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A contrastive investigation of the performative and descriptive use of surprise frames in judicial opinions of the HKSAR

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ABSTRACT

This article examines the use of surprise frames in judicial opinions of the HKSAR. Specifically, it examines the semantic variation of surprise frames and the discourse purposes for which they are used. In doing so, it explores the underlying interactivity of surprise frames by distinguishing between performative expressions of surprise (those that emanate from the current author's reflection) and descriptive expressions (those that report on another's sense of surprise). Recognising that legal discourse scholars often neglect lower courts, the paper contrasts opinions from three levels of court in the HKSAR. Genre and court-specific patterns emerge: a key similarity is that all three courts, performatively and descriptively, most often use the TYPICALITY frame. Key differences include a significantly greater use of the TYPICALITY frame by the appeal courts in relation to the trial courts; more qualitatively oriented analysis shows that the use of surprise frames maps onto the common law standard of review, i.e., the appeal courts largely use surprise frames to focus on legal issues. In contrast, the trial courts focus on facts and evidence. The article concludes with a discussion of the implications of the main findings for researchers and professionals.

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1. Introduction

Surprise is often theorised as the emotional response that is generated between what is perceptually or conceptually expected and what transpires (e.g., see [Teigen and Keren, 2003](#): 68; [Tutin, 2015](#): 418). The basic emotion of surprise ([Ekman, 1992](#): 170) can be triggered by a seemingly infinite number of things including unexpected events, sudden discoveries, and encounters with the peculiar. It can be expressed in non-verbal and verbal ways, with the latter involving various categories of meaning, especially in English. The psychological experience of surprise is distinguished from its discursive expression. The psychological experience of surprise is regarded as a largely involuntary response, whilst the discursive expression of surprise, as a form of 'emotive communication' ([Caffi and Janney, 1994](#): 328), is a strategically deliberate act. The present study pays attention to the strategic expression of surprise in the high-stakes genre of written judicial opinions of the HKSAR. Specifically, it examines the expression of surprise in judicial opinions concerned with constitutional law issued by three levels of the HKSAR judiciary: the Trial Courts, the Court of Appeal, and the Court of Final Appeal. In doing so, the present study redresses a tendency within legal discourse studies to overly focus on the output of supreme judicial bodies ([Poole, 2021](#): 177), which essentially neglects the writing practices of courts that handle the vast majority of cases (see also

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Dundon, 2024). The present study also contributes to a growing area of legal discourse studies that treat jurisprudence as a pragma-discursive phenomenon (e.g., *Szczyrbak, 2014; Goźdź-Roszkowski, 2017; McKeown, 2022a*) here constitutional law – a legal area that touches the lives of citizens in a most direct way, e.g., in delimiting rights such as citizenship, marriage, and peaceful protest.

Given the supposedly objective nature of judicial opinions, it may initially seem odd to investigate the expression of an emotion like surprise in the genre. Whilst positivists promote a view of the law as an impersonal/objective phenomenon, a notion that is often supported by judicial writing style guides (e.g., *Garner, 2002*), research has shown that affective stance is frequently present in judicial opinions (*Goźdź-Roszkowski, 2013; Mazzi, 2015; Yu, 2023; Oluwaseyi-Daniel, 2024*) including the expression of surprise. As a discourse category, surprise can be accounted for under several leading frameworks, including Interpersonal Metadiscourse (*Hyland, 2005*), Appraisal (*Martin and White, 2005*), and Discourse News Values (*Bednarek and Caple, 2017*). However, as lamented by Wang & Hu, studies that lump surprise with other nebulous concepts, e.g., attitude markers, may ‘obscure varying, sometimes, even opposite, patterns of use’ (2022: 2). In studies of judicial discourse, although incidentally mentioned (e.g., *McKeown, 2022b: 17*), surprise as a stand-alone discursive phenomenon has been neglected. Given that authors of research articles have been shown to use surprise to ‘heuristically engage in cognitive explorations and construct academic knowledge’ (*Wang and Hu, 2022: 2*), the investigation of surprise in judicial opinions offers the potential to uncover such insight in the genre. The present study contributes to the study of the discursive expression of surprise in two ways. Utilising the theory of Frame Semantics (*Fillmore, 1985*), it explores variation in the semantic articulation of surprise (e.g., unexpectedness vs. atypicality) and the corresponding discourse purposes for which the semantic frames were used. Utilising a distinction found in *Nuyts (2000)*, it further explores discursive expressions of surprise that emanate from the judicial opinion writer (i.e., performative) versus those for which another discourse participant is seemingly responsible (i.e., descriptive).

Contrasting the performative and descriptive use of semantic frames of surprise in judicial opinions from three levels of the HKSAR judiciary, the following research questions guide the current study:

- How do judicial opinion writers performatively and descriptively use surprise frames?
- What (dis)similarities exist between courts in their performative and descriptive uses of surprise frames?

In Section 2, I will discuss the two major conceptual components on which the present study turns: frame semantics and the performative/descriptive distinction. This will be followed by an explanation of the data and analytical steps taken, followed by a discussion of the frequency distribution of the surprise frames. The significant findings will then be presented in a more qualitative manner. Finally, the conclusions and implications will be presented.

2. Literature review

2.1. Frame semantics

According to the theory of frame semantics (*Fillmore, 1985*), a semantic frame is a context-based cognitive structure that represents the essential meaning of an event, situation, or concept. Semantic frames consist of two linguistic components: Targets, which are the words/phrases that evoke the semantic frame (e.g., *Unusual* evokes the frame of TYPICALITY), and Frame Elements (FE), which are cogno-syntactic like components that construct the meaning of a frame (e.g., Explanation – explains why something is surprising). Across their pioneering work, *Hu and Chen (2019)* and *Chen and Hu (2020a, 2020b)* draw upon Frame Semantic theory and utilise FrameNet¹ to develop a conceptual framework firmly rooted in discourse analysis. In doing so, they generate a genre-specific frame of surprise for academic research articles. Recognising inconsistencies in the labelling of FEs (see *Hu and Chen, 2019: 162*), the researchers also reify the FEs of the semantic frames that fall under surprise in FrameNet.

