An Approach to the Study of Public Law: A Pragmatic Discursive Analysis of Judicial Decisions in Spanish and English

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Abstract Despite the presence of some work on genres in the area of private law, less attention has been paid to the genres of public law (mainly case law and legislation) in comparative studies of legal discourse in English and in Spanish. The present study tries to prove that the analysis and description of judicial decisions in both languages depends on cultural factors underlying the asymmetry between the Spanish legal system, and that of England and Wales, where precedent has an unequal prominence as a source of law. Through a qualitative analysis of a limited corpus of judgments of the English and Spanish Supreme Courts, I will attempt to reveal how well they reflect the preponderance attributed to precedent in each of the legal cultures emanating from such texts.

Keywords legal cultures, legal genres, legal discourse, legal traditions, pragmatic-discursive analysis, genre studies

1 Introduction: The purpose of our study

In recent years, comparative studies of legal texts in English and Spanish have attracted the interest of scientific research, especially in the field of translation (Borja 2000 and 2007; Alcaraz/Hughes 2002; Monzó 2001) and in the teaching of languages for specific purposes (Orts 2006, 2009 and 2012; Engberg/Arinas 2011). However, while it is true that studies have mainly been carried out on the discourse of private law in both languages, such as wills and powers of attorney (Vázquez y del Árbol 2008 and 2009), insurance policies and contracts (Orts 2006, 2009 and 2014), and that other relevant analyses have been carried out on the language of public law in Spain (Alvarez 2008, Taranilla 2009 and 2012, Marin/Rizzo 2012, Polanco/Yúfera 2013) and in English (Bhatia 1993, 1995, 2004, 2008, 2010 and 2012; Bazerman 1994, Maley 1984, Bawarshi/Reiff 2010, Kähler 2013, just to name a few), hardly any of these studies focuses on the pragmatic-discursive differences between court decisions as genres, both in English and in Peninsular Spanish, and the cultural genesis that these differences have. With some notable exceptions (Ruiz Moneva/Ángeles 2013, Vázquez y del Árbol 2014), there is a scarcity of work accomplished in the area of comparative, contextual approaches, taking stock of the different structuring and textualization of judgments from the cultural perspective of the legal system in which they originate.

The argument in the present paper is that it is, precisely, in the wording of case law where ethnographic differences between the legal culture of Spain and that of England and Wales can be most dramatically perceived, since judicial decisions play an uneven role in these cultures, their pre-eminence in each system being entirely different (Cross/Harris 1991): the Spanish legal system is an instance of the Continental model, representative of the paradigm of written or coded legislation, whereas the main source of English law is "the unwritten law of England, administered by the King's Courts, which purports to be derived from ancient and universal usage" (Alcaraz/Hughes 2002: 49 in Ruiz Moneva/Ángeles 2013).

The greatest challenge that comparative lawyers, but also LSP linguists and legal translators, face is that law systems – as culturally-bound sets of tacit constructs – are not uniform

and constant for each and every civilization, but different from one another (Gotti 2005). In Šarčević's (1997: 13) words: "Despite fundamental similarities among its constituent legal systems, a legal family does not correspond to a biological reality." Law, like language, is the product of local convention, and it develops and roots in a specific community throughout history, through the usage that its members make of it. Indeed, legal models also change from culture to culture, as culturally-bound sets of tacit constructs. Tetley (2000) defines legal cultures as influenced and marked by legal traditions and families. In his opinion, legal systems are not uniform and constant for each and every civilization, but different from one another and in tune with a whole array of conditions that make them evolve and that frame them as unique and peculiar to each legal tradition. Just as there is not one but numerous languages, legal models also change from culture to culture, through history, through political and economic changes; they are likely to be more static in some cultures, more pliable in others.

As a cognitive activity, legislative ruling acts through language, since it is not by chance that law has been defined as a profession of words (Mellinkoff 1963). Consequently, the sources of each system, their configuration and their rules of interpretation – in short, their legal cultures – have to be considered when inter-legal communication, or multilingual and multicultural interpretation and application of two, or more, legal traditions, is to take place. Legislating, interpreting the law, applying and translating it, are all linguistic activities, and the substance of legal practice is language. According to Alcaraz and Hughes (2002: 24), translators/linguists and lawyers have in common the pursuit of meaning in texts, and of particular words in particular texts.

In general terms, the basic traits of law in the English-speaking countries and in Spain are as dissimilar as might be expected from two systems springing from different legal traditions. Indeed, the Spanish and English legal cultures have their origin in different cultural and epistemological contexts developed through centuries. England and Wales, on the one hand, have their epistemological sources in an Anglo-empiricist context based on pragmatism, induction, and philosophical materialism (Bristow 2011). Spain, on the other hand, springs from a rationalist tradition based on abstract idealism, deductive practice, and spiritualism (Woolhouse 2002). Formal and hermeneutical differences between their two legal traditions are but the result of those two very different legal systems: one, the Common law of England and Wales, allows judges to reach their own decisions and that, being based on precedent (where judicial decisions bind later ones), gives little scope for vagueness and considers expressive certainty as the most precious quality in legislative drafting. On the other hand, the Continental system of Spain relies heavily on the judiciary to interpret and apply the meaning of the law and sacrifices certainty for simplicity of expression.

