

ACTORS AND ACTIONS IN PRENUPS AND CAPITULACIONES MATRIMONIALES: A CROSS-CULTURAL STUDY

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Abstract

The investigation of a corpus of American prenuptial agreements and Spanish *capitulaciones matrimoniales* shows how the popularity of premarital contracts is spreading everywhere. The American and the Spanish documents, juridically diverse in many aspects, embedded in two different legal systems, belong to the genre of contracts and are classified as a type of negotiation/mediation. The lexical and semantic analysis focuses on the specialized terminology used to refer to the human actors and their actions within the documents. The aim is to discover whether and how legal, intercultural and sociological divergences emerge from the textual context. Participants play several roles in the various semantic-pragmatic units constituting the contract, being in turn considered as contracting parties, married couple, notary public, parents, *esposos*, *padres*, and *otorgantes*. Their actions are highlighted by a punctual and proper use of verbal constructions and speech acts, such as asserting, signing, stipulating, agreeing. The study demonstrates how actors and actions do not stand autonomously and separately: they perform and fulfil a specific pragmatic function in a precise legal and cultural context.

Key words: prenuptial agreements, legal terminology, negotiation, mediation

1. Introduction

The growing popularity of premarital contracts, as a way to handle the financial aspects in the marriage in order to prevent possible future disagreements, is directly linked to the increasing number of divorces, a phenomenon spreading in several countries.

This paper, part of a more comprehensive research, aims at providing an investigation of a corpus of American prenuptial agreements and Spanish *capitulaciones matrimoniales*. The two institutions are juridically diverse in many aspects, being embedded in two different legal systems regulating life in two diverse cultures. The lexical and semantic analysis will focus on the specialized terminology used to refer to

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the human actors and their actions within the documents in order to discover whether and how legal, intercultural and sociological divergences emerge from the textual content. Starting from the observation that both prenuptial agreements and *capitulaciones matrimoniales* comply with the genre of contracts and employ elements of negotiation/mediation, this study will focus on the roles participants play in the various semantic-pragmatic units (Gotti 2005, 124) such as parties, married couple, notary public, parents, *esposos*, *padres*, and *otorgantes*, highlighted by a peculiar use of verbal constructions and types of acts, such as asserting, signing, stipulating, agreeing. Actors and actions do not stand autonomously and separately: they perform and fulfil a specific pragmatic function in a precise legal and cultural context.

2. Legal background

Prenuptial agreements, or prenups, are nowadays recognized in all fifty American states, although sometimes they may not be enforced and different degrees of juridical discretion may be exercised. The lack of uniformity among the states in the application of this legal institution seems to be the major feature. The states are divided into two groups, the *community property states* (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin) and the *equitable distribution states* (the remaining 41 states), which differently govern the way in which properties will be allocated within the couple in case of death or divorce. The Uniform Premarital Agreement Act (UPAA) in 1983 aimed at giving the states uniform guidelines, but it itself is currently not applied homogeneously (Al Mureden 2005).

The Spanish *capitulaciones matrimoniales* or “articles of marriage” identify the agreement between future spouses or married couples who decide to choose, modify or substitute their matrimonial property regime. All over Spain the stipulation of *capitulaciones* is regulated by the *Código civil*. The most common form is the Community Property Matrimonial Regime, *régimen de gananciales*, which is applied by default if nothing is agreed by the spouses, according to the *Derecho Común*. On the contrary, in some regions such as the Autonomous Communities as Catalonia, Balearic Islands, Aragon, País Vasco and Navarra, regulated by the *Derecho Foral (regional)*, in case of no agreement between the spouses, the Separate Property Matrimonial Regime, or *régimen de separación de bienes*, is applied by default.

There has been a steady growth in the amount of divorces in the last few years in Spain and this factor has brought about an increase in the number of couples deciding to settle their financial matters before the wedding (Lamarca *et al.* 2003), choosing the matrimonial property regime on their own rather than accepting the one applied by default in their place of residence, in case nothing is agreed upon.

The various legal differences and modes of application both in the USA and in Spain will not be dealt with here since that goes beyond the final aim of the present study.

