Language and Law

A resource book for students

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Chapter B3

Genre Analysis of Legal Discourse

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pulled in different directions. Its statements have to be so phrased that we can see their general applicability, yet be specific enough to apply to individual circumstances. They have to be stable enough to stand the test of time, so that cases will be treated consistently and fairly, yet flexible enough to adapt to new social situations. Above all they have to be expressed in such a way that people can be certain about the intention of the law respecting their rights and duties. No other variety of language has to carry such a responsibility.

B3

GENRE ANALYSIS OF LEGAL DISCOURSE

Unit A3 introduces the concept of genre partly by contrast with linguistic register. Both kinds of variation, we point out in that unit, contribute to the overall characteristics and suitability in a given situation of a text or stretch of discourse. In this unit, we look more closely at how discourse genres function in law. We distinguish between synchronic (systemic) and diachronic (historical) aspects of genre and illustrate how legal genres have developed by reference to the history of law reporting. In Unit C3, we look at features of another legal text type: the statute.

Directions in genre analysis

Genre has been studied extensively since ancient times, both as an aesthetic category (e.g. the distinction between tragedy, epic and lyric in Aristotle's *Poetics*) and in treatments of public rhetoric (e.g. the contrast between forensic and political styles of speaking in the same philosopher's *The Art of Rhetoric*). A range of classificatory systems can be found, including ones based on formal properties, conventional purpose, occasions of use, and anticipated effect. Although training manuals have always existed offering instruction in different styles of writing and speaking, it is relatively recent that questions raised by differences of discourse type have been viewed as a distinct field of research: **genre analysis**.

Modern linguistic theories of genre

In his study of genre analysis as a way of understanding English in academic and research settings, Swales (1990) summarises different approaches to genre thinking, including accounts in folklore studies, literary criticism, rhetoric and linguistics. Central to his own understanding is a concept of 'discourse community', or group of language users narrower than a sociolinguistic speech community who are all concerned with shared purposes in an organised, social or professional practice. Building from this starting point, Swales develops an approach to analysing genre based on the following propositions:

1 A genre comprises a class of **communicative events**; such events share communicative purposes that are recognised by expert members of the discourse community and provide the rationale for the genre.

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2 Genre can only be realised in complete texts (or text that can be projected as if complete), because genre does more than specify codes to be found within a group of related texts; it specifies conditions for beginning, continuing and ending one particular text.
3 While linguistic register imposes constraints at the levels of vocabulary and syntax, genre imposes norms at the level of discourse structure. Genres may have their own 'complementary' registers, however, and communicative success may require some appropriate relationship between systems of genre and register.
4 Genre is socio-rhetorical in character; it performs social action in the form of text production and reception.
5 Genres show stability in conventions of different kinds and are named or labelled, sometimes using an informal metalanguage, by participants or users in the relevant discourse community.
6 Genre involves **content schemata** (i.e. frameworks of knowledge, values and an orientation towards the topic), as well as **formal schemata** (i.e. how something should be told or narrated). Participating in a discourse community may entail some assimilation of its world view in order to communicate successfully.
7 Texts in a genre exhibit family resemblances in structure, style, content and intended audience. Texts are exemplars or instances of genres, which vary in their degree of prototypicality.

Current research and application

Swales's work has been influential in many fields. Co-researchers and others have extended his conception (sometimes referred to as **textography**) while retaining the main themes. But relatively little work has been done, for reasons we discuss below, on legal genres. Available contributions include work by Bhatia (1993: 207–18), who has applied genre considerations to the 'easification', or simplification for ease of use, of legal discourse, and Heffer (2005), an extract from whose work is reproduced in Unit D3.

Applied linguistic analysis of legal genres raises at least two significant challenges:

1 The *purposes* served by legal genres are embedded in specific and changing kinds of professional interaction and transaction. So if we merely say that legal discourses aim to create, implement and enforce laws, such a general observation will fail to capture the essential differences between legal subgenres. On the other hand, if we try to grasp the difference between legal subgenres in terms of purpose more precisely, we cannot do so exclusively by linguistic methods. Most of the relevant considerations will be specifically legal, taking the form of rules, reasoning and outcomes. Research into such differences accordingly requires an interdisciplinary perspective.
2 In linguistic studies of genre that compare different professional fields, genre functions as a *descriptive* category. In professional (including legal) settings, by contrast, genre is a prescriptive or normative category: it groups features and expectations based on explicit or tacit rules regarding what *should be* incorporated into writing or speech in a given set of circumstances. Even aesthetic forms such

as fiction, music and film are regulated by normative constraints (e.g. audience expectations that need to be met, and marketing categories); but with legal genres, the constraints are actively imposed and enforced (not least because requirements must be fulfilled for a text to be operative). A combination of procedural rules, legal training and contestation ensures conformity with norms.