Indeed, the legal system of England and Wales is – like those that integrate the family of Common law – called that of *stare decisis*, or 'stand upon what has been decided'. In this system, respect for precedent is absolute and judgments occupy a central role as an unwritten[1] and unenacted, but, nevertheless, primary, legal source (Mellinkoff 1963, Russell/Locke 1992, Riley 1995, Tiersma 1999). The Common law doctrine of *stare decisis* implies that the

[1] According to Black's Dictionary, unwritten law is all that portion of the law, observed and administered in the courts, which has not been enacted or promulgated in the form of a statute or ordinance, including the unenacted portions of the Common law, general and particular customs having the force of law, and the rules, principles, and maxims established by judicial precedents or the successive like decisions of the courts. See Code Civ. Proc. Cal. 1903.

courts of the hierarchy as a whole are required to follow all decisions taken in courts superior to them, as well as their own. For operational reasons, and due to the volume of the previous decisions accumulated over the years, the instructive and argumentative force of English judgments is structured into two different sections, a binding part which later judges must take into account, and a section which complements this one, of a purely persuasive character. This reflects how *stare decisis* works, marking how judgments have to be properly applied and cited as precedent in subsequent cases. These sections, the *ratio decidendi* and the *obiter dicta* respectively, are to be replicated in subsequent cases, and such a structuring invests English decisions with timelessness and, consequently, an importance in the system that is much lesser in the Spanish law.[2]

In contrast, the Spanish system is heir to the Roman tradition of codes, and one of the members of the Civil law family. The result of the development from the times of Justinian is a compact body of rules made up of codes, where case law and custom have minor importance, comparatively. In the Spanish legal system, of Continental inspiration, court decisions constitute a secondary source of law, as provided by the Spanish Civil Code itself.[3] *Stare decisis* is not usually a doctrine used in Civil law systems, because it violates the principle that only parliament may make law. Legal sources emanate from a single authority, the written code, and judges are relegated to the role of arbitrators, who must decide if the reality is inside or outside the norm through the deductive process.

Each system shows differences in legal interpretation and argumentation, these constituting the aftermath of the disparities in the pre-eminence that case law has in each system. Legal reasoning in Common law systems tends to be an ontological process, the norm being embedded in a whole network of specific cases. According to some experts, interpretive processes are analogic (Maley 1985; Ruiz Moneva 2013), since binding precedents play a major role in the judge's decision. In contrast, legal reasoning Spain is deductive and teleological, as the written law is the fundamental source of inspiration for the application of justice, and is to be applied to all individual cases (Iturralde Sesma 1989).

The present study is, precisely, aimed at addressing the matter of judgments as legal genres in the legal system of Spain and that of England and Wales. Through a comparative study of two subcorpora of legal decisions in English and Spanish that deploys some element of genre and discourse analysis, I will specifically attempt to distinguish how the cognitive mechanisms that operate in a discourse community can be glimpsed from their different textual and rhetorical organization, as the cultural and ethnographic context of the legal system which deploys them is accounted for. Ours is a qualitative test that analyses the discursive level of judicial decisions from the perspective of the communicative purpose that decisions have to fulfil in each system. This happens particularly with regard to the disposition of their macrostructure (Alcaraz 2000), conceived here as the product of the cognitive organization of the particular

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2 *Rationes decidendi* also exist in Spanish law, but they lack the preponderance they have in Common law (Batiza 1992).

3 Spanish Civil Code, Preliminary Title http://www.boe.es/buscar/act.php?id=BOE-A-1889-4763: *"La jurisprudencia complementará el ordenamiento jurídico con la doctrina que, de modo reiterado, establezca el Tribunal Supremo al interpretar y aplicar la ley, la costumbre y los principios generales del derecho".*
"Case law shall complement the legal system with the jurisprudence repeatedly established by the Supreme Court when interpreting and applying the law, custom and the general principles of law" (Own translation).

legal tradition from which the texts emanate. Our hypothesis is that such an arrangement will indeed reflect the different role of case law in each of the systems. In order to illustrate this, both subcorpora shall be analyzed looking at the way in which decisions are paradigmatically organized in them. To complete our study, the judgments in the subcorpora will be considered in the light of textual and contextual factors such as their intertextuality, or their relationship with other legal texts, and their rhetorical function.

2 Analyzing judgments: corpus and methodology

Since our study has a purely qualitative nature, the corpus that it is made up of consists of ten judicial decisions in English and ten in Spanish, which collectively reach around half a million words. For the sake of symmetry in the collection of the material, our texts were chosen from those decisions made at the highest instance of each of the systems: the English and the Spanish Supreme Courts, which are the highest courts of appeal available in the hierarchy of each legal system. Additionally, since uniformity was of utmost importance, the judicial decisions were selected having in mind the same topic: in this case, corruption and its various criminal behaviours, such as bribery, influence peddling, embezzlement of public funds and money laundering. The searches to gather the Spanish corpus were conducted through the CENDOJ database (the Spanish *Centro de documentación judicial*, or Judiciary Document Centre), the technical arm of the General Council of the Judiciary that deals with the official publication of case law (art. 107.10 LOPJ), but which has other various competencies in the field of judicial documentation and knowledge management services. The collection of the English corpus was made through the BAILII (British and Irish Legal Information Institute) database, an online case law directory that gathers, apart from other legal sources such as doctrine and legislation, case law in the United Kingdom.

