

Language and Law

A resource book for students

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Chapter A3

Legal Genres

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of variation evident in the general formation of New Englishes (e.g. Indian English, Nigerian English, etc.), the linguistically conservative tendency of legal English has acted as a brake on divergence. Perhaps as influential, however, as regards the footprint of legal English has been the extraterritorial reach of the English **common-law** system as the way to arbitrate international commercial cases, as well as the twentieth-century development of international legal bodies (the EU, UN, WTO and others) that use English as spoken or written and interpreted by non-native speakers who have no historical connection with Anglo-American common-law traditions.

LEGAL GENRES

A3

In this unit, we explore another important kind of linguistic variation in legal discourse: variation by text type, or genre. Each different genre consists of interlocking elements that together allow it to fulfil a particular purpose. While genres can be found across all domains of discourse, in law specific genres serve precisely defined roles: they may prohibit something; impose duties or obligations; make promises; impose an order; advocate a course of action; or report the reasoning or findings of a court. Below, we outline the concept of genre and illustrate the most common legal text types. In Unit B3, we analyse how genres in law have developed historically, taking the example of the law report; and in Unit C3, we analyse generic features of a statute (what are sometimes called in legal skills courses ‘the anatomy’ of a statute; Finch and Fafinski 2011: 65–73). Our Unit D3 extract summarises some detailed empirical research into what is found to be a hybrid legal genre: that of jury trial.

Aesthetic and professional genres

To begin, it is necessary to clarify what we mean by **genre**, especially because the term carries connotations of aesthetic choice and artiness that seem out of place in the company of legal texts. Such associations may suit fiction and ballet but to many people seem inappropriate in relation to professional, especially legal, kinds of discourse.

In its most general sense, *genre* simply means sort, or type, of text. The word comes from Latin *genus*, meaning ‘kind’ or ‘type’ of anything, not just literary or artistic works. (*Genus* is still used in a technical sense to describe ‘type’ in the classification of species; and *generic* means ‘broad’ or ‘with properties of a whole type or class’, being related in this meaning to *general*.) In our discussion of legal language, we prefer the term *genre* to *text type*, since the latter seems to highlight formal rather than functional differences between texts.

Genre and register

In Thread 2, we discuss the concept of register as stylistic variation that applies across legal text types. By contrast, genre is concerned with the distinctiveness of legal text types within the overall class of texts that all display legal register.

Here is a brief comparison between register and genre. With register, relevant variable features tend to occur repeatedly within a text. Preference for passive grammatical constructions over active ones (*the meal was cooked by me* rather than *I cooked the meal*), idiosyncratic use of third-person *shall* ('the buyer shall . . .'), or presence or avoidance of contractions (*it's*, *they've*, *isn't*) recur in situations where a choice is available. Analysing register variation involves studying choices where relevant options were available to the writer or speaker (Biber and Conrad 2009). By contrast, genre markers are structural. Features that define a text – is it a recipe or restaurant review, a ballad or blues, a romcom or tragedy, or a will or wish list? – mostly occur only once, at particular points (often towards the beginning or end). Such features work together, usually serially (except in static forms such as photos and paintings), like a textual machinery or 'apparatus'. They imply movement and direction, propelling the text along a track that starts in one place and ends in another.

In documents, genre markers can be found in:

- ❑ layout, including **textual mapping** (e.g. section or chapter divisions, use of paragraph topic sentences);
- ❑ use of headings, titles and other ways of the text self-identifying as a particular kind of document;
- ❑ opening and closing statements that bootstrap the document into action and declare its purpose;
- ❑ types of material contained at successive stages; and
- ❑ closing statements outlining application or anticipated effect, signatures and dates where applicable.

Analysing genre is a process of checking for strategic markers of structure and purpose. This is because genre is to do with how things get done linguistically. Without essential elements, a text may cease altogether to function as an exemplar of the text type it is trying to be. In literature, music or film, that may not have any major consequence; it may even prompt new directions in creativity. With legal genres, however, the job to be done by the text, such as functioning as a will or a lease, cannot be accomplished unless essential, 'operative' elements are all present and relate to each other in the correct way.

The essential difference between register and genre can now be seen. One of its implications is that there may be many examples of the same genre that differ substantially in stylistic realisation while all achieving the same function. But if you take an essential genre feature away, although a text may still be in a register associated with particular genre, it may no longer function (e.g. as a job offer, letter of authorisation or will). The concepts of genre and register in this way contrast as dimensions of legal language, but coexist in any given text and often work in mutually reinforcing ways. Legal requirements for each clause in a contract will be realised in language with particular register characteristics (as well as jurisdiction-specific and period-specific legal dialect characteristics); and a preamble to a statute will have features that we recognise instantly as legal register but which also function as the preamble to a statute, not as a will.

