



# ***Contrastive Analysis of Chinese and American Court Judgments***

Copyright © 2008  
*Critical Approaches to Discourse Analysis across Disciplines*  
<http://cadaad.org/ejournal>  
ISSN: 1752-3079  
Vol 2 (1): 49 – 58

**CHENG LE, SIN KING KUI and ZHENG YING-LONG**

City University of Hong Kong  
City University of Hong Kong  
Zhejiang Gongshang University

## ***Abstract***

*Whether in legal practice or jurisprudence, court judgments or case briefs are one of the most important legal genres for the legal profession. The paper aims to examine contrastively the linguistic characteristics, moves and rhetoric of Chinese and American court judgments, with the aim of specifying the rhetorical preferences that are characteristic of 'standard' judgments. Legal cultures are employed to account for the generic and rhetorical differences. This study also has an underlying pedagogical motivation in that the results would be of great value and interest to the Chinese students of Language for Legal Purposes (LLP) and the lawyers practicing foreign legal affairs.*

**Key words:** *Language for Specific Purposes, Chinese and American court judgments, contrastive analysis*

## ***1. Introduction***

Since the emergence of English for Specific Purposes (ESP) in the 1960s, more and more studies of language use in specific contexts have been carried out in the field. With the expansion of bilateral and multilateral agreements and treaties, international cooperation of justice and effective function of the WTO usher in another period of radical change in the Chinese legal system. In accordance with the requirement of transparency (Article 10 of GATT), the State Council of the People's Republic of China requires that all the administrative rulings be translated into English accurately and promptly, which should also be applicable to trade-related laws, regulations, and judicial decisions (court judgments). Moreover, it is essential for legal professionals to have a good command of the discourse conventions, which characterize legal writing. Contrastive rhetoricians maintain that different discourse communities' expectations are the primary reason for cross-cultural differences in writing styles, and that writers of second languages may transfer their L1 textual and rhetorical strategies to the new situation of the second language before they have fully absorbed the expectations of their second language audience (Connor 1996). Sub-cultural differences further entail the discourse contrast even within the same discourse community. In terms of

legal community, basically, there is a dichotomy about the division of legal system: the Common Law system and the Civil Law system. Despite the division of legal system, court judgments are noteworthy in both. Knowledge about the discourse structure of a text can increase processing precision by reducing search space, and facilitate the identification of rhetorical segments. Depending on communicative functions and genres, legal texts exhibit distinctive discourse structures and patterns of message distribution. Since the communicative goals of segments govern the distribution of content and presentation style, the identification of the discourse organization can significantly facilitate text processing. Moreover, a contrastive study has been a buzzword in forensic linguistics.

## ***2. Design of the Study***

### **2.1 Composition of the Data**

The corpuses contain judgments available on [www.findlaw.com](http://www.findlaw.com) and [www.chinacourt.com](http://www.chinacourt.com). 100 judgments in English and 100 judgments in Chinese are analyzed as indicated in table 1. The average size of the English judgments that are input to the study is between 1000 and 4000 words (2 to 8 pages), which constitute 75% of the English judgments. The judgments having less than 1000 or more than 4000 words are respectively 8% or so. The average size of the Chinese documents that are input to the study are judgments between 3000 and 7000 characters long (3 to 7 pages), which form 85% of all the 100 Chinese judgments; 15% of the documents having about 2000 characters or fewer (about 2 pages); Only 5% of the judgments have more than 8000 characters. Contrary to some previous researches that focus only on limited types of judgments, the study deals with many categories of judgments covering various fields of law. Moreover, the paper extends its study to the judgments by courts of the first instance and second instance. Besides, we get some information from law dons and lawyers involving foreign affairs.