3. Data and methodology

The data for this study is part of a wider corpus currently being built up and collected by the authors from specialized legal websites or kindly provided by law firms in the US and in Spain. It includes:

- a) premarital agreement from the State of Illinois (PREN1 henceforth);
- b) prenuptial agreement from the State of Texas kindly provided by the law firm Granstaff, Gaedke and Edgmon, P.C, San Antonio, Texas, (PREN2 henceforth);
- c) *modelo de acuerdo prematrimonial* (CAP1 henceforth);
- d) *modelo de capituciones matrimoniales* (CAP2 henceforth);

If four documents could seem a small corpus to carry out a quantitative analysis on the one hand, on the other they surely provide a large amount of material to be investigated from a qualitative point of view, especially when dealing with specific terminology or even with everyday terms which acquire a special connotation in a given legal context.

As already pointed out in a previous study on the matter (Denti, Giordano 2010), the different legal systems and social and cultural backgrounds account for the different overall organization of texts and the main sequential “semantic-pragmatic structures” (Gotti 2005, 124), or “conceptual units” (Garzone 2003, 188), which identify the several parts or sections in the agreements. Some of the conceptual units are explicitly covered in the American prenups, while they are not in the *capituciones* and vice versa. The documents surely belong to the same type of text, displaying many of the features typical of the genre of contracts, but different drafting rules and practices and legal frameworks interfere with the final result.

The documents will therefore be analysed contrastively taking into account the legislative frameworks of the countries where they are utilised, in a cross-cultural perspective in order to find out the existence of differences or similarities on the lexical and semantic level and to ascertain whether such dissimilarities can be the outcome of divergences in the legal system or differences due to cultural and social factors.

The theoretical framework within which the data is analysed includes the description of human actors proposed by Salmi-Tolonen (2003) and the taxonomy of speech act verbs suggested by Fraser (1975).

4. Participants or “human actors”

The first part of the present discussion will deal with the terminology used to refer to participants or legal subjects or, with Salmi-Tolonen’s words (2003, 324), “the human actors” performing some type of acts in the context of the agreement signing.

Human actors in the corpus can be classified into three large groups: contracting parties, official authorities, and third parties (see Table 1). Reference to them is made through the use of different lexical items according to their functions in the text which imply different actions they are supposed or required to perform in order to stipulate an agreement.

Participants or “human actors”	
American prenups	Spanish <i>capitulaciones</i>
CONTRACTING PARTIES	CONTRACTING PARTIES
party/parties Party/Parties Party A resident of beneficiary trustee surviving spouse deceased spouse omitted spouse spouses owner-spouse owner non-managing spouse respective Party	los reunidos los comparecientes los otorgantes los intervinientes los futuros esposos los cónyuges, ambos cónyuges los esposos, ambos esposos los consortes los padres la madre, el padre el progenitor, los progenitores el cónyuge titular del domicilio conyugal el cónyuge que tenga la custodia el cónyuge no custodio el progenitor no custodio
OFFICIAL AUTHORITIES	OFFICIAL AUTHORITIES
the court a mediator an arbitrator Notary Public attorney independent legal counsel witnesses	el Notario
THIRD PARTIES	THIRD PARTIES
children minor children children from other marriages successors heirs, assigns, personal representatives and all successors creditors	los hijos del matrimonio los hijos mayores de 12 años los menores

Table 1 Human actors in prenups and *capitulaciones matrimoniales*

4.1. The contracting parties in prenups

The opening statement in PREN1

“THIS AGREEMENT is made and entered into this ___ day of ____, 2004, by and between Lisa Renee Smith, a resident of Chicago, Illinois, and Ricardo Montoban, Jr. a resident of Madrid, Spain, who shall be collectively known herein as ‘the parties’”

introduces the contracting parties, providing their names and place of residence: each party is identified as a “*resident of*” and, therefore, both geographically and legally located. In both American prenups, the parties are either referred to by their first name

and surname or by “*the Parties*”, either capitalised initially, such as in “The Parties desire to make reasonable and sufficient provisions for each other” (PREN2), or in lower case, such as in “the parties desire to fix and determine various financial relationships that will apply during their marriage” (PREN1). The terms “*party/parties*” (PREN1) and “*Party/Parties*” (PREN2) are utilized consistently throughout the two prenups. In PREN2 parties are often referred to by their proper names (which recur more frequently than in PREN1) or by the expression “*either Party*” when they are taken or considered individually. Similarly, in PREN1, they are referred to as “*each party*” or “*either party*” when considered individually and “*both parties*” when taken collectively as a couple.