As reflected in FrameNet, the expression of surprise can fall into different semantic frame categories (e.g., TYPICALITY and EXPECTATION). Although Hu and Chen stress the need for a ‘semantically-oriented framework’ (2019: 158) and the importance of not overlooking semantic differences between categories (*Chen and Hu, 2020b: 661*), they ultimately collapse the different semantic frame categories into one. This makes sense regarding their research objective of generating a general surprise frame for academic articles, but this is not the approach taken here. In fact, the frequency distribution of the semantic categories and the discourse purposes involved in their use is the central focus of the present enquiry.

Within the theory of Frame Semantics, there is a distinction between core FEs and peripheral FEs. Core FEs construct the essence of a frame’s meaning; peripheral FEs can enrich but are not central to a frame’s meaning. According to *Hu and Chen (2019)*, surprise frames contain three core FEs: Trigger (what is driving the surprise in a given frame), Explanation² (why is the Trigger surprising), and Resolution (how, if at all, the surprise is resolved). Surprise frames often contain two peripheral FEs: Degree (how surprising is the Trigger) and Experiencer (who is surprised). *Hu and Chen (2019)* and *Chen and Hu, 2020a, 2020b* contain further subcategories of FEs, but these are genre-specific. For instance, one of the subcategories of Explanation concerns surprise arising from an incongruence between prior knowledge and the findings of the study reported in the

¹ A freely available, online lexical database that aggregates frame categories: <https://framenet.icsi.berkeley.edu/>.

² Later referred to as ‘Source of Expectation’ (*Chen and Hu, 2020b: 672*).

research article (see [Chen and Hu, 2020a](#): 6). Unlike [Hu and Chen \(2019\)](#) I do not quantify the FEs but use the general categories for qualitatively oriented analysis as this allows for an exploration of how the surprise frames identified 'work in longer discourse extracts' ([Mauranen, 2023](#): 50). Indeed, as will be seen, such analysis allows for the identification of a noticeable difference in foci between the appeal courts and the trial courts (see section 4).

2.2. The performative/descriptive distinction

In the present paper, I utilise a distinction between performative and descriptive utterances ([Nuyts, 2000](#)) as it allows for the identification of who is the primary Experiencer of surprise. It should be noted that although the performative/descriptive distinction is largely developed in relation to epistemic modality and evidentiality, it applies to the affective domain of language use (see [Nuyts, 1990](#)).

Broadly understood, performative utterances emanate from the current authorial persona (e.g., *I am surprised by the submission ...*), i.e., the writer is responsible for and committed to the utterance. Such utterances are the product of a direct reflectional act of the writer and represent their view at the time of communicating ([Nuyts, 2000](#): 39). Descriptive utterances report another's view, here another's sense of surprise (e.g., *...the judge went on to refer to what he termed surprising results ...*). [Nuyts \(2000: 40\)](#) claims descriptive expressions are mute as to the producer's commitment to or evaluation of the reported utterance. In judicial discourse, this position can be questioned. In a highly dialogic genre like judicial opinions (see [Vázquez Orta, 2010](#); [Ruiz Moneva, 2013](#)), writers often discursively put 'on stage' ([Garzone, 2016](#): 14) things said, done, or experienced by others to provide explicit commentary on such phenomena (see [Mazzi, 2010](#): 378; [Garzone, 2016](#); [McKeown, 2022b](#)) meaning many utterances are not purely descriptive, i.e., report without disclosing the author's evaluation of the utterance. Furthermore, [Goźdz-Roszkowski \(2019\)](#) demonstrates that the choice of reporting verbs discloses evaluation (e.g., reporting verbs like *suggest* or *claim* have epistemic implications). Whilst this may be so, the operationalisation of the descriptive category here captures instances of the expression of surprise in which the primary Experiencer is someone other than the current writer, irrespective of implicit or explicit (dis)agreement expressed (see next section).

3. Data and approach

Using the Hong Kong Legal Information Institute (HKLI),³ an open-access database of HKSAR legal authorities, all available judgments were collected from the Trial Courts⁴ (TC), Court of Appeal (CA), and Court of Final Appeal (CFA) in which the Basic Law of Hong Kong⁵ had been substantially adjudicated (i.e., not merely mentioned in passing) from 1997 to 2022 (inclusive). Each case included must have progressed through the entire legal chain⁶ (i.e., reached the CFA for determination). This sampling choice allowed for an exploration of how the respective courts did (or did not) express surprise when adjudicating similar issues of the Basic Law (e.g., Article 39). An initial number of 170 cases that met this criteria were collected. Sampling from the total number of CFA judgments at a 95% confidence level was done via a sample size calculator.⁷ The final sample consisted of the majority opinions from 119 cases (4, 569,241 words in total), divided into three corpora: the Trial Court (1, 934,271 words), the Court of Appeal (1, 362,969 words), and the Court of Final Appeal (1, 272,001 words).

The analytical process involved four main steps.

Step 1: Identification of Potential Surprise Markers

A list of markers (81 in total) was compiled to identify the Targets of surprise. The list was compiled with the use of words lists from existing studies (e.g., [Hu and Chen, 2019](#); [Wang and Hu, 2022](#)), the NRC Word-Emotion Association Lexicon,⁸ and the use of the Merriam-Webster Dictionary (for synonyms and antonyms of the surprise). Twenty-five opinions were also read in full to identify any genre-specific expressions of surprise: the idiomatic phrase 'taken aback' was recovered from this exercise. Forty-seven surprise markers (including base and lemmatised forms, e.g., *unusual* and *unusually*, as well as the prepositional phrases *taken aback*, *out of the blue*, and *out of the ordinary*) occurred 683 times.