As to the content of both subcorpora, judgments in the Spanish corpus were sought, as noted above, taking into account the criminal nature of the cases (all of them referring to punishable behaviours under the Spanish Criminal Code) subsequently consisting of appeals tried in the Criminal Division of the Supreme Court. Specifically, the judgments collected here fall within the textual typology of *recursos de casación*, or "cassation appeals": those are unlike other types of appeals which stand before the Supreme Court against final judgments of other courts, when essential procedural guarantees have supposedly been contravened.

The search was more difficult when gathering the English subcorpus, where judicial decisions were also collected under the common theme of corruption and the criminal behaviour that stems from them. Nevertheless, the results showed by the BAILII database are not entirely consistent with the Spanish corpus of judicial decisions, the generalist vocation of the English Supreme Court making homogeneity difficult to attain.

Details are shown in the tables describing the two subcorpora, cf. table 1 and table 2.

Table 1: The Spanish corpus, Judgments of the Spanish Supreme Court

Number	Ref Number	Topic	Year	Number of words
1	STS 5902/2013	Bribery	2013	7.846
2	STS 5767/2013	Bribery and extortion	2013	3.322
3	STS 5652/2013	Illegal detention and bribery	2013	16.414

4	STS 5074/2013 'Maquillaje' case	Influence peddling	2013	45.426
5	STS 4753/2013	Bribery (bis)	2013	19.623
6	STS 4108/2013	Administrative malfeasance	2013	10.857
7	STS 3864/2013 'Palma Arena' case	Influence peddling	2013	41.823
8	STS 5816/2013 'Minutas' case	Misappropriation of public funds	2013	96.287
9	STS 5811/2013	Tax crime	2013	15.028
10	STS 4318/2013	Breach of law	2013	5.175
TOTAL				206.813

Table 2: The English corpus, Judgments of the English Supreme Court

Number	Ref Name	Topic	Year	Number of words
1	Abela and others v Baadarani	Extradition offence	2013	9.305
2	Kapri (AP) v The Lord Advocate	Right to a fair hearing	2013	6.101
3	Assange (Appellant) v The Swedish Prosecution Authority	Competent judicial authority	2012	52.887
4	Flood (Respondent) v Times Newspapers Limited	Libel, bribery	2012	32.543
5	R v Forsyth R v Mabey	Mismanagement of funds	2011	3.831
6	R v Maxwell	Police misconduct	2010	18,752
7	R v Chaytor and others	False accounting	2010	19.877
8	Oceanbulk Shipping & Trading SA v TMT Asia Limited and others	Contracts	2010	7.672
9	R v Rollins	Money laundering	2010	5.333
10	Phillips v Mulcaire	Phone hacking	2010	7.556
TOTAL				163.761

Among the contents within the subcorpora are, in the English case, certain judgments of significant stature, such as the ruling of the Supreme Court against the extradition of Julian As-

sange, or the famous case of corruption concerning the trials of three former Members of Parliament for false accounting, in relation to the Parliamentary expenses scandal of 2009 (R v Chaytor & Ors). On the other hand, the Spanish corpus is made up of the judicial decisions of the usual – sadly common – type in the Spanish scenario of political and administrative corruption; as compared to the English subcorpus, the cases have been much more difficult to pin down, since the judgments contain anonymising and/or incomplete data about the identity of the actors (by virtue of the confidentiality requirements imposed by the CENDOJ database), all of them quite well-known in the Spanish scenario of corruption, through the publicity they receive through the press.

Also, as can be seen in tables 1 and 2, there is a noticeable difference between the length of the judgments in Spanish and those in English, with an average of 20,681.3 words per judgment in the first subcorpus and 16,376.1 in the second. The length of the Spanish subcorpus (21 % higher than the English corpus) obeys, as shall be seen, to a greater abundance of intertextual data: the literal transcription of other texts (proven facts from judgments of lower courts, among other legislative data and sources) that the Spanish judgments deploy. In the English subcorpus, the only exception in terms of extension is the length of the Assange judgment, which is due to the fact that the judgment includes the transcribed renderings of the Vienna Convention, and other sources of European law which are related to the line of argument and to the reasoning of the case.

As far as the methodology deployed is concerned, genre theory is a paradigm bearing fruitful results to the field of research, description and translation of specialized discourse. It lavishes special attention on the theoretical and applied aspects of the professional and academic varieties of language, and explains, according to the literature of recognized authorities on the subject (Swales 1990, Bawarshi/Reiff 2010, Bhatia 1995 and 2012, among others), how the communicative events produced by a specialized language community are structured. In Swales's (1990: 58) already classic definition of genre, there are two key concepts: that of discourse community, and that of communicative purpose. First, a discursive community is a group of members of a professional or academic community who have a greater knowledge of the conventional purposes, the construction and the use of texts deployed by the community, than those users who are not specialists. What Spack (1988: 36) calls "genre literacy" is the knowledge that the members of the discipline have of the relevant communicative conventions which operate in academic reading and writing practices, for those members to build their own identity and assert their stance in the professional world. Getting to know a genre amounts to gaining mastery of the communicative mechanisms that operate within the specialized community; therefore, the more generic knowledge one has about a specific profession, the greater knowledge one will have of the devices that articulate its communicative processes.