The subsections “Contributions and accumulations in retirement plans and accounts” (PREN2) and “Contributions to Retirement Accounts” (PREN1) identify each party as the “*plan beneficiary*” (PREN1) or as a “*participant or owner of such retirement account*” (PREN2). The expressions “*surviving spouse*”, “*deceased spouse*”, “*deceased party*” or “*omitted spouse*” are used in the section “Waiver of Rights Upon Death” (PREN1) to identify the contracting parties and their rights and duties in the event of death of one of the spouses. In some cases, the surviving spouse can be nominated “*executor or personal administrator*” (PREN1) of the deceased spouse’s Last Will.

The terms used to identify the party are therefore context-dependent: the change of context brings about a change in the function of participants, thus the contracting parties take on a different role. The same happens when the agreement deals with the assets or liabilities of the parties considered as a married couple and the expressions “*spouses*” or “*owner-spouse*” are used in contrast with the terms “*owner*” and “*non-managing spouse*”, employed when dealing with separate property management (PREN2). In particular, the expression “*respective Party*” is utilized when coping with “Separate property to remain separate property” in PREN2.

It can be concluded that all the lexical items referring to the contracting parties regarding rights and duties on properties and assets all belong to the financial field. This is in accordance with the peculiar “financial character” of American prenups in which alimony, debts, common family expenses, retirement plans, pensions and wills are the matters at issue. However, they cannot provide for children’s support, custody and education, especially if limiting their rights, since these issues cannot be contemplated in American prenups.

4.2. The contracting parties in capitulaciones

In the first Spanish document under scrutiny (CAP1), the opening statement defines the contracting parties as “*los reunidos*” of whom proper names and personal details are provided. The lexical item “*los reunidos*” is utilized each time the parties are fulfilling their legal duties appearing before a notary public in order to discuss and agree on some future conditions in case of separation or divorce. The last statement in CAP1 closes the agreement underlining the parties’ will to sign all necessary legal documents and to ratify them before a judge for the agreement to be enforceable:

“(…) el presente constituirá el convenio de separación o divorcio, obligándose los reunidos a firmar cuantos documentos públicos o privados sean necesarios y en todo caso a comparecer en la presencia judicial para su ratificación”.

The terms “*los futuros esposos*”, “*los cónyuges*”, and “*los consortes*” are employed throughout the text to refer to the parties as an engaged pair aiming at getting married, and as a couple either married or already divorced, and their repetition conveys internal cohesion to the document.

The most striking difference between CAP1 and the other documents under scrutiny is the presence of provisions for the couple’s children. The very first article of marriage in CAP1 contemplates the possibility of “*separación*”. Therefore, the parties are considered “*el cónyuge que tenga la custodia*”, the spouse who will win child custody, who can become “*el cónyuge ocupante*” if he/she decides to live in the matrimonial residence after separation; or “*el cónyuge titular del domicilio conyugal*” and “*el cónyuge que ostente la propiedad de la vivienda*”, meaning the spouse who can demonstrate to be the legal owner of the matrimonial residence.

The second article in the agreement, distributed in several sub-sections all dedicated to the couple’s children, “*los hijos del matrimonio*”, changes the role of the contracting parties completely, showing again how the choice of the terms referring to the parties is context-related. When the parties are considered collectively as parents, they are referred to as “*los padres*” or “*los progenitores*”; when each party is considered individually can be either “*el padre*”, “*la madre*”, “*el progenitor*”, “*el cónyuge no custodio*” and “*el progenitor no custodio*” (alternatively the father or the mother or the spouse who has or has not child custody). The financial aspects leave the floor to the legal aspects but also to the practical matters linked to the parents-children relationship and to everyday life, foreseeing parental legal custody, “*guarda y custodia*” or “*patria potestad*”; visitation to the children, “*régimen de visitas y estancia*”; custody during weekends, “*fines de semana*”, Christmas and Easter holidays, “*vacaciones escolares de Navidad y Semana Santa*”, summer holidays, “*vacaciones estivales*” and even parents’ work holidays, “*vacaciones laborales*”.