Step 2: Identification of Performative/Descriptive Use

In the second step, the Targets of surprise were classified according to the performative/descriptive distinction. Two things are worthy of clarification here: the explicit presence of the Experiencer in performative utterances and descriptive utterances in which the author explicitly discloses (dis)agreement.

³ <https://www.hklii.hk/eng/>.

⁴ In the HKSAR this comprises the Court of First Instance, the High Court, and the District Court.

⁵ Hong Kong's 'unique Constitution' ([Mason, 2011](#): 625). The search term 'Basic Law' was used to collect these judgments.

⁶ In common law systems, cases start in the trial courts and progress through appellate courts until reaching the supreme judicial body for final determination.

⁷ <https://www.calculator.net/sample-size-calculator.html?type=1&cl=95&ci=5&pp=50&ps=210&x=70&y=18>.

⁸ <https://saifmohammad.com/WebPages/NRC-Emotion-Lexicon.htm>.

In the present study, there was no requirement for the explicit presence of an Experiencer for an example to be classified as performative.

Example 1

It would be most **surprising** if the provisions of the Basic Law were not formulated so as to provide in principle for its provisions to be capable of being applied as from the first moment of the establishment of the HKSAR.

In the example above, the surprise is expressed in a conditional structure that lacks any direct indexical marker (McKeown, 2023) of the Experiencer. In Chen and Hu (2020a), it would likely have been categorised as an ‘Unnamed’ Experiencer⁹ –although they would seemingly accept that there is an ‘implicit’ Experiencer (Tutin, 2015: 421). Here, it was classified as performative as the expression of surprise results from the current writer’s reflection. This can be contrasted with the following example.

Example 2

Mr Chiron States that Mr Aitken’s participation in the press conference came as a **surprise** since he had believed that the latter would not be involved in the FMIC issues.

In the example above, the surprise is purely descriptive. The judicial opinion writer reports Mr Chiron’s sense of surprise without explicitly expressing (dis)agreement¹⁰ in either the sentence or the co-text. This is not so in the following example.

Example 3

The suggestions which are made by the appellant that the case was changed mid-stream, that the appellant was taken by **surprise**, or somehow prejudiced, do not sit well with the history which I have recited ...

In the example above, the (disputed) surprise is attributed to the appellant (rendering a descriptive classification). However, the judicial opinion writer refutes the appellant’s sense of surprise.¹¹ Again, here, the descriptive category captures primary Experiencers of surprise other than the author, irrespective of the evaluations by the latter. The example above was, therefore, classified as descriptive.

Step 3: Identification of Semantic Frame Categories

As in Wang and Hu (2022), with the use of FrameNet,¹² an automated analysis of the surprise markers identified in the data was first performed to see which semantic frames they evoked. This initially returned ten frames in total (i.e., EXPECTATION, TYPICALITY, FREQUENCY, STIMULUS_FOCUS, STIMULATE_EMOTION, EMOTION_DIRECTED, IDIOSYNCRASY, JUST_FOUND_OUT, FAMILIARITY, and, DESIRABILITY). The automated analysis was supplemented with a subsequent manual analysis in which all of the surprise markers identified were analysed in their original context. Discrepancies between the automated and manual analyses, as well as the specific focus of the present study, necessitated a slight reconceptualisation of the final frame categories employed. As can be seen in Table 1 below, five distinct semantic frame categories were utilised in the present study.

Table 1
Taxonomy of semantic frame categories used in the present study.

Frame	Explanation	Performative Example	Descriptive Example
EXPECTATION	The frame is explicitly constructed in terms of unexpectedness.	... the law sometimes leads us down unexpected paths ...	He had not expected it to ‘become a big affair’ ...
TYPICALITY	The frame is constructed in terms of categorical prototypicality.	However, I should think it most unusual for a document to have the force of law if it does not have to go through the legislative process ...	The judge also emphasized the unusual feature that the money was first paid to ...

⁹ Although not the focus of the present study, Hu and Chen (2019) report 83% of all instances of surprise falling into the unnamed category; just 4% of their surprise instances involve an explicit naming of the Experiencer. In the present study, 13% of all instances of surprise involved the explicit presence of the Experiencer (e.g., see Example 7).

¹⁰ 83% of all descriptive instances in my data were not accompanied by explicit (dis)agreement of the sense of surprise experienced by another.

¹¹ 11% of all descriptive instances were accompanied by explicit disagreement; 6% by explicit agreement.

¹² <https://framenet.icsi.berkeley.edu/>.

Table 1 (continued)

Frame	Explanation	Performative Example	Descriptive Example
EMOTION_OF_SURPRISE	The frame is constructed in terms of emotional responses to surprising phenomena.	It is amazing that they were able to reach different and opposite conclusions as to the views and intention of the Court of Final Appeal ...	However, he thought it was Mr Ma's construction that produced the other and even more surprising result ...
IDIOSYNCRASY	The frame is constructed in terms of uniqueness and distinctiveness.	The case before me is a peculiar case whereby two funds were involved ...	However, Ms Cheung has sought to distinguish this case on the peculiar facts involved.
JUST_FOUND_OUT	The frame is constructed in terms of suddenness or novelty of discovery.	I would not have wanted that intention to have been unwittingly frustrated by the unexpected discovery that concubines did not enjoy a legal status equivalent to wives ...	He watched this male for about 30 s, when the male suddenly noticed him standing watching several metres away.