On the other hand, the communicative purpose is the one that configures the genre from the point of view of its discursive and textual organization, or macrostructure, and of its rhetorical organization. Relevant changes in the communicative purpose of the event itself will give rise to different macrostructures and, therefore, to different types of genre. Thus, for example, within the professional discourse of law statutes and judicial decisions are conceived as different kinds of genre, because even if both are instances of written Public law, their communicative purposes are radically different, also differing, as shall be seen, from legal culture to legal culture. Less relevant changes will result in different subgenres; for example, within the category of judgments as genres there exist several subsets, including the judicial decree and the judicial decision. These form a subtype of genre, inasmuch as their communicative purpos-

es somewhat vary in different proportions, depending on the scope of the case and the communicative goal that each of these judgments wishes to meet: the subset of judicial decisions aims at resolving the main issue of the case, but the subset of decrees is aimed, on the contrary, not at central issues, but at some residuary ones related to such litigation. The communicative purpose of the text is also concerned with the identification of the matter/subject/extra-textual reality that the text seeks to represent, change, or deploy. Such rhetorical devices have been termed the 'dominant' contextual focus of the text, and connects with the relationship between the issuer (in this case, the specialized community) and the receiver of the text (the audience) as well as the purpose of the text, in harmony with the relationship that such text has with the previous elements, issuer and receiver. Using Hatim's (2001: 215) distinction, judicial texts have three rhetorical foci, namely expositive, providing relevant information about legal facts and events, instructive or exhortative, where the binding force of law is found, and, finally, argumentative texts, which are to be found in the discussion through which judges justify their decisions within the judgment.

Finally, the phenomenon of intertextuality (Kristeva 1980) will be analyzed in our judgments. In the analysis of legal discourse, intertextuality refers to the construction of discourse from a combination of other sources, some of which come from other levels of the law, mainly legislation or codes. Therefore, it aims to identify the mixture of texts and linguistic traditions that specifically acts as the background of a particular genre, illustrating the existence of connections with previous cases, statutes or other texts, like treaties and conventions. As pointed out by Ferrán (2006), the letter of the law has an outstanding presence in legal texts and is always present, either explicitly or implicitly, even if it is often not referred to in the document itself. The rule of law in its various forms is always working as the implicit entity that inspires and gives life to the text. Regarding Spanish judgments, Tomás Ríos (2005) speaks of the constant references made to sections of the acts, and of different acts, in the legal grounds section of judgments, and distinguishes between the intertextuality that occurs as an overall reference, when the text is transcribed in its entirety, and as partial reference, when only the name of the act or of the section of the act appears without their being cited literally. Furthermore, with regard to intertextuality in English judgments, Borja (1998, in Ferrán 2006: 159) notes that, indeed, in this unique system, judges must make reference to previous judgments when writing their own, quoting part of them. To what extent intertextuality occurs in our texts, is something to be explained later on.

Our analysis of judgments of the superior courts of the English and Spanish system will, then, revolve around the concepts of communicative purpose and discourse community, embodied in a study of a pragmatic and discursive nature which will take into account the macro-structure, the intertextuality and the rhetorical function of our judgments. This analysis will help us to draw conclusions about the specialized communities that these texts belong to, combining the results obtained with the ethnographic features of the discourse community and how they affect each genre in turn.

3 A pragmatic-discursive analysis of genre: macrostructure, rhetorical function and intertextuality in Spanish judgments

The textual or discursive level relates to genres as instances of speech or written texts, created according to the basic rules of linguistic organization that make them work, and not just as mere strings of randomly arranged words. The textual elements of professional languages are visible in its supra-organization, or macrostructure (Alcaraz 2000: 135), which is a very visible

part in the text, and which frames the textual segment, helping the reader's overall understanding. The macrostructure represents the domain of the text at functional level, revealing how it is that the elements of a textual typology operate. Such a textual structure reflects, in turn, the socially conventionalized knowledge that is at the disposal of the professional community, as well as the strategies or tactical decisions generally deployed to make the discourse more effective from the perspective of the goals that the issuer wishes to accomplish.

Legal texts have peculiarly restrictive structures and a tendency to systematize the arrangement of information, such organization playing a key role as an aid to limit and confine the parts into which the text is structured. The macrostructural rigidity of legal genres, the prototypical lack of elasticity that characterizes them, greatly facilitates their comprehension, making them more visually and graphically accessible. Therefore, a textual analysis based upon the understanding of the structure and the arrangement of information in these genres – considered from the point of view of its macrostructure and their textual conventions, and including their ortho-typographical standards – may help to identify the different semantic elements in the genre, therefore helping the reader to grasp the text as a whole.

In regard to Spanish judicial decisions at large, the Spanish Law[4] differentiates rulings, orders and judgments, and prescribes that Spanish judgments have a strict structure, where the different parts are explicit. They have to be formulated expressing the proven facts, i. e., the 'history of the case', and the legal grounds, both in separate numbered paragraphs after a heading. Finally, the pronouncement or ruling is signed by the magistrate, judge or judges who issue them.