On the contrary, reference pattern to the contracting parties in the second Spanish document (CAP2) is far less complex (Denti, Giordano 2010, 121). Throughout the text, “*los futuros esposos*” establishes the identity of the parties as an engaged couple committing themselves to perform some joint legal action, such as sharing the burdens of marriage or “*las cargas del matrimonio*”. When their individual duties and legal rights and obligations are at stake, each spouse, “*cada uno de los futuros esposos*”, is considered separately.

When the contracting parties are considered as legal subjects who appear before the notary in order to sign and execute a public instrument such as the articles of marriage, they are defined as “*los comparecientes*”, “*los otorgantes*” or “*los intervinientes*”.

4.3. Official authorities

The second group of human actors includes the notary public, the attorneys, the independent legal counsels and even the witnesses.

The notary is the official authority *par excellence* in both American and Spanish documents: his presence and official duties assure legal validity to the agreement stipulation and signing.

In PREN1 the final statement is the Notary's declaration, introduced by the use of the first person singular pronoun which confers authority and legitimacy to the whole document:

"I, the undersigned, a Notary Public authorized to administer oaths in the State of Illinois, certify that (...).
IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this ____ day of October, 2004".

In PREN2, final ACKNOWLEDGMENTS recite as follows: "BEFORE ME, the undersigned Notary public in and for the State of Texas, on this day personally appeared (...)"

Similarly, "*el Notario*" in the *capitulaciones matrimoniales* becomes an active actor: his/her official functions include introducing the parties, acknowledging their identity and their will to marry, mediating, signing and sealing the agreement with the fixed closing formulas. In CAP2, he/she introduces the parties in the first statement "*ANTE MI, _____ Notario del Ilustre Colegio de Madrid (...) comparecen (...)*" meaning "before me, the Notary (...) appeared..." followed by the parties' proper names. Later in the same document, the notary legitimizes and swears upon the legal validity of such public instrument attesting the parties' legal capacity and their free consent to the agreement (Denti, Giordano 2010, 122).

Differently from the Spanish *capitulaciones*, American prenups foresee the possibility to consult an expert, who assists the parties in understanding the agreement content and in complying with the formalities which make it valid and enforceable. After the ACKNOWLEDGMENT by the Notary, the CERTIFICATION OF ATTORNEY is uttered and signed by both parties' attorneys as follows:

"I certify that I am an attorney at law, duly licensed and admitted to practice in the State of Texas; that I have been employed by _____ (...) and that _____ has acknowledged his full and complete understanding of this agreement and its legal consequences, and has freely and voluntarily executed the agreement".

In addition, in PREN2 "*witnesses*" as well hold an official role within the documents, and "*the court*", a "*mediator*" and an "*arbitrator*" are introduced when suggesting the resolution of a dispute through Alternative Dispute Resolution methods such as mediation or arbitration (Denti, Giordano 2010, 119).

4.4. Third parties

The third group of participants in the American prenups includes "*children*". Though, children support is not dealt with since "Nothing in this agreement shall be construed as relieving either party of an obligation to support their minor children" (PREN1). PREN2 mentions "*children from other marriages*", and, with reference to the couple's children support it is specified that "The provisions of this agreement are not intended to adversely affect the right of any child of this marriage to child support".

In both American documents, “*successors*”, “*heirs*”, “*personal representatives*”, and “*assigns*” are examples of the third party (Denti, Giordano 2010, 119)

“This Agreement (...) is binding on the Parties and their respective heirs, personal representatives, successors, and assigns.” (PREN2)

As already explained, CAPI is the only premarital contract among those under scrutiny which explicitly deals with the issues related to child custody and the rights and duties influencing the relationship between divorced parents and minor children, or “*los menores*”. The couple’s children, or “*los hijos del matrimonio*”, are introduced in Section A of the first article. The children’s mother, “*la madre*” will be responsible for child custody in case she decides to reside in the same town where the matrimonial residence is placed, and especially if the father, “*el padre*”, decides to move elsewhere. In this case, children represent just passive actors for whom parents are supposed to make decisions. On the contrary, in Section B of the second article of marriage, children older than twelve, “*los hijos mayores de 12 años*” become active actors since they are capable of choosing freely their custodian parent, or “*progenitor que libremente elijan*”. Joint custody is generally mentioned and preferred when minors are involved: custody should be “*compartida por ambos cónyuges*” meaning collaboratively shared between the parents.