**Table 1: Composition of Court judgments**

	<b>American Court Judgments</b>	<b>Chinese Court Judgments</b>
First Instance	50	50
Second Instance	50	50
Civil Law	25	30
Criminal Law	30	20
Administrative Law	10	15
Procedure Law	15	20
Others	20	15

## **2.2 Methods and Procedures of the Study**

Our approach of analyzing and producing the results has a qualitatively and quantitatively combined basis. In combination with the literature review related to the genre analysis of court judgments and interview of 5 jurists, a qualitative analysis is used to decide the moves of a court judgment. As to the size and percentage of each move and step, it depends mainly on computer-based calculation and part of them needs manual computation. In order to make sure of the validity and reliability of the study, the judgments are selected at random from the above-mentioned corpuses; after the determination of the structure (moves and steps) of a court judgment, the law experts are interviewed about their reasons for their respective perspective. In case of conflicting responses to the same question, the law dons are invited to air their opinions to reach a consensus. Furthermore, a literature review about legal tradition and legal system is carried out in order to make the results and analysis more objective and exhaustive.

## **2.3 Research Questions**

The major research questions in the thesis are included as follows: Is there any difference in the moves and steps of Chinese court judgments and American court judgments? Are the moves and steps of a judgment by a court of first instance the same with those by a court of second instance? Do the judgments by courts of the same trial level follow exactly the same moves and steps? Is there any difference in terms of legal analysis between Chinese court judgments and American court judgments? Can any reasons be provided to account for the differences, if there do exist some differences?

# ***3. Results and Discussion***

## **3.1 Genre Analysis**

Discourse analysis is viewed not simply as an act of linguistic description but more as linguistic explanation; therefore, genre analysis has become one of the major influences on the current practices in the teaching and learning of languages, in general, and in the teaching and learning of ESP and English for Professional Communication (EPC), in particular. Bhatia (1997) holds that there are at least four distinct, though systematically related, areas of competence that an ESP learner needs to develop in order to get over his or her lack of confidence in handling specialist discourse. Genre analysis, thus, is an indispensable and feasible means employed in the analysis of court judgment, a discourse of professional communication and for specific purposes. By applying the genre theory to the court judgments, the findings and results are listed as follows: moves and steps of a Chinese court judgment are different from those of an American court judgment; moves and steps of a court judgment by a court of first instance are different from those of a court judgment by a court of second instance; judgments by courts of the same trial level do not necessarily follow exactly the same moves and steps; and some court judgments have embedded moves and steps. In American court judgments, there are two types of legal analysis: *obiter dictum* and *ratio*

decidendi. Ratio decidendi, having a binding force for the later decision of the same court or inferior courts, is indispensable. Obiter dictum, with a persuasive role but without a binding force, can be optional and usually appears in first singular person in term of linguistic feature. Obiter dictum can be unanimous, concurring, and dissenting. In the 100 court judgments, 8 of them have judge's postscripts, which are functionally or rhetorically different from obiter dictum or ratio decidendi.

## 3.2 Move Analysis

### 3.2.1 Move analysis of American judgments by the courts of first instance

Move 1 Heading Step 1 Court Step 2 Written case No. Step 3 Parties Step 4 Judges  
 Move 2 Summary  
 Move 3 Facts and issues in dispute  
 Move 4 Legislation applied  
 Move 5 Arguments/ Discussion  
 Move 6 Decision/Conclusion

Sometimes, move 3 and move 4 cannot be clearly identified in a court judgment and some move may have embedded steps or even sub-steps. In some court judgments, moves and steps cannot be clearly identified, that is, some of them are tangled with each other. Sometimes, some moves or steps might be lack or omitted in some court judgments. In American judgments, Obiter Dictum, with a persuasive role but without a binding force, can be optional.

### 3.2.2 Move analysis of Chinese judgments by the courts of first instance

Move 1 Heading Step 1 Headline Step 2 Written Judgment No. Step 3 Parties  
 Move 2 Summary  
 Move 3 Facts and evidence  
 Step 1 The facts, evidence and reasons by plaintiff or prosecutor  
 Step 2 The facts, evidence and reasons by defendant  
 Move 4 Grounds of judgment  
 Step 1 The facts and evidence established by the court  
 Step 2 The reasons for judgment Step 3 The law applied  
 Move 5 The results of judgment  
 Move 6 The time limit for appeal and the competent appellant court.  
 Move 7 Signature by the judge(s) and the recording clerk, and seal by the people's court.

The above-mentioned move analysis is applicable to the judgments by the court of the first instance. In the judgments by the court of second instance, Move 6 can be omitted. In recent judgments, we find a trend that judge's postscript or epilogue, which is part of the judgment but not the legal reasoning or analysis of the decision, is favored by some judges.