The language is stereotypical and impersonal (it is the court, not the judge, who addresses the reader), as in: *"Esta Sala, compuesta como se hace constar, ha visto el recurso de casación interpuesto"* [This Chamber, whose members have been identified above, has examined the appeal before them]; *"La Sala (…) ha visto"* [The Chamber (…) has deemed that].[5] Also, an impression of greater neutrality is conveyed through nominalizations: *"**El indicio** debe estar acreditado por prueba directa, y ello para evitar los riesgos inherentes"* [Evidence must be accredited *prima facie*, thus avoiding inherent risks]; *"Procede **la estimación** del recurso"* [It is proper to uphold the appeal]. Referring to facts in the most neutral and objective possible way also requires the usage of the passive voice, as in: *"El primer motivo se formula por infracción de precepto constitucional, al amparo del artículo"* [The first plea has been formulated in breach of a constitutional provision under Article]; *"Se declararon probados los siguientes hechos:"* [The following facts were declared to be proven]. Rituality in the doubling of verbs is also usual, as in: *"Debemos revocar y revocamos"* [We must overrule and so we overrule]; *"Debo declarar y declaro"* [I must declare and therefore declare].

Additionally, specialists in the judicial discourse of Spanish law denounce an intricate, complex and improper use of syntax, which is usually translated into protracted syntactic constructions, the result of which is often an unintelligible and often anti-normative discourse (Polanco/Yúfera 2013). Examples of these in our corpus are long, difficult sentences such as the following:

> *"La acusación popular, respecto de la cual se interesó por algunas defensas su expulsión del procedimiento a la vista de que en realidad actuaba como defensa de algunos acusados,*

4 Organic Law 6/1985 of the Judiciary.

5 All the translations of the Spanish judgments into English are the author's.

> *fue sin embargo mantenida en la causa por el Tribunal, no sin hacer mención a la actitud de dicha parte procesal, que considera 'irregular, si no espuria' al no dar explicación de su retirada de acusaciones para algunas personas en el acto de la vista, concluyendo, en definitiva que su acusación solo podía ser 'adhesive', sin agregar nada, dada la extemporaneidad de su formulación"* [The popular jury, whose dismissal was considered by some defence counsels in view of the fact that they actually operated as defence of some of the accused, was nevertheless kept within the trial by this Chamber, not without mentioning the attitude of such party to the procedure, which considered (such popular jury) "irregular, if not spurious" since (their members) did not explain their withdrawal of charges in relation to some of the accused during the hearing, ultimately concluding that their accusation could be biased, adding nothing to the process, given the lateness of their formulations].

Our corpus of judicial decisions follows this general, rigid configuration, as unbending as that set out by the system, and is also divided into heading, proven facts, points of law and ruling. Nevertheless, it is fair to say that, being appeals, they have some peculiarities differentiating them from other types of judgment. Appeals are not ordinary, but extraordinary remedies which are set to allege and demonstrate defects in form or substance in the judgment of a lower court. Cassation appeals in Spanish law may only be brought for strictly limited legal grounds, and they are not easily admitted by the courts. In these grounds for appeal, only violations of law, procedural defaults or constitutional breaches may be alleged, and they should be presented to the court, through the so-called "notice of appeal" (cf. table 3).

Table 3: Macrostructure of the Spanish judgment

Administrative data identifying the judgment	a) Venue, date, names of parties, names of legal representatives or attorneys. b) Type of court and procedure. c) Names of judges. d) Grounding for the legal process. e) Name of the lower court in which the case was settled earlier.
Heading: Legal identification of the judgment	Formula that confers legal effect to the judgment, implicitly approving the appeal and explicitly acknowledging that a ruling was previously issued.
Facts as found: Narrative of the previous trial **FIRST** **SECOND** **THIRD** **[…]**	a) Presentation/contextualization of the appeal. b) Facts as found (listed in earlier judgment/s issued by the Provincial Court or the Superior Court, usually in italics). c) Numbered grounds for the appeal (according to the written version of the file initiating proceedings). Hefty legal reasoning supported by codes, enacted laws and other precedents. d) Written communication of repeal and rejection of pleas by the public prosecutor.
Legal Grounds **FIRST** **SECOND** **THIRD** **[…]**	a) Application of the rule of law and reasons alleged to estimate or dismiss the pleas. b) Grounds for appeal are listed, together with their approval or rejection.

Ruling	a) Statement on the scope and intention of the conviction, if applicable. b) Statement on judicial costs.

Texts of this nature show an apparently homogeneous organization similar to other judicial decisions, but their structure is actually organized in a more restricted way than in any other appeal. As may be seen, the steps to be followed in this type of text are fixed, and they are replicated in all judgments of the Spanish subcorpus. On the one hand, this is due to the measures imposed by the Law of Criminal Procedure; on the other hand, it is also due to the fact that a cassation appeal is an extraordinary kind of appeal coming from a lower court, the facts being tested are necessarily those examined in a previous court. It is worthwhile emphasizing that benefiting from a cassation appeal requires a fundamental limitation: accepting the facts declared as proven, since cassation is not the path to be chosen to report errors of fact, but those of law. This implies that the factual story as such does not emanate from the judicial decision itself, but requires the interference of other texts: codes, laws and, in a minor, lesser extent, the ruling of the lower court, such as: *"El artículo 234.2 LEC exige que"* [Article 234.2 of the Criminal Proceedings Law demands that]; *"Dice el artículo 16.8 del Código Civil"* [Article 16.8 of the Civil Code states that].