5. Actions

The second part of the analysis has focused on the actions performed by the contracting parties, the official authorities and the third parties present within the documents. The actions present in Tables 2 and 3 have been chosen with reference to either their occurrence frequency or their semantic role within the text. The aim of this analysis was to highlight the position of the actors towards the propositions, i.e. what was being decided upon.

In order to investigate the actions performed by the actors to stipulate the agreement and make it enforceable, according to Fraser (1975, 189-193) the speech act verbs in the documents were categorized as follows (an example is given for each speech act):

- Asserting – evaluating the suitability of what is expressed in the context and supporting the truth of what is expressed: “Each party acknowledges an opportunity to view said financial information prior to execution of this document” (PREN1);
- Evaluating – appraising and judging the truth: “I, the undersigned, a Notary Public (...), certify that Lisa Renee Smith and Ricardo Montoban, (...), declared to me that they had willingly signed and executed the instrument as their Prenuptial Agreement” (PREN1);
- Reflecting speaker’s attitude – expressing the reaction to previous or following acts expressed by the proposition: “The Parties desire to make reasonable and sufficient provisions for each other (...)” (PREN2);
- Stipulating – expressing a position towards the specificities of what is uttered: “John Doe (...) and Jane Doe (...) have entered into an Agreement with respect

to such marriage for the following reasons and with reference to the following facts (...)” (PREN2);

- Requesting – asking the other actor for a response: “*La patria potestad sobre los hijos será compartida por ambos cónyuges*” (CAP1) (both parents will share their children’s support);
- Suggesting – expressing the wish for the other actor to consider the value of what follows: “I certify that I am an attorney at law, (...) and that I have advised him with respect to this contract” (PREN2);
- Exercising authority – expressing rights or powers to be established and exercised by the actors: “(...) *yo, el Notario, DOY FE*” (CAP2) (and, I, the Notary Public, guarantee);
- Committing – expressing obligations to be defined and respected: “(...) *que tienen intención de contraer matrimonio en (...), el día (...)*” (CAP2) (that intend to get married in ..., on ...).

However, even if Salmi-Tolonen (2003, 326) argues that this can only represent a general framework referring to ordinary common speech rather than to legal language events, Fraser’s taxonomy of illocutionary acts (1975, 189-190) perfectly adapts to the present study. As a matter of fact, the author specifies that along with the *vernacular performatives*, term used to refer to acts of a general, everyday variety, the *ceremonial performatives* exist, meaning those verbs which belong to some codified and conventionalized activities such as those pertaining to the legal, religious, business, government, and sport fields.

5.1. Actions in prenups

After classifying the American prenups’ speech acts following Fraser, Table 2 was drawn to represent the analysis results: some of them appear only in one of the documents, and that is specified in brackets.

Actions in American prenups				
ACTION	ACTORS			TYPE OF ACT
	Contracting parties	Official authorities	Third party	
acknowledge	X			asserting
acquire property	X			exercising authority
act	X	X (PREN2)	X	exercising authority
administer		X		exercising authority
advise		X (PREN2)		suggesting
agree, covenant	X			committing, exercising authority, reflecting speaker’s attitude

Actions in American prenups				
ACTION	ACTORS			TYPE OF ACT
	Contracting parties	Official authorities	Third party	
appoint	X (PREN1)			exercising authority
assume	X (PREN2)			committing
certify		X		evaluating
define	X (PREN2)			stipulating
desire/wish	X			reflecting speaker's attitude
disclose, make disclosure, examine disclosure	X			asserting, evaluating, exercising authority
dispose	X			exercising authority
elect	X (PREN1)			evaluating, stipulating
enter	X			stipulating, committing
execute	X			committing
express intention to get married and to stipulate the agreement: <i>intend to, plan</i>	X			committing and stipulating
explain		X (PREN2)		asserting
fix and determine	X			evaluating, stipulating
give up, waive	X			exercising authority
indemnify	X			stipulating
make	X	X		exercising authority
order		X (PREN2)		requesting
own	X			asserting
pay, make payment	X			stipulating
request	X			requesting
schedule		X (PREN2)		stipulating
select	X	X	X	stipulating
sign	X	X (PREN1)		committing
submit	X			committing
undersign		X		committing

Table 2 Actions in American prenups

As it can easily be observed from Table 2, most actions are performed by the parties, as they represent the main actors within the document, those mostly involved and affected

by the agreement. They try to foresee all possible outcomes and future events in their marriage and in their potential divorce, and the provisions to deal with them. They state their present and future rights and duties, but also evaluate: “each party has had the opportunity to fully examine the financial disclosures of the other party” (PREN1). In the example

“each Party expressly waives in this written instrument any right to disclosure of the property or financial obligations of the other Party beyond the disclosure provided in this instrument as summarized in Schedule A” (PREN2),

the parties’ intent is to exercise their authority to maintain their separate property separate both during their marriage and in case of divorce.