The automated analysis in FrameNet suggested the FREQUENCY and FAMILIARITY frame categories for some surprise markers. On closer inspection, the markers that returned the FREQUENCY and FAMILIARITY frame categories required a strained interpretation of surprise: judicial opinion writers used the FREQUENCY category to make simple statements of legal rarity (e.g., *The court is not regularly called upon to consider the application of art. 4*) and the FAMILIARITY category to express a sense of unfamiliarity arising from things like non-common law rules (e.g., *That no doubt is a product of grappling with terminology with which I am so unfamiliar*).¹³ The automated analysis in FrameNet also suggested the DESIRABILITY category for some surprise markers. A closer reading of the context of the data showed that these were better classified as EXPECTATION or TYPICALITY. Take the following example.

Example 4

We do not know if this is what occurred in this case to account for the **extraordinary** length of time taken to resolve this one issue.

The automated analysis in FrameNet classified the marker (i.e., extraordinary) as evoking the semantic frame category of DESIRABILITY, essentially concerned with evaluating situations and entities as (un)desirable. It is submitted that the primary meaning in the example above is atypicality, i.e., compared to the ordinary time taken to resolve a case, the case in question was *extra-ordinary*.

The automated analysis in FrameNet suggested the STIMULUS_FOCUS, STIMULATE_EMOTION, and EMOTION_DIRECTED frame categories for some of the markers. In FrameNet, the STIMULUS_FOCUS frame category focuses on the stimulus that triggers a given emotion; the STIMULATE_EMOTION frame category focuses on the causative process that triggers a given emotion; the EMOTION_DIRECTED frame category focuses on the entity, event, or situation towards which the Experiencer's emotion is directed. All three of these frame categories share an underlying, similar semantic theme - they capture different aspects of an emotional response experienced by an Experiencer. However, given that the present study is focused on the broader semantic expression of surprise, it was decided to merge these three separate categories into a single, overarching EMOTION_OF_SURPRISE frame category.

Step 4: Significance Checking Between the Respective Data Sets

Using the UCREL tool,¹⁴ pairwise comparisons were conducted across the three data sets (CFA-CA, CFA-TC, CA-TC) to check for statistically significant differences in the frequency distributions of the surprise markers. Specifically, the log-likelihood ratio was calculated for each pair of data sets, and these ratios were then tested to determine if the observed differences in marker frequencies were statistically meaningful (see Table 3 below).

4. Findings

As shown in Table 2 below, the majority (86.9%) of the surprise markers identified in the data could be classified into three semantic frame categories (i.e., EXPECTATION, TYPICALITY, and EMOTION_OF_SURPRISE). This finding is also consistent with the results reported by Hu and Chen (2019: 161), although, unlike their study, my data also returned surprise markers involving the category of IDIOSYNCRASY. This highlights the importance of investigating differences in the semantic articulation of surprise across different genres. Furthermore, unlike Hu and Chen (2019), TYPICALITY markers, often evoked by

¹³ I thank one of the anonymous reviews for confirming this point.

¹⁴ <https://ucrel.lancs.ac.uk/llwizard.htm>.

Targets such as *(un)usual*, *(ab)normal*, and *(un)ordinary*, were the most frequently used markers, occurring more than double the amount of the second most used category, i.e., EXPECTATION.¹⁵ This pattern held across both the performative and descriptive uses of TYPICALITY markers in judicial opinions, prompting the question of why TYPICALITY features so prominently in this context. Due to structural factors, the law tends to govern and protect the interests of typical individuals and situations (Jain, 2021: 273). A major motivator of litigation is that an individual or a situation does not align with typical standards, which can justify the need for judicial clarification (e.g., litigation challenging the heteronormative typicality of marriage –see Macagno, 2016). In other words, atypicality is an engine of litigation and often warrants judicial attention. In marking atypicality, judicial opinion writers also limit the precedential value of the opinion, i.e., confining the power of a decision to bind only similar atypical cases. From this perspective, it is reasonable to conclude that the marking of atypicality should frequently be included in judicial opinions.

EXPECTATION, discussed in more detail in Section 4.4., was frequently evoked by Targets such as *(un)predictable*, *(un)foreseen*, *(un)expected*, and *unprecedented*. Although the stylistic literature often frowns on the expression of emotion in judicial writing (e.g., see Neuman, 2001: 298), as seen in Table 2, EMOTION_OF_SURPRISE markers were the third most frequently used category. EMOTION_OF_SURPRISE was frequently evoked by Targets like *surprising*, *startling*, and *staggering* and will be discussed in more detail below (see Sections 4.5. and 4.6.). The results in Table 2 show that the three courts infrequently used JUST_FOUND_OUT markers. The relative under-use of JUST_FOUND_OUT markers may be explained by the historicity of a case, i.e., as a case progresses through the court system, the chances for novel discoveries diminish.

Table 2
Frequency distribution of surprise markers.

Frame	Court	Overall frequency	% frames	Performative frequency	% of frames	Descriptive frequency	% of frames
EXPECTATION	CFA	47	6.9	41	7.3	6	4.8
	CA	39	5.7	30	5.4	9	7.3
	TC	45	6.6	38	6.8	7	5.6
TYPICALITY	CFA	110	16.1	96	17.2	14	11.3
	CA	116	17.0	92	16.5	24	19.4
	TC	119	17.4	93	16.6	26	21.0
EMOTION_OF_SURPRISE	CFA	18	2.6	13	2.3	5	4.0
	CA	54	7.9	43	7.7	11	8.9
	TC	46	6.7	37	6.6	9	7.3
IDIOSYNCRASY	CFA	18	2.6	13	2.3	5	4.0
	CA	27	4.1	26	4.7	1	0.8
	TC	33	4.8	28	5.0	5	4.0
JUST_FOUND_OUT	CFA	2	0.3	2	0.4	0	0
	CA	2	0.3	2	0.4	0	0
	TC	7	1.0	5	0.8	2	1.6
Total	–	683	100	559	100	124	100