Regarding the rhetorical features of texts, Polanco and Yúfera (2013) say that judgments are the most complex of legal genres, since they depict the development of the legal process as a whole, constituting a compound argument that accommodates other small arguments. According to the examples analyzed in the subcorpus under study, cassation appeals are rulings that, at their very beginning, state the facts and reasons that led to the appeal itself, either explicitly (transcribed in italics) or implicitly. The findings, or account, of facts, constitute the expositive part of the judgment, consisting of the elaboration of descriptive or enumerative sequences in which proven facts and grounds of appeal are included, of the kind: *"PRIMERO. – Antes de dar inicio a las sesiones del juicio oral el Tribunal acordó (….); SEGUNDO. – Las partes se han pronunciado (…) TERCERO. – Notificado el auto a las partes, se preparó recurso de casación por el MINISTERIO FISCAL"* [FIRST. – Prior to starting the sessions of the trial the Court decided to (…); SECOND. – The parties have spoken (…); THIRD. – The parties having been informed about the ruling, the appeal was prepared by the PROSECUTION]. The argumentative part is entirely composed of a complex reasoning, by means of which the Judge-Rapporteur, in the first person plural, gives voice to the other judges in the panel – usually five to seven –, thus setting out the legal grounds substantiated for granting or rejecting each of the reasons provided in the appeal, in the light of the written norm. In this section of the judgement, the panel of judges refer to themselves in a formal way as *This Court/This Chamber*, as in: *"La Sala constata que no es la primera que vez que"* [This Court/this Chamber notes that it is not the first time that] or as in: *"Esta Sala ha admitido los recursos"* [This Court/this Chamber has admitted the appeals]. Finally, the ruling is the instructive or exhortative part of the text, where the actions to be followed by the appellants are prescribed, also in the ritualistic first person plural of the Judge-Rapporteur: *"FALLAMOS: Que debemos declarar y declaramos"* [WE RULE: That we must declare and so we declare]. The communicative purpose of this type of judgment is, thus, to collect all the factual and legal details of the case history, and to present the legal grounds for the case (expositive part), subsequently arguing the legal soundness of such reasons under the law (argumentative part), and imposing the decision of the court on the appellant/defendant (instructive part).

With regard to the intertextuality of the text, it is clear that cassation appeals are resorts offered by the law, and that such law is explicitly and implicitly present throughout the text. As was noted above, the account of facts marks the beginning of the judgment, and it does this by citing italicized parts of the previous decision, in the account of the history of the case, or in the provision of a partial reference to the evidence gathered in the court, or courts, of previous instance. As Ruiz Moneva (2013: 84) affirms, it is usually formulated in the third person singular of the preterit indicative [*formuló, suplicó* (lodged/stated, pleaded)], or else through impersonal constructions [*se personó, se admitió* (appeared in court, it was admitted that)]. Such intertextuality is still present, again partially or completely, in the preamble that heads this section, as it reports or transcribes entire portions of the facts as found. Finally, intertextuality appears again in the legal grounding of the case, which constitutes a constant argument where law sections, constitutions, treaties and other legal documents are quoted to back up the different reasonings. Examples are:

- *"conforme a los arts. 741 y 717 de la LECr"* [pursuant to pages 741 and 717 of the Criminal Procedure Act],
- *"El Tribunal Constitucional ha tenido ocasión de fijar la finalidad, alcance y límites de la motivación"* [The Constitutional Court has had occasion to set the purpose, scope and limits of the (legal) grounding]
- *"Al amparo de lo dispuesto en el art. 852 de la Ley de Enjuiciamiento Criminal, y art. 5.4. de la Ley orgánica del poder judicial"* [Under the provisions of section 852 of the Criminal Procedure Act, and section 5.4 of the Organic Law of the Judiciary]

Tomás Ríos (2006) states that all of these references to other legal instruments support the decision that appears in the ruling, as the last, and most consequential, part of the text.

4 Macro-structure, rhetorical function and intertextuality in English judgments

The primary role that judgments play in English law has already been remarked upon, together with their strongly normative character. What is more, the fundamental difference between the systems of Continental and Common law is that in the former, judges are not obliged to follow the dictates of previous judges, but in the latter they are. In this regard, it is also important to note that, when a judge decides about a case in Common law, he/she is also creating law (Cross/Harris 1991), and this is done through a critical statement which is called *ratio decidendi*, which will be adhered to in subsequent judgments. Therefore, it is the thesis of this paper that the cardinal hue that precedent has in the Common law system strongly influences how its genre – the judicial decision – is articulated in the legal system it belongs to, and it does so by means of the binding force of the *ratio*.

In giving voice to the person of the judge (or judges, in the case of the Supreme Court), the English judgment is much more personal a product than its Spanish equivalent. Like in the Spanish Supreme Court, five to seven judges act in this court of highest appeal. However, even if there is also a rapporteur or leading judge – who will make the most important statement on the decision, upon which the *ratio decidendi* will be interpreted – all the others have a voice in the process, taking turns to give consistency to the reasoning of the leading judge (concurring opinion) or to disagree with it (dissenting opinion). In this sense, the judgment is a highly individualistic genre, and its less stereotyped tone shows the greater involvement of the person of the judge-legislator, whose personality is somehow revealed in the text through flashes of

verbal wit, the use of irony, sarcasm, and that of rhetorical questions and metaphors. As Ruiz Moneva (2013: 87) states the first person singular is used by judges when they admit their limitations when it comes to deciding on some particular aspect, and also when they have to assume their own responsibility for the decision made: "I have reached the conclusion", "In these circumstances, I see no reason why", "I would not accept the submission that …", as examples.

