 of this Article shall be issued in accordance with technical and other regulations and shall be legibly and clearly written.)

Similarly, in (46) and (47) below greater cohesion is achieved by repeating the comment from the first sentence as the topic of the second sentence:

(46) Trgovac je dužan da, prije zaključenja ugovora, obavijesti potrošača o eventualnoj promjeni uslova iz ponude, a u ugovoru se mora izričito navesti koji su uslovi iz ponude mijenjani.

Ponuda iz stava 1 i obavještenje iz stava 4 ovog člana moraju biti sačinjeni u skladu sa članom 56, stav 2 ovog zakona.

(Before the conclusion of the contract, the trader shall notify the consumer of any changes in the conditions stated in the offer, if any, and the contract must explicitly describe the conditions that were stated in the offer but were subsequently changed.

The offer referred to in para. 1 and the notification referred to in para. 4 of this Article must be made in accordance with Article 56 para 2 of this Law.)

(47) Trgovac je dužan obavijestiti potrošača o važećoj cijeni proizvoda koja mora biti vidno istaknuta.

Važeća cijena se ističe na robu ili ...

(The trader shall notify the consumer of the current price of the product, which must be visibly indicated.

The current price shall be indicated on the goods or ...)

3.3.3. Rule 3: use the passive to introduce a longer part of the sentence (subject, object, prepositional clause, etc)

This rule refers to a small group of provisions (13, or 6.63%). Many of them open with 'Zabranjena je' (It is prohibited), as in:

(48) Zabranjena je prodaja zdravstveno i higijenski neispravnih proizvoda, proizvoda kojima je istekao rok upotrebe, kao i proizvoda koji nijesu deklarirani u skladu sa zakonom.

(It is prohibited to sell the products that do not comply with health and sanitary requirements, the products whose shelf life has expired, as well as the products that are not declared in accordance with law.)

The agent, i.e. the entity imposing this prohibition, is implied; it is the legislator, acting through the authority of inspection services and courts. By placing the 'preparatory it'¹² and 'be prohibited' at the beginning, the legislator emphasises the object of prohibition.

In (49) and (50) below, the passive in the first part of the sentence introduces a prepositional clause which specifies the action expressed by the verb:

(49) Cijena javne usluge obračunava se prema stvarnim isporukama, odnosno prema potrošnji, uz primjenu prethodno utvrđene tarife.
(The price of public service shall be calculated according to the actual deliveries, or according to the consumption, where the previously determined tariffs shall apply.)

(50) Distancioni ugovor je raskinut u trenutku kada je trgovac primio obavještenje o raskidu ugovora, ako je obavještenje o raskidu ugovora poslato u rokovima iz člana 41 ovog zakona.
(Distance contract shall be terminated at the time when the trader receives the notification about termination of the contract, provided the notification on contract termination has been forwarded within the deadlines referred to in Article 41 of this Law.)

Examples 38-50 above are representative of the remaining passives in the Montenegrin corpus. They are all justified as they illustrate one of the three general rules on the proper use of passives in a legal text.

4. COMPARISON OF THE USE OF PASSIVES IN THE TWO CORPORA

In both corpora, the passive is the less frequent voice. In the Montenegrin corpus, it is used in 38.50% cases, and in the English corpus in 35% cases. When used, in both languages it complies with the three general rules that are seen as justified by both linguists and lawyers. The three rules are as follows:

(I) RULE 1: use the passive to place emphasis on the thing done;

(II) RULE 2: use the passive in the pattern of theme and rheme for greater cohesion; and

¹² Swan (2005: 423) calls this use of 'it' 'preparatory it'.

(iii) RULE 3: use the passive to introduce a longer part of the sentence (subject, object, prepositional clause, etc).

In Rule 1, the information in the passive itself is emphasised, whereas in the other two rules the passive is used as a device to achieve cohesion (Rule 2) and to introduce another part of the sentence which is more emphasised (Rule 3). This generalisation applies to both languages.

Under Rule 1, we have identified a specific use of past participles for post-nominal modification in both corpora. We have included these examples in the analysis since they are condensed restrictive relative clauses in the passive voice (represented as Rule 1a in Table 1 below). For better comparison between the two corpora, the percentage is shown in Table 1:

CORPUS	RULE 1	RULE 1a	RULE 2	RULE 3
English	90%	(-24%)	1.47%	8.3%
Montenegrin	87.75%	(-15.59%)	5.61%	6.63%

Table 1. Use of passives in the corpora under the three general rules

As the table clearly shows, English and Montenegrin are pretty similar in the way they use the passive voice in the legal language. Both languages use the passive the most (in around 90% of cases) under Rule 1, i.e. to emphasise the thing done. In the selected corpus, English uses more participles in post-nominal positions, whereas Montenegrin uses more passives to achieve cohesion. However, what matters most is that all the passives in the corpus are used for a good reason, i.e. with a clear communicative function.

5. CONCLUSION

We hope to have proved that the belief that the passive voice is excessively used in the legal language is a myth. English and Montenegrin are very similar in the way they use the passive voice in statutes, as a legal genre. The majority of passives (around 90%) are used in both languages to emphasize the thing done, i. e. the actions, processes, and procedures that the statute regulates. There are slight differences in the way the two corpora implement the other two rules when using passives. Most importantly, all the uses identified in the corpora are justified. We must bear in mind, however, that this analysis is limited in scope. Its results should

be compared with similar analyses with at least two other pieces of legislation on different areas of law. We have selected legislation that is generally seen as more relevant to an average citizen. It is therefore expected that such legislation uses the active more to avoid any ambiguities with respect to the parties involved and their individual responsibilities. It would be interesting to see whether the use of passives is greater in the acts that are traditionally seen as the most complex, e.g. in criminal code.

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