4.1. Performative use of surprise frames

As can be seen in Table 2, over 80% of the surprise markers were performative. As will become evident in Sections 4.4., 4.5., and 4.6., a more qualitatively oriented analysis of the FEs allowed for the identification of a trend in which judicial opinion writers in the appeal courts used surprise markers in the construction of wider frames to focus on legal issues (i.e., make general legal statements, respond to legal arguments, and respond to things done in the lower courts). In contrast, those in the trial courts focused on facts and evidence specific to the case. This is a reasonable finding when considered in the light of the common law standard of review (Gifis, 1998: 510), according to which appellate courts, especially supreme judicial bodies like the CFA, accept cases for consideration on points of law, whereas trial courts conduct trials with a focus on facts and evidence. Due to limits on space, I will only discuss the use of surprise markers in which no statistically significant frequency differences emerged between the courts (those with significant differences will be discussed in Sections 4.4., 4.5., and 4.6.).

In accordance with the standard of review, judicial opinion writers in the appeal courts most often performatively used IDIOSYNCRASY markers in the construction of wider surprise frames to make general statements of law; CFA ($n = 7$) and CA ($n = 19$), i.e., to stress surprisingly unique constitutional arrangements within Hong Kong. Judicial opinion writers in the TC most often used IDIOSYNCRASY markers to construct wider surprise frames that stressed the current case's unique facts ($n = 22$). The Targets *peculiar*, *bizarre*, and *unique* often evoked IDIOSYNCRASY. In the appeal courts, the use of JUST_FOUND_OUT markers displayed no observable trends, perhaps due to the infrequent use of these markers. In the TC data, the frame was most frequently used in relation to the specific facts of the case ($n = 4$), e.g., to mark a factual finding that emerged in the trial as surprising. The Target *sudden(ly)* most frequently evoked the JUST_FOUND_OUT frame.

¹⁵ EXPECTATION was the most frequently used frame in Hu and Chen (2019).

4.2. Descriptive use of surprise frames

Under 20% of all surprise markers were descriptive (see Table 2). Again, the influence of the standard of review was evident: the judicial opinion writers in the appeal courts largely reported on surprise expressed in legal arguments of counsel and judges in the lower courts; those in the TC largely reported surprise expressed by the litigants concerning factual and evidential phenomena (e.g., an event experienced as surprising by a claimant). As will be seen in Section 4.3., no significant differences emerged in the frequency distribution of markers classified as descriptive.

As already mentioned, TYPICALITY markers were the most frequently used category in all three courts. Descriptively, judicial opinion writers in the CFA (n = 9) and CA (n = 13) most frequently used TYPICALITY markers in the construction of a wider surprise frame to report what had been constructed as atypical by judges in the lower courts. Judicial opinion writers in the TC (n = 15) most frequently used the markers in testimonial recounts of what the litigants had found unusual, e.g., being required to send business emails to a stranger. The same patterns were observed across the three courts in the use of EMOTION_OF_SURPRISE markers. Judicial opinion writers in the TC data most often used EXPECTATION markers in the construction of frames that reported factual recounts of testimony (e.g., a claimant who overstayed his visa did not expect to be prevented from leaving HK). Both the CFA (n = 3) and the CA (n = 4) most frequently used EXPECTATION markers in wider frames that reported statements of unexpectedness made by legal counsel during proceedings (e.g., the unexpectedness that could arise from using a controversial remedy). Similarly, all three courts used IDIOSYNCRASY markers in this way, i.e., they reported what was regarded as legally unique about a case by counsel. In the trial court data, both descriptive uses of the JUST_FOUND_OUT markers occurred in frames that factually recounted sudden events happening to litigants.

4.3. Court comparison of frequency distribution

I will briefly outline the significant differences between the dyadic comparisons of the three courts (the results of which are in Table 3 below). The significant differences that emerged will be explored more qualitatively in Sections 4.4., 4.5., 4.6. As can be seen in Table 3, the appeal courts (i.e., the CFA and CA) displayed similar frequency distributions when using surprise markers; greater differences existed between the appeal courts and the trial courts.

4.3.1. CFA-CA comparison

As can be seen in Table 3, the only significant difference between the two appeal courts concerns the use of EMOTION_OF_SURPRISE markers; CA judicial opinion writers used significantly more (LL = 14.94) of these markers than those in the CFA (explored in more detail in Section 4.5.).

4.3.2. CFA-TC comparison

Three significant differences emerged when comparing the CFA data with the TC data: Judicial opinion writers in the CFA used significantly more performative EXPECTATION (LL = 4.82) and TYPICALITY (LL = 9.55) markers. These differences will be explored in more detail below (see Section 4.4.). Judicial opinion writers in the TC used significantly more EMOTION_OF_SURPRISE markers (LL = 4.13) than those in the CFA. This was the only dyadic comparison in which judicial opinion writers in the TC used more surprise markers than those in the appeal courts, which will be explored in more detail in Section 4.6.

4.3.3. CA-TC comparison

As can be seen in Table 3, in terms of individual categories, CA judicial opinion writers used significantly more TYPICALITY (LL = 5.29) and EMOTION_OF_SURPRISE (LL = 4.99) markers than TC judicial opinion writers, which will be explored in more detail in Section 4.5.

Table 3
Frequency distributions of surprise markers compared by court.