### 3.3 Rhetorical Segments and Functional Analysis

Every type of writing exists with an intended purpose. In scientific research, the goal is to convince the intended audience that the work reported is a valid contribution to science (Myers 1992). Court judgments are very different in this regard. They are more strongly performative than research reports, the fundamental act being decision. Particularly, in court judgments, the judge aims to convince his professional and academic peers of the soundness of his argument. Therefore, a judgment serves both a declaratory and a justificatory function (Maley 1994). In truth, it does more even than this, for what a court judgment shows is not only its justification, but also its legitimacy. Therefore, the fact and the analysis supporting the decision or disposition are inevitably indispensable. Under such a premise, a court judgment can be segmented according to the different rhetorical roles. Tables as follows are the findings of the paper in terms of rhetorical segments and the content, linguistic markers percentage and function of each segment. Table 2 provides an overview of the rhetorical segments, along with their contents and linguistic markers, of court judgments developing from the above-mentioned corpuses. Table 3 provides a scheme of the percentage of each rhetorical segment of a court judgment.

**Table 2: Overview of the rhetorical segments, along with their contents and linguistic markers**

<b>Rhetorical Segments</b>	<b>Content</b>	<b>Linguistic markers</b>
Heading	To make a brief summary of jurisdiction, decision time, title of proceeding, nature of the case the parties involved, etc.	decision, judgment, reason, order; Reasons for order, Reasons for judgment and order
		人民法院, 判决书, 民/刑/行, 初/终字
Introduction	To describe the situation before the court and answers these questions: who (the parties) did what (facts) to whom and how the court has dealt with the case.	introduction, summary
		提起诉讼, 开庭审理, 现已审理终结
Facts	To explain the facts in chronological order, or by description. It might include the disputed facts, the agreed facts and the found facts.	facts, background; The factual background, Agreed statement of facts
		原/被告认为, 经审理查明

Analysis	To describe the comments or arguments of the judge the application of the law to the facts as found.	analysis, , discussion arguments
		本院认为, 依照 xx 规定
Conclusion	To express the final judgment--- disposition or decision made by the court (in Chinese judgments) or judge (in American judgments) and specify the effects on the parties.	conclusion, disposition, costs ,revert, remand, affirm
		判决, 驳回, 维持, 改判, 发回重审

**Table 3: Percentage of Each Rhetorical Segment (C=Chinese Judgments; A=American Judgments; O=Optional)**

Rhetorical segments		Percentage	
Label		Chinese Judgments	American Judgments
Heading		6%	1%
Introduction		4%	5%
Jurisdiction (A/O)			2%
Context/ Facts	Facts Elucidated	20%	
	Facts Ascertained	40%	20%
Analysis	Legal Analysis	21%	68%
	Statutes	2%	
Decision/Conclusion		7%	4%
Judge's Postscript (O)		1%~4%	

For some linguists, language has to serve various purposes, as there are different types of occasions for using it, that is, language serves different functions in accordance with the concrete situations. The functional approach to describing language has its roots in the traditions of British linguist Firth (1957), who viewed language as interactive and interpersonal, as a way of behaving and making others behave. Halliday (1985) believes that language is what it is because it has to serve certain functions. In other words, social demands on language have helped to shape its structure. He provides one of the best expositions of language functions, used the term 'function' to mean the purposive nature of communication and outlined seven different functions of language.

Legal documents can serve a variety of functions, including eliciting information, persuading, memorializing events such as reciprocal communications, or accomplishing performative goals, such as creating or revoking legal relationships. Court judgments, as a special genre of legal discourse community, typically have a performative objective: they are intended to decide or alter legal relationships relevant to some controversy before the court. In fact, more exactly, we should say the decision/disposition part of a court judgment serve the performative function; the other parts of a court judgment have their own functions. Table 4 as follows is a match between the rhetorical distribution and functional analysis of a court judgment.

**Table 4: rhetorical distribution and functional analysis of a court judgment**

<b>Rhetorical Segments</b>	<b>Functional Analysis</b>
Head	Informative
Introduction	Informative
Jurisdiction (A/O)	Informative
Context/Facts	Informative
Analysis (ratio decidendi)	Expressive/personal (binding)
Decision/Conclusion	Performative/regulatory
Judge's Postscript	Evocative/expressive/personal
Obiter Dictum	Evocative/expressive/personal (persuasive)

From the analysis of the data above, we can conclude the main differences between Chinese and American court judgments are: a. legal analysis/reasoning takes much more proportion in an American court judgment than in a Chinese one; b. judge's postscript in a Chinese court judgment is more an expressive component than a persuasive one (obiter dictum) or having binding force (ratio decidendi in American judgments); c. ratio decidendi in American judgments has a binding force and ratio decidendi in Chinese court judgments might have a guideline function; d. plural first person is used in the ratio decidendi in an American judgments but singular first person is used in the obiter dictum in an American judgments. All those differences can be accounted for in the legal culture.

Contrastive legal studies in the United States have tended to focus mainly on Romano-Germanic civil law tradition, or on the law of particular geographic regions (e.g., East Asia studies, Latin American studies) (Glendon et al 2003). Those in China mainly deal with the comparison of two legal systems. For the comparative legalists, one of the pressing tasks is try to capture how far in actual practice what is described as globalization in fact represents the attempted imposition of a one particular legal culture on other societies, not just limited to the concept of legal culture. Indeed, with the economic globalization and legal cooperation, the two major legal systems overlap with

and influence each other. It is inevitable that Chinese legal culture is also under the impact. In China, some law specialists agree that the practice of legal precedents could help to protect the integration of the law and guarantee impartiality and efficiency in administering justice. It will prevent different laws being applied to similar cases or contradictory verdicts on similar cases despite the application of the same law by inexperienced or incapable judges. Consistency between legislation and enforcement will be maintained, too.

#### **4. Conclusion**

It should be noted that ELP (English for Legal Purposes) should not be limited to the language itself but a notion extending to the discourse, genre, rhetoric and culture. Besides the study of foreign legislation, the research of foreign court judgments, especially those of English-speaking countries, is necessitated due to the requirements of the WTO transparency principles. In Chinese court judgments, because of the influence of *li* (which is the opposite of law) and the connotation of 'dictatorship of the proletariat', the legal analysis is obviously weaker. Under the impact of the Common Law system, judge's postscript appears in Chinese court judgments, which, to some extent, is a compensation for the insufficiency of legal analysis. Nonetheless, epilogue remains an expressive statements but not a *ratio decidendi*. Genre analysis, in combination with cultural analysis, will provide an interesting area in the discourse analysis of legal genres such as legislation, court judgments and other legal documents. From the study, the author likes to put forward the following pedagogical implications: genre analysis remains a practical and preferred instrument in LSP (Language for Specific Purposes) instruction; contrastive genre analysis is a feasible and useful tool in cross-cultural discourse analysis; when a generic analysis is carried out, we should not just do some superficial research such as the lexical, structural features, but go further to probe into the underlying rationales for those features from a socio-linguistic perspective such as a cultural angle; In LLP teaching or learning, we should adopt or develop genre-based materials promoting legal community and culture, not those based on legal content; legal translation is more than a symbolic transfer, but a cross-cultural communication. Therefore, what a legal translator needs is not only solid bilingual proficiency but also a grasp of different legal contents and cultures.

#### **References**

- Bhatia, V.K. (1997). Applied genre analysis and ESP. In T. Miller (ed.), *Functional Approaches to Written Text: Classroom Applications*. English Language Programs: United States Information Agency.
- Connor, U. (1996). *Contrastive Rhetoric: Cross-cultural Aspects of Second-language Writing*. Cambridge: Cambridge University Press.
- Firth, J.R. (1957). *Thesis in Linguistics*. London: Oxford University Press.
- Glendon, Mary A., Michael W. Gordon, Paolo G. Carozza (2003). *Comparative legal traditions* (2nd ed). Peking: Law Press.



- Halliday, M.A.K. (1985). *An Introduction to Functional Grammar*. London: Edward Arnold.
- Maley, Y. (1985). *Judicial Discourse: The Case of the Legal Judgment*. Festschrift in honour of Arthur Delbridge. Beitrage zur Phonetic und Linguistik
- Myers, G. (1992). Speech acts and scientific facts. *Journal of Pragmatics* 17.