In particular, committing, exercising authority and stipulating are the most common performative acts, denoting the text as formal, objective, precise and impersonal: verbs such as *agree*, *covenant*, *appoint*, *dispose*, *execute*, *intend to*, *plan*, *sign* and *undersign* typically belong to the field of legal discourse and in particular identify and ascribe these texts to the genre of contracts.

Official authorities mostly carry out formal actions, such as representing and acknowledging the parties, certifying the legality and ratification of the document, and counseling actions, as they hold the role to advice the parties and make sure they understand their rights and duties. “IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my official seal this ___ day of October, 2004” underlines the commitment of the Notary Public who places “himself under an obligation to bring about the state of affairs expressed in the proposition” (Fraser 1975, 193).

The third party, mainly children and successors, are barely represented in Table 2, as they are essentially a passive party, upon whom the parties’ obligations fall, as it is evident in the following examples “This Agreement will bind and inure to the benefit of the respective heirs, personal representatives, successors, and assigns of the Parties” and “The provisions of this agreement are not intended to adversely affect the right of any child of this marriage to child support” (PREN2).

A particular archaic verb form which is worth mentioning is *WITNESSETH* in capital letters in PREN1, an instance of asserting act, introducing the subsequent five premises, each one starting with the adverbial *whereas*, typical of contracts.

5.2. Actions in capitulaciones

The same closer analysis on the performative verbs was conducted for the Spanish *capitulaciones matrimoniales* which display many of the several elements typically present in those texts drafted according to the rules of *el español jurídico*.

As it can be seen from Table 3, in the *capitulaciones matrimoniales* analysed, the parties are again the most important players.

Actions in Spanish <i>capitulaciones</i>				
ACTION	ACTORS			TYPE OF ACT
	Contracting parties	Official authorities	Third party	
<i>comparecer, reconocer</i>	X			asserting
<i>acreditar</i>	X (CAP1)			evaluating
<i>acuerdo, convenir, pactar, consentir, coincidir</i>	X		X (CAP1)	exercising authority, reflecting speaker's attitude
<i>compartir</i>	X (CAP1)			requesting
<i>conservar, tener, quedar, continuar</i>	X			asserting
<i>contribuir</i>	X			exercising authority
<i>corresponder</i>	X (CAP1)			evaluating, stipulating
<i>dar fe</i>		X (CAP2)		exercising authority
<i>decidir</i>	X (CAP1)			evaluating
<i>declarar</i>	X (CAP2)			asserting
<i>efectuar pagos y saldar, pagar</i>	X			exercising authority
<i>ejercer derechos</i>	X (CAP2)			exercising authority
<i>elegir</i>			X (CAP1)	exercising authority
<i>ser deseo de</i>	X (CAP1)			reflecting speaker's attitude
<i>establecer</i>	X (CAP1)			evaluating
<i>exponer</i>	X			asserting
<i>tener intención, pretender celebrar, contra matrimonio, otorgar capitulaciones matrimoniales</i>	X			committing, stipulating
<i>facilitar</i>	X (CAP1)			committing
<i>firmar</i>	X			committing
<i>independizar</i>			X (CAP1)	asserting, exercising authority
<i>intervenir</i>	X (CAP2)			requesting, exercising authority
<i>obligar</i>	X (CAP1)			committing
<i>pasar</i>			X (CAP1)	exercising authority

Actions in Spanish <i>capitulaciones</i>				
ACTION	ACTORS			TYPE OF ACT
	Contracting parties	Official authorities	Third party	
<i>permanecer</i>			X (CAP1)	exercising authority
<i>permitir</i>	X (CAP1)			exercising authority
<i>reconocer</i>	X (CAP2)			asserting, exercising authority
<i