Frame	Comparison	Performative LL Score	Descriptive LL Score
EXPECTATION	CFA-CA	2.56	0.41
	CFA-TC	4.82*	0.22
	CA-TC	0.22	1.44
TYPICALITY	CFA-CA	0.59	2.02
	CFA-TC	9.55**	0.37
	CA-TC	5.29*	0.9
EMOTION_OF_SURPRISE	CFA-CA	14.94****	1.91
	CFA-TC	4.13*	0.09
	CA-TC	4.99*	1.51
IDIOSYNCRASY	CFA-CA	3.47	3.19
	CFA-TC	1.12	0.04
	CA-TC	1.02	1.69
JUST_FOUND_OUT	CFA-CA	0.00	–
	CFA-TC	0.38	2.02
	CA-TC	0.49	2.13

Significance levels: *p < .05; **p < .01; ***p < .001; ****p < .0001.

4.4. The performative use of TYPICALITY and EXPECTATION frames in the Court of Final Appeal data

As already stated, CFA opinion writers used significantly more TYPICALITY markers than TC judicial opinion writers ($p < .01$). Judicial opinion writers in the CFA most often used the TYPICALITY frame to express general legal statements ($n = 40$). The following two examples contain a discursive pattern frequently observed in the CFA data, i.e., the judicial opinion writer evokes surprise to resolve it subsequently and, in doing so, justifies an action taken by the court. The first example occurred in a case concerned with judicial bias and recusal, i.e., a process where a judge does not hear a case due to impartiality issues. Part of the controversy concerned the fact that one judge, sitting alone, had initially refused an application for appeal by the defendant who had been convicted of burglary. When the refusal of appeal was appealed, the same judge, sitting as part of a panel of three, reheard the application and refused to recuse himself.

Example 5

Similarly, it would be an **unusual** case where a single permanent judge of this Court, having refused leave to appeal when sitting as part of the Appeal Committee, would be required to recuse himself from sitting on the substantive appeal to the Court on the grounds of apparent bias arising from his prior refusal of leave to appeal. (HKSAR V MD Emran Hossain, 2016)

Across the excerpt, the judicial opinion writer justifies siding with the judge's refusal to recuse himself from the case by constructing a frame of TYPICALITY (evoked by the adjective *unusual*). A hypothetical outcome is used to evoke surprise and subsequently resolve it. The Trigger (i.e., what is surprising) comprises the prospect of forced recusal with the Explanation (i.e., why something is surprising) essentially amounting to a statement of convention, i.e., given the judge participated in the adjudication of the appeal application; it would be surprising if he did not participate in the adjudication of the substantive case. The court's actual decision implicitly resolves the (potential) surprise, the logic essentially being *it would be surprising if we required recusal, but we do not, so our decision is not surprising*.

Judicial opinion writers in the CFA also used significantly more EXPECTATION markers than those in TC ($p < .05$). Again, the use of the frame involved general statements of law ($n = 28$). The example below occurred in a case where the secretary of justice, using a law known as the Chinese Temples Ordinance, attempted to bring the management of a Taoist temple complex (and its significant assets) under public administration, effectively depriving private parties of control. In part, the constitutional legality of the Chinese Temples Ordinance was disputed.

Example 6

Confiscatory statutes are hardly what one ever **expects** to find in Hong Kong. And where New Territories land is concerned, there is the added factor that the Peking Convention of 1898 states in terms that “there will be no expropriation” and that if land is required for official purposes “it shall be bought at a fair price”. We are satisfied that the Chinese Temples Ordinance is not confiscatory. If it were, then its constitutionality would be open to question under Article 105 of the Basic Law which entrenches the right to compensation for lawful deprivation of property ... We now turn to the task of demonstrating why the Ordinance is not confiscatory and explaining the regulatory manner in which it operates. (Secretary of Justice v To Kan Chi and Others, 2000)

Across the excerpt, surprise is once again evoked to be later refuted. In a paragraph initial topic sentence, the judicial opinion writer frames the general legal position in Hong Kong in terms of EXPECTATION: confiscatory statutes (i.e., the Trigger) are unexpected in Hong Kong. The Experiencer (i.e., who experiences the surprise) of the opening exclamatory statement is slightly ambiguous. It is unclear if the first person impersonal pronoun *one* exclusively refers to the Experiencer alone or is used inclusively to refer to people in general. Given the high-stakes nature of the legal issue for Hong Kong society, the latter reading is preferred. In either case, the judicial opinion writer is included, which thus supports a performative reading. The judicial opinion writer qualifies the Target of surprise with an element of Degree in as much as the qualifying adverb *hardly* allows space, however slim, for potential conditions under which one could expect to find a confiscatory statute in Hong Kong. Nevertheless, across the example, he discursively labours to explain what gives rise to such unexpectedness by citing two legal sources and highlighting the remedies available.

What action is the judicial opinion writer justifying? It can be argued that the use of the EXPECTATION frame alleviates potential concerns in regards to the specific determination of the court, i.e., the Chinese Temples Ordinance is not confiscatory (and hence constitutionally legal). This determination of the court functions as a Resolution of the (potential) surprise evoked. In other words, the court is essentially saying that the finding of a confiscatory statute would be surprising, but they do not find such a statute in this case. In the final sentence, the judicial opinion writer uses previewing metadiscourse (Mauranen, 2023) to commit to further explaining the court's determination. As an aside, and as will be seen in other examples, frequent occurrence of discourse reflexive elements in the construction of frames of surprise were observed in the data. It is worthy to note that discourse reflexivity is often used to mark something as 'problematic ... [and] worth sorting out' (Mauranen, 2023: 116), suggesting that (potentially) surprising things discovered in the adjudication of the cases take on a degree of discursive importance.

4.5. The performative use of the EMOTION_OF_SURPRISE and TYPICALITY frames in the Court of Appeal data

Again, the CA data contained significantly more performative EMOTION_OF_SURPRISE markers than the CFA ($p < .0001$). CA opinion writers most often used the EMOTION_OF_SURPRISE frame in response to things done by lower judicial bodies ($n = 25$).