For this very reason, and as far as structure is concerned, judges do not adhere to the strict conventions that guide the macrostructural requirements of the Spanish judgment, their decisions being much more individual in nature, the internal structure of the judgment often not being reflected by a division into different sections, as will be seen below.

Bhatia, in his seminal work on legal genres (1993: 113–118), described the parts of the English judgment such as that in table 4.

Table 4: Macrostructure of the English judgment, according to Bhatia (1993)

1. Identification of the case
2. Establishment of facts
3. Argumentation of the case. **a. Presentation of case histories.** **b. List of arguments.** **c. Specifying the *ratio decidendi*, or principal legal basis**
4. Pronouncement of judgment

However, Bhatia himself states that this division is cognitive in nature, and that the parts in which he structures the text follow a linguistic construct called "movement" or textual segment (1993: 129). Textual segments divide the text and are made up of a number of linguistic features that confer a uniform orientation on the text. Consequently, it is true that, although ostensibly the visual format of the English judgment is easier on the eye that its Spanish equivalent, it is no less true that the formal, graphical or ortho-typographical structuring is absent in some of its sections, and that the reader outside the system must carefully scrutinize the text to clearly identify its parts. The exception is the identification section, or heading, which has a formulaic materialization for the sake of which the parts of the process are listed and quoted explicitly, in addition to detailing the type of procedure involved, the date on which the trial took place and when the judgment was issued. As an example: "Oceanbulk Shipping & Trading SA (Respondent) v TMT Asia Limited and others (Appellants), before Lord Phillips, President, Lord Rodger, Lord Walker, Lord Brown, Lord Mance, Lord Clarke, Sir John Dyson SCJ. JUDGMENT GIVEN ON 27 October 2010. Heard on 14 and 15 July 2010".

The explicitness in identifying the parties to the process is deployed to name the precedent itself, unlike in Spanish judgments, where the identification thereof is performed using a number preceded by the abbreviation STS (*Sentencia del Tribunal Supremo*, or Supreme Court Decision, cf. table 1) since, as has been asserted here, the reference to the case is much less important in a system where precedent has a minor role.

The text of the judgment begins with the name of the leading judge and those of the judges with the same opinion, as for example, in the case of Phillips v Mulcaire: "Whom LORD WALKER with Lord Hope, Lord Kerr, Lord Clarke and Lord Dyson agree". What Bhatia (1993: 130) calls the establishment of facts, or account of the facts in the case, appears early in the

text of the judgment, and identifies the background of the case and the roles that the parties have in the process, together with the nature of the controversy and the decision reached in the court of previous instances (Fajans et al. 2004). This part has no fixed title, usually being labelled as 'The issue/s', 'The facts' or simply 'Introduction'. Appeals to the English Supreme Court are, by definition, texts revising previous ones, and, hence, their factual part is reduced to the minimum – just enough to contextualize the subsequent argument – sometimes such a part having no title. The latter represents the main argument of the leading judge, whose opinion is followed by the reasoning of the rest of the judges in the panel. In the expression of opinions, it is worth noting the strongly personal stance shown by the leading judge towards the judgments of lower courts that are submitted for revision, or to the other parties in the dispute, as in: "Reliance was placed on the reference in subsection (4) to protection from legal liability for words spoken or things done. (…) I do not consider that these provisions advance the defendants' case"; "I now turn to views expressed as to the ambit of article 9. Once again it is not always easy to differentiate between comments (…)"; "The concept is only of value in the present context where it describes an act which has no connection with the conduct of parliamentary business, as counsel rightly agreed."

As regards the argumentation of the case, and despite Bhatia's (1993) division, the legal rationale developed by the judges does not clearly distinguish the initial description of facts we have just discussed from the presentation of the background, which, according to Bhatia, is the initial part of such a rationale. The only concession made to the formal arrangement of the judgment is carried out in the division and numbering of paragraphs from the beginning of the text, which serves as an intratextual reference for judges to refer to, and name, their respective arguments in a peculiar dialogue of sorts in which they appear to engage. Thus, the main part of the judgment – much more complex in nature than the previous parts – consists of the analysis of legal issues, both those raised in the case in previous instances, and the new principles or legal issues with which the judges base their ultimate decision. Generally speaking, arguments take a personal dimension when the question under discussion seems to be controversial, and therefore, the judge feels it necessary to admit responsibility when uttering his/her opinion: "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions (…)"; "To my mind equality before the law is one of the pillars of freedom"; "That a Member of Parliament against whom there is a *prima facie* case of corruption should be immune from prosecution in the courts of law is to my mind an unacceptable proposition at the present time. I do not believe it to be the law."

This legal argumentation, which is the longest part of the judgment, is split into different headings which together provide an indicative map of the different issues of the case. For example, the Oceanbulk Shipping & Trading SA decision is entirely structured into 48 numbered paragraphs with no title, with the exception of 15 (titled 'Estoppel'), 17 ('Remoteness'), 18 ('Without prejudice – the legal principles'), 30 ('The exceptions to the without prejudice rule'), 36 ('Should the interpretation exception be recognized as an exception to the without prejudice rule?') and 47 ('Conclusion'). Sometimes judges themselves are the ones to make reference to the aspects that are being discussed as in "In para 18(1) (ia) of the re-re-amended defence and counterclaim TMT pleads"; "The first issue in these proceedings is as follows"; "Essentially the same issues arise under this head".

In contrast with Bhatia's (1993) remarks, the *ratio decidendi* of the judgment is a difficult part to distinguish in these appeals to the Supreme Court, since it does not appear, as he affirms, at the beginning of the text, or alongside the argument. As Cross and Harris (1991: 51)

suggest, this section is often identified in subsequent cases and it is not always made so clear; sometimes the judges who deal with the precedent in later cases are the ones who have to decide what the *ratio decidendi* was in the first place. Finally, the last section of the judgment is what Fajans et al. (2004: 348) identify as the disposition of the case, which in judgments issued at first instance consists of the pronouncement of the judge or judges and the conviction, if appropriate, but on appeal it is made up of a single judgment, in which the previous pronouncement is accepted or rejected. Regarding their rhetorical aspects, the descriptive and instructive parts of the English judgment in appeals to the Supreme Court are quite brief, compared to the argumentative part. The latter is the most extensive, essential part of the text overall, since it is where the judicial reasoning takes precedence. It discusses topics of a great importance, not only jurisprudentially, but also sociologically and institutionally, in the context of a system where what judges have to say is the law. Expressions of value are common, where the persona of the judge refuses to disappear, as in: "It is commonplace, and sensible, for a claim to Reynolds privilege to be determined as a preliminary issue" (Flood v Times Newspapers), or in: "It is a sad fact that, (…) there are still states where the judiciary as a whole is infected by corruption" (Kapri v Albania), or in: "But in view of the wide language of clause 3 (…), this argument is hopeless" (R. v Rolling).

As regards their intertextuality, these are texts where the legal grounding is key, and in the framework of a Common law system, this is going to materialize in the all-pervasiveness of case law above legislation. Cases are quoted fully – as extracts of previous decisions are transcribed by the letter – or partially, by just mentioning them, as in: "As Lord Mance noted in Jones v Whalley [2007]" (R. v Rolling), or in: "the reasoning of the Court of Appeal in Knauf UK GmbH v British Gypsum Ltd [2002] 1 WLR 907" (Abela & Ors 9 v Baadarani) among many others. However, we referred earlier to the fact that judgments of the English Supreme Court deal with legal issues of a precise and essential nature for the system, often international in scope; this is the case of the judgment having to do with Assange's extradition, which contains extracts of the Vienna Convention, a framework decision of the Council of the European Union, and even the English Extradition Act 2003. To a greater or a lesser extent, the reference to laws and treaties also happens in other cases such as Kapri v the Lord Advocate, where the application of the European Convention on Human Rights is in question, or in R v R v Forsyth and Mabey, also dealing with human rights, where the applicability of certain UN resolutions is debated.

5 Conclusions

Our analysis of judgments in Spanish and English law has been aimed at revealing the importance of the discursive community in the configuration of judicial decisions as genres with a peculiar communicative purpose, somewhat dissimilar in accordance with the legal culture of each system. As demonstrated, both genres have very different hues, in tune with lack of symmetry in the communicative goal that inspires them. The English judgment is made to last, which is why it bears a memorable name, whilst its Spanish equivalent is designed to be more of an administrative product, with an impersonal name, but with extreme accuracy in the legal detail and completeness of data coming from other written legal sources.

Also, while the judgments of the Spanish Supreme Court have a perfectly identifiable, rigid macrostructure, this is completely absent (at least explicitly) in the appeals to English Supreme Court. This factor should ostensibly make the Spanish judicial genre a more understandable kind of text for lay readers, but this is not always the case. The verbal prolixity in the

judgments of this Continental system is largely originated by an imperious need to achieve intertextual precision, which is why previous statements and writings to the Court are as present in the judgments as the law itself. This factor, together with the distance created between the issuer (the court, the group of judges) and the receiver, produce an unfriendly text for the unspecialized reader, in contrast with the shorter, English judicial decision, of a more personal tone. However, it is also true that the absence of clear organizational format in the latter confers on the English judge the prerogative to precisely pinpoint, and interpret, the legal basis or *ratio* which is to be adhered to in subsequent judgments. Finally, the adversarial character of the English system is evident in the intertextual element of its texts: the ubiquity of the precedent in the legal reasoning processes of judges establishes a dialogue of the present decision with previous texts as well as with forthcoming ones.

The present paper has analyzed a selection of Spanish and British judgments with a view to characterizing them. As has been attempted to demonstrate, both these genres are the product of an extremely specialized discourse community belonging to different legal systems and cultures, and both LSP trainers and translators will need to delve fully into their ethnography for their comprehension. It is to be hoped that this study may shed some light on the discourse community that issues these texts, the communicative purposes and functions that they fulfil, and how the information is organized, structured and presented in them so as to attain those purposes. Only their close scrutiny, as accomplished by the pertinent discursive and pragmatic tools, will make sense of what is not explicit, but is embedded in the genre tradition that reveals the professional, everyday activity of the specialist community, in turn immersed in a distinctive, peculiar legal culture.

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