Consider the interaction between genre and register in a **will**. A clause from a will (examined by Butt 2013: 303–4) states:

Signed by the above-named Sarah Smith as her last will in the presence of us present at the same time who at her request in her presence and in the presence of each other have hereunto subscribed our names as witnesses.

Features of legal register are unmistakable here: ‘hereunto’ and ‘subscribed’ (the latter in the sense of ‘written below’); the complicated coordination involved in saying the people were all there simultaneously; and the oddity of word order (adverbials placed between ‘who’ and its related verb). Butt’s commentary, which is concerned with reform of legal drafting styles, proposes a simpler alternative: ‘Signed by the testator in our presence and then by us in hers’. But Butt notes that alongside features of linguistic register, we must recognise another aspect of the clause: its essential role within the ‘will’ genre. The clause is an **attestation clause**: the will would have been invalid without a signature made by the testator in the presence of two or more witnesses present at the same time. A statement fulfilling this specification is not a matter of style (Butt in fact demonstrates that the will could have been written in a number of different styles). Rather, the attestation clause is an element in a specialised discourse ‘apparatus’ that has **performative effect**: it will bring about a transfer of possessions, but subject to the requirements of the relevant conventional legal genre, or text type, being met.

Legal text types

Genre is an important concept in relation to legal language. It is genre considerations that allow documents to perform, in a given instance, as operative **legal instruments**, carrying out acts rather than merely describing a wish or plan or reporting that changes have been brought about by some other action. The functions performed by genre also show why ‘legal document’ can be an object of analysis for a register study but not the name of a genre. ‘Will’ or ‘insurance policy’, by contrast, are such names, in that these are terms that indicate situated purposive behaviour.

There is no fixed list of legal genres, even though a set of prominent legal text types can be identified. The core types include:

- ❑ ‘legislative’ documents (e.g. treaties, constitutions, statutes, statutory instruments, by-laws (sometimes ‘bye-laws’), regulatory codes);
- ❑ ‘private law’ documents (e.g. contracts, orders, deeds, wills, leases, conveyances, mortgage documents, building contracts); and
- ❑ ‘procedural’ documents (e.g. opening speech in a trial, cross-examination, summing-up speech, jury direction).

Each text type performs a specific legal task, or combination of tasks, and is governed by conventions that vary between legal systems. The first two categories are typically written genres (though contracts need not be). The third category consists of legal text types realised in speech, for example during court proceedings and at inquests and other

tribunals. There are some text types again that can involve either speech, or writing, or the two in combination: **pleadings** (statements of case and related legal submissions such as skeleton arguments on which oral submissions will be based); and **judicial opinions**, as recorded in law reports (often written, sometimes with the assistance of a clerk, to be spoken, or written up after having been delivered orally and transcribed).

Moving beyond this core area of text types, other legal genres include expository documents explaining the law on a particular point or in a given area; there are also office memoranda, client advisory communications, and emails exchanged in case preparation. Moving outwards from courts and solicitors' offices into legal studies and public information, there are published **case notes**, law review articles, policy reports and reform proposals, as well as legislative materials in preparation (green papers, white papers, **travaux préparatoires**, transcripts of parliamentary debate), and many other kinds.

Genre is particularly important in relation to legal text types because legal systems function through a hierarchy of **authorities** ('authorities' here meaning statements made or reported in available document 'sources'). For the purpose of legal proceedings, some kinds of document will not be taken into account because they are inadmissible or not binding in a given context. More generally, sources are given different weight in legal argument. And while sometimes a single document may have its effect independently (e.g. an uncontested will), often documents occupy slots within an overall procedure that unfolds over time. Each builds on some previous document's specialised role within a larger 'legal machine' (e.g. a whole court case, or the complex process of legislation during which policy documents evolve into legislative drafting, are published as statutes or regulations, applied by courts, contested in litigation, and reported – all in ways that may result in later amendment and **codification**).

Contracts as an example

Consider the written **contract** as an example of genre. Contracts are private law documents that set out agreements between parties to perform particular actions. There is no legal requirement for a contract to follow a particular format; legal contestation will take not only the written document into account where there is one, but a range of other relevant circumstances and legal principles. Nevertheless, commercial contracts prepared by lawyers tend to follow a similar structure.