Example 7

Somewhat surprisingly, when the Tribunal heard the appeal they held that the relevant provisions in the Schedule had to be struck down as they were contrary to the Basic Law. I say “**Surprisingly**” as their function is to determine questions of fact not legal issues. (Commissioner of Registration v Registration of Persons Tribunal, 2000).

In the example above, the judicial opinion writer first uses a sentence adverbial (i.e., the Target) in relation to the Trigger, i.e., the declaration of a lower judicial body that certain legal provisions are unconstitutional. In the second sentence, the judicial opinion writer enters the text (using the first person pronoun *I*) and thus explicitly identifies himself as the Experiencer. The communication predicate (*I say*) amounts to an act of metadiscursive clarifying (Ädel, 2023: 13), which explains why the Trigger is surprising. The Explanation amounts to an accusation of ‘ultra vires’ (see Gifis, 1998: 514) against the lower tribunal, i.e., it has acted in excess of its powers. This serious legal accusation raises questions about the Degree of surprise expressed in the first sentence. The use of the adverbial minimiser (i.e., *somewhat*) suggests that the behaviour of the lower tribunal was only moderately surprising. It is hard to reconcile such meaning with the fact that, as a basic tenet of the rule of law, legal bodies are not supposed to act beyond their specific powers. Perhaps the Degree of surprise can be taken as a humorous understatement.

When using performative EMOTION_OF_SURPRISE frames, CA opinion writers also frequently commented on incredulous arguments put before the court by counsel ($n = 12$). The following two examples occurred in a case that involved judicial review, i.e., ‘the review by a court of law of some act, or failure to act, by a government official or entity’ (Gifis, 1998: 260). In the following example, the judicial review concerned the home secretary’s refusal to add a certain village to the formal list of indigenous villages.

Example 8

I will first of all deal with a point now taken by Mr Kwok who argued that no decision had in fact been taken by the Secretary. **I have to say that I am surprised** by this submission ... If it had been argued that no decision in fact had been taken by the Secretary, it is inconceivable that the court would have granted leave to the applicant to apply for judicial review and then proceeded to determine the case. (Lai Tak Shing v Director of Home Affairs, 2006)

In the example above, the Trigger (i.e., Mr Kwok’s argument) precedes the Target of surprise. The Target of surprise occurs within a metadiscursive act of saying (Ädel, 2006: 60), which foregrounds that something is being communicated. Interestingly, the writer articulates the act of saying as made in a state of compulsion, which discursively transposes the loss of control associated with the psychological experience of surprise (see Kövecses, 2015: 282; Rhee, 2023: 4) and functions here to intensify the Degree of surprise. The judicial opinion writer provides an Explanation as to why the Trigger is surprising, i.e., the whole application for appeal was based on the lower’s courts findings about the secretary’s decision, meaning the fact that the secretary had made a decision was uncontested (even by the secretary) in the lower court. In essence, between the first hearing and the appeal hearing, Mr Kwok offers up ‘alternative facts’ (Barrera et al., 2020: 1) regarding the existence of the secretary’s decision. The legal context may help explain the motivation for such an outlandish claim. Again, this was a judicial review case; without a decision by a public body, there would be no technical grounds for judicial review, i.e., there would be no authority to hear the case.

The CA data also contained significantly more performative TYPICALITY markers than the TC ($p < .05$). CA opinion writers most frequently used the TYPICALITY frame to respond to things done in lower judicial bodies ($n = 33$).

Example 9

It is plain that the Secretary treated the ‘basic principles’ referred to in the letter 18 July 2003 as the complete answer to the applicant’s request to amend the Schedule. There was no independent evaluation of the applicant’s case. His decision to refer the matter of amendment to the rural committee further lent support to the applicant’s case that he had fettered the exercise of his discretion.

Findings of fact by the judge

However, what is **unusual** in this case is that the judge had made specific findings:

1. Tsing Yi Hui was not an indigenous village and
 2. The applicant is not an indigenous inhabitant of Tsing Yi Hui.
- (Lai Tak Shing v Director of Home Affairs, 2006)

In the first three sentences, the judicial opinion writer justifies the grounds for the secretary's decision being subject to a judicial review. The Trigger (i.e., the factual finding exercise of the judge) is expressed twice: once in the sub-heading heading (i.e., *Findings of fact by the judge*), thus giving it topic prominence and again in the complement of the relational clause expressing the surprise (i.e., *the judge had made specific findings*). The Target of surprise is articulated in terms of TYPICALITY (the adjective *unusual* expresses the non-normative nature of the Trigger). A jurisprudential determination of (a)typicality 'begs the question of what constitutes the appropriate comparative baseline' (Lee, 2004: 789); recourse to the legal context must be made to understand the comparative baseline, i.e., why the Trigger in this example is atypical. In judicial review cases, the general rule is that judges do not concern themselves with issues of fact (see, e.g., Fordham, 2012: 14–15). In other words, judges do not supplement their fact-finding/decision-making capacity for that of an executive administrator, as this can potentially violate the separation of powers. In short, it was atypical for the judge in the lower court to have made factual determinations as it was a judicial review case.

4.6. The performative use of the EMOTION_OF_SURPRISE frame in the Trial Court data

The TC data contained significantly more performative EMOTION_OF_SURPRISE markers than the CFA ($p < .05$). Judicial opinion writers in the TC most frequently used the frame to comment on facts and evidence of the current case ($n = 31$). In the following example, the judicial opinion writer invokes surprise to doubt factual claims asserted by the plaintiff.