Legal genres as constructs

We can look at legal genres either synchronically or diachronically. Synchronically involves analysing a number of factors: the configuration, at a particular time, of the community of users of legal discourse; the types of text they produce, use or expect to encounter; and normative pressures on what they do and believe. Such analysis is likely to consist of investigating the rhetorical organisation of texts as types, coupled with contextual study (e.g. through ethnographic methods) of user expectations and values. Studying genre diachronically involves investigating the historical development of genres and the combination of linguistic and institutional forces acting on the processes of change that affect them. For law, the two kinds of study are closely connected; this is because the process of historical development in law directly involves the past imposing its imprint on later genre structure.

Case study: law reporting

Genres do not form a fixed list, but are an evolving range. They emerge, develop and become residual in ways that depend on their usefulness to a relevant community of users. In addition, because genre is concerned with patterns of thought and values associated with a given discourse community, not only with aspects of form, the historical development of a genre is simultaneously both the development of a field or practice and the development of a language style or format.

One result of such complex interaction between discourse forms, users and social context is that genre requires a different *kind* of history from the history of register (as described in Unit A2). The history of a legal genre must describe changing communicative needs and purposes, within changing legal institutions. We illustrate these points below with a brief history of **law reporting**, taking English law as our example (adapted from Durant 2012; for further legal detail, see Zander 2015). The account we present should make it possible to see how far the history of language use in law is simultaneously the history of legal thinking in action.

Here is a short history of law reports:

1 In England, the earliest court decisions were only stored in the minds of judges and court officials. But there has been a recognisable genre of law reporting from the thirteenth century onwards, growing out of early medieval **plea rolls**. The rolls, literally rolls of parchment, recorded decisions and were kept to establish the rights of the parties in a particular case, as well as to assist with enforcement of decisions.
2 During the period between the late thirteenth and mid-sixteenth centuries, law reports take the form of what are now known as **Year Books**. These were handwritten, first in Law French and Latin, then later in English. Such reports show a shift of purpose: they were no longer addressed only to the court and parties

directly involved, but also to a public beyond consisting largely of law students who were less interested in the details or outcome of a case than in the reasoning applied in it (since this could offer a more general picture of the system of law and might be useful in arguing later cases).

3 From the mid-sixteenth century onwards, law reports are known, especially after 1578 (the date of a collection by Edmund Plowden called *Commentaries*), as **nominate reports**. These reports were commercially published, and of variable accuracy. They were called 'nominate' reports because they were known by the names of their authors: Plowden himself, Sir Edward Coke, slightly later James Burrow and others. The nominate reports took a more expansive, 'commentary' form, elaborating on the earlier and narrower recording of stages of litigation and decisions.

4 Although the nominate reports circulated in a rapidly expanding law profession, there was still nothing resembling a public *system* of law reporting, with a standardising influence over the genre of the kind that now exists. Over time, however, reports increasingly recorded judicial decisions as sources of legal authority. This new emphasis responded to a need, in the rapidly expanding field of law, to explain decisions. But in doing so, it blurred the distinction between a historical record of judicial decisions and statements of what the law was. Only later, during the second half of the eighteenth century, were conventions to be followed in reporting actively sought. When adopted, such conventions related to who could write reports (authorised reporters), what the process of publication and circulation should be (to minimise delays in publication), and what topics should be covered (essentially, which cases should be reported).

5 From the 1860s, the *Law Reports* series ('Judicial Decisions of the Superior and Appellate Courts in England and Wales') conferred greater authority on published reports. They also incorporated advocates' arguments and opinions, revised by judges. The second half of the nineteenth century also brought further standardisation and institutional oversight: the *Incorporated Council of Law Reporting for England and Wales* dates from this period, followed by the *Weekly Law Reports*, *Times* reports (with antecedents in *The Universal Register*), and later *All-England Reports*. In principle, any report of a judicial decision could be cited in court, but law reporting gradually became a specialised profession; and a rule of **exclusive citation**, under which preference was given to authorised reports, was adopted and periodically restated.

6 Following further nineteenth-century reforms, English law reports came largely to resemble modern reports. Even now, however, in a period of online access to decisions of courts of record, less than 5 per cent of English cases are reported in an authoritative, published form. Even *Law Reports*, the most official reporting channel, and so a mouthpiece of legal authority, covers only about 10 per cent of that 'less than 5 per cent' reported overall.

Modern law report structure

This brief history provides necessary background for understanding the modern genre of a law report. Further detail along such lines would help clarify the circumstances in response to which particular new features of the genre were introduced.