Simplified considerably (adapted here from Haigh 2015), a typical modern commercial contract follows a general structure and sequence of presentation:

- ❑ names and addresses of the parties;
- ❑ **recitals** (background information typically introduced by the register-specific term 'whereas');
- ❑ definitions;
- ❑ **conditions precedent** (i.e. conditions stated as being in place before the agreement);
- ❑ agreements;
- ❑ representations and warranties (promises that a given statement or set of facts is true, including promises that may give rise to a claim to damages if the contract becomes the subject of litigation);
- ❑ **boilerplate clauses** (standard statements of terms and procedures);

- ❑ schedules;
- ❑ signatures; and
- ❑ appendices.

Some steps or stages have general names that are recognisable from other kinds of text (even if some of these, such as ‘schedules’ meaning separate lists, or the phrase ‘conditions precedent’, which reverses the sequence of adjective and noun, may sound archaic). Other stages (‘recitals’, ‘representations and warranties’ and ‘boilerplate clauses’) use specialised names. Realisation, or fulfilment, of each step depends as much on legal requirements as on linguistic formulation, making genre a key area in which ‘language and law’ are not simply juxtaposed concepts, but intersect and create new, specifically legal meanings.

Some relevant legal requirements of a contract may be used in many different types of contract: e.g. effect of extraneous events (**force majeure**); service of notices; statement of governing law; basic interpretation principles; duration; what happens in the event of bankruptcy or insolvency; termination for breach; and dispute resolution. Others will be specialised to a particular type of transaction: e.g. lessor’s powers and lessee’s obligations in a lease; or a mortgagee’s rights and remedies. All, however, are episodic features that characterise an operative legal genre. They bootstrap a document into existence as a particular kind of document; they define its purpose, scope and terms; they state its provisions; and they stipulate the circumstances of its application.

Each feature of a legal genre is accordingly both:

- ❑ conceptual (within the rule-governed system of what law requires and what the parties to the particular document want); and
- ❑ linguistic (expressed by means of a particular **speech act**: spelling out presumptions, requiring something to be done, undertaking to do something, stating agreement, etc.).

For each step, it is possible to move down a level, to see typical realisations that will satisfy what is needed for that step to be **legally binding**: for example, a particular clause may need to specify agency, or state exemptions or deadlines. Such clauses may be repeated, with relevant variation while retaining the elements required to be deemed operative. This contributes to the formulaic character of the genre as regards legal register.

Various shorthands are used in legal textbooks and training materials to describe document structure, including:

- ❑ COAL (how material should unfold in a contract): conditions, obligations, authorisations, limitations (Butt 2013: 119); and
- ❑ CLEO (a model developed primarily for students of legal English): claim, law, evaluation, outcome.

Reflecting on good and bad practice in legal drafting, Butt (2013) suggests that most (private law) transactional legal documents can logically follow one of three alternative

structures that, weighed up from the point of view of anticipated reforms of legal language, he concludes have different merits:

- 1 a 'telescoping' form, front-loaded with essential information presented before less important information;
- 2 a 'thematic' form, dealing with each main topic in succession along with everything that relates to it; and
- 3 a 'chronological' form, following steps in a transaction in the order in which they would take place, like a narrative.

Scope for such variation in structure points to a significant aspect of legal document genres hinted at above: that already tested structures are usually followed. This conventional aspect of document patterns is reinforced on each occasion of use, reflecting and contributing to wider legal conservatism. Ready-made, 'boilerplate' material containing standard formulations (including **specimen clauses**) is available for incorporation into documents, within law firms and commercially, including increasingly online. Because of law's precise procedural needs, use of templates that require only filling in of standardised forms is not frowned on, but encouraged, although responsibility for understanding how a particular use of language relates to the law in a given set of circumstances will normally remain with the document user.

PARTICIPANT ROLES AND SPEECH STYLES

Extending our discussion of genre in Thread 3, especially Heffer's analysis of jury trials as a complex, hybrid genre in Unit D3, we now describe the main determinants of spoken language styles used in courtrooms. Even within a specialised legal setting, we show, speech style co-varies with participant roles and with different stages in legal proceedings. We then examine the main speaking roles and associated styles likely to be encountered in court, identifying prominent features for further analysis in Unit B4. The speech styles used by advocates, which form a distinct kind of adversarial rhetoric, are introduced in Thread 5.

Who talks during a trial, at what stage and in what capacity?

There are major differences between different kinds of trial. So our brief introduction here involves considerable simplification (for a fuller description, see Mauet 2002; Zander 2015). The stages we outline are the main steps in an overall institutional process that is simultaneously procedural, conceptual and linguistic. The process is also adversarial, in common-law trials, and may last varying amounts of time. Not all steps are present in all kinds of proceeding, or at all levels in a court hierarchy, or in all jurisdictions. Our description of speech styles needs to be read with such legal variation in mind.