Example 10

The second interview, said the applicant, was conducted by an officer who was not in uniform but was wearing civilian clothing. His most **startling** assertion, however, was that this second interview was conducted in total silence. (Ng Siu Tung and Others v Director of Immigration, 2008)

The example above was taken from an immigration case. During the trial, a major discrepancy arose between one of the plaintiffs and the immigration department regarding what transpired during a day of interviews, e.g., how many interviews took place, how many interviewers were involved, and what was said. The Target of surprise occurs at the beginning of the second sentence, where the judicial opinion writer uses the adjective *startling* to classify one of the plaintiff's assertions. The OED lists the primary meaning of *startling* as 'very surprising'. Nevertheless, the judicial opinion writer uses superlative morphology (i.e., *most*) to intensify the Degree of surprise further expressed. It could be argued that using the intensifier makes 'a bigger splash' (Martin and White, 2005: 20) at the sentential level. It also creates an effect at the macro level in as much as grading the assertion as *most startling* suggests that other things asserted by the plaintiff are startling. Beyond the expansion in the complement clause (i.e., that the second interview was conducted in total silence), no further Explanation is given as to why the Target is surprising. Perhaps the factual claim of a telepathic/gesturally conducted interview (as indeed claimed by the plaintiff) speaks for itself in terms of surprise.

5. Conclusion

In the present paper, I investigated how judicial opinion writers performatively and descriptively used surprise frames in cases concerned with constitutional law. In examining the frequency distribution of the markers used to evoke the frames and the discourse purposes for which the frames were used, I compared three levels of court in the HKSAR. The implications arising from the key findings will be discussed here.

The present study departed from recent research efforts (e.g., Hu and Chen, 2019; Chen and Hu, 2020a) in that it maintained an interest in the different semantic frame categories into which surprise markers can be classified. This allowed for the identification of genre and court-specific distribution patterns. For instance, whilst Hu and Chen (2019) found that research article authors most frequently used EXPECTATION markers, the present study found that TYPICALITY was the most used marker in judicial opinions. A surprise marker not present in Hu and Chen (2019) was also uncovered, i.e., IDIOSYNCRASY. Keeping the different semantic categories separate allowed for the identification of (dis)similarities that might otherwise have been overlooked. For instance, all three courts descriptively used the IDIOSYNCRASY frame for similar purposes (i.e., to report what legal counsel regarded as legally unique about a case). It is submitted that research efforts might benefit from maintaining an interest in the different semantic frame categories when investigating the discursive surprise in novel genres.

In terms of frequency distribution, no significant differences emerged between the respective courts in their frequency use of descriptive surprise markers. However, differences in the underlying discourse purposes for which the descriptive frames were used were apparent, i.e., judicial opinion writers in the appeal courts largely reported surprise expressed and experienced by legal counsel and judges in the lower courts; judicial opinion writers in the TC data largely reported surprise expressed and experienced by the litigants. These differences broadly align with the common law standard of review in which appeal courts focus on legal issues and trial courts focus on issues of fact. The findings underscore the need for greater sensitivity to the distinct writing practices and communicative purposes of different courts; legal discourse scholars should be careful not to treat judicial opinions as a monolithic genre (see McKeown, 2021: 234).

Significant differences emerged in the frequency distribution of performative surprise markers. Although all three courts most frequently used TYPICALITY markers, judicial opinion writers in the appeal courts used significantly more than in the TC. In the CFA data, an observable pattern emerged in which judicial opinion writers performatively used the TYPICALITY frame to justify controversial decisions; this involved the construction of a hypothetical scenario as surprising (e.g., enforcing judicial recusal – as in [Example 5](#)), which served as a discursive contrast for the court's preferred course of action. Judicial concerns for the sensitivities of the wider discourse community were apparent here. Given that fundamental rights often hang in the balance in constitutional law cases, legal advocates often need to challenge existing precedent in pursuit of their causes. It could be argued that judicial opinions involving the strategic use of surprise frames – where traces of the court's concern for sensitivities within the broader discourse community are apparent – point to areas of tension or conflict within the law that could serve as fruitful paths for future litigation.

In making decisions, judicial opinion writers rely on the submissions of counsel ([Malphus, 2014](#)). Given that the findings here showed that judicial opinion writers used surprise frames to justify decisions as situated within wider legal norms when writing briefs and making oral arguments, legal counsel may want to strategically emphasise the typical or unsurprising nature of their desired outcomes, particularly if those outcomes are novel or controversial. The findings also showed that judicial opinion writers in both appeal courts used the TYPICALITY frame to highlight atypical legal aspects of the current case (e.g., unusual actions taken by judges in lower courts – as in [Example 9](#)). This explained why the current case was subject to an appeal, i.e., atypicality was used to justify further judicial consideration. When trying to get a case considered for an appeal or avoid a problematic precedent, legal counsel may seek to emphasise the atypical or unusual elements of the case. The discursive construction of atypicality in cases where judges engage in hair-splitting (i.e., a practice in which judges focus on small distinctions between cases to avoid having to follow precedent) may be worthy of exploration by researchers.

Judicial opinion writers in the CA and TC data used significantly more EMOTION_OF_SURPRISE markers than those in the CFA. The influence of the common law standard of review was again apparent in the underlying discourse purposes for which the respective courts used the EMOTION_OF_SURPRISE frame. Judicial opinion writers in the CA data most frequently used the frame in relation to arguments made by counsel and things said and done in the lower courts (as in [Examples 7 & 8](#)). Judicial opinion writers in the TC most frequently used the frame in relation to surprising facts and incredulous evidential claims made by the litigants (as in [Example 10](#)). The articulation patterns observed in the more qualitatively oriented analysis of this frame suggest a future line of research, i.e., an exploration of humour, irony, and sarcasm in judicial opinion writing – forms of meaning not necessarily associated with the genre.

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Jamie McKeown: Writing – review & editing, Writing – original draft, Visualization, Validation, Supervision, Software, Resources, Project administration, Methodology, Investigation, Funding acquisition, Formal analysis, Data curation, Conceptualization.

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