But now switch from diachronic to synchronic. Allowing for variation in different types of publication, the list below indicates how a modern law report typically sets out its material:

- Names of the parties, court where the case was heard, names of the judges, date.
- **Catchwords**: compiled by the law reporter (rather like keywords in a research article).
- **Headnote**: summary of the facts of the case, questions of law, decision (in the USA, known as **syllabus**).
- List of cases cited in judgment.
- List of other cases cited in argument.
- Details of the proceedings: short history of the case.
- Résumé of counsels' arguments.
- Judgment: the facts, legal issues, and outcome (in the highest courts, this may consist of several opinions, including dissenting opinions).
- **Formal order** (i.e. outcome, such as 'appeal dismissed').

These largely standardised stages are now the main genre conventions of law reporting in terms of layout. Fuller understanding of them would involve taking drafting considerations into account, analysing who reports are read by, and what use is made of them (e.g. in preparing for and during legal proceedings). During the twentieth century, reports have been increasingly presented in layouts that make searching, skimming and citation easier, with simplified vocabulary and sentence structure, and clearer signposting of speech acts (e.g. reflecting moves from summarising earlier proceedings, through narrating facts of a case and developing legal arguments, to delivering judgment and handing down a verdict).

What makes legal genres worth examining in this way is that they are not simply fixed receptacles of legal procedure, but discourse forms that have responded and continue to respond – even if at a slower pace than other discourse styles – to changing needs and priorities. Conventions in law reporting vary between jurisdictions, and change both for legal and ergonomic (user-related) reasons. For example, the shift to online reporting has modified the convention of referring to page numbers and led to adoption of a system of paragraph numbering, now accepted as a proper form of citation. More significantly, decisions of the European courts (which hear some cases, and to which **preliminary questions** are referred by national courts in other cases before judgment) are reasoned and presented in a manner that differs from traditional English law reporting, and there is a tendency towards accommodation between the two. Trends in law reporting will continue to respond to shifts of form and expectation; and because of the institutional structures and conservative culture of law, as conventions evolve, normative practices develop around them, along with an instructional literature.

Examining the genre of the law report brings different rewards depending on the perspective from which such reports are viewed. For law reporters, understanding the genre guides how to write reports (a task of modelling to which applied linguistics could contribute); for law students, familiarity with the genre involves specialised reading

skills (i.e. it is a field of applied comprehension); for judges and judges' clerks, facility with the genre guides the drafting of opinions suitable in content and style for incorporation into a now sophisticated document style that originated as simply an aid to judicial memory. To the linguist, law reporting presents the challenge of understanding the development, functioning and style of a discourse form more institutionally constrained and complex than genres such as the conversational anecdote, the prayer, the detective novel, or the scientific research article.

SPEECH IN THE COURTROOM

Fields including conversation analysis (CA) have shown that everyday verbal interaction is highly structured and rule-governed. How far, we ask in this unit, does courtroom discourse simply transpose structures from everyday verbal interaction into a new setting? Or does it alter patterns and expectations that underpin communicative behaviour, creating a distinct and specialised kind of interaction? Trials have often been characterised as a battle, contest, performance, or process of storytelling. All these descriptions capture important insights. But in this unit, we aim to describe courtroom discourse more precisely, by looking at how the verbal interaction involved consists of specific moves and sequences. Then we consider the higher-order organisation of courtroom discourse into episodes, as an overall genre. Finally, we explore how different levels of organisation of courtroom discourse are connected and why this matters.

Courtroom interaction

An early description of courtroom speech patterns, drawing on the then emerging field of **conversation analysis** (Hutchby and Wooffitt 2008), is presented in Atkinson and Drew (1979). Two characteristics distinguish Atkinson and Drew's approach from an ethnographic study. First, they do not only focus on obviously unusual speech patterns; rather, they seek to establish basic rules and patterns that constitute a whole, given area of observed behaviour. Second, their analysis avoids dependence on subjective reporting by conversational participants; instead, they offer an account based on linguistic evidence, including especially uptake by other parties in an interaction.

Atkinson and Drew's description suggests a mix of similarities and differences between courtroom talk and everyday conversation. For example, in examination of witnesses both the order of **conversational turns** and the types of turn permitted are highly constrained. In CA terms, the question–answer **adjacency pair** is the primary pattern of exchange. But other, locally managed sequence types are embedded into this unit of exchange including sequence types known as **challenge–rebuttal** and **accusation–denial**. More generally, Atkinson and Drew's study suggests a hierarchy of levels of structuring, with systems of local subroutines ordered by higher-order structures and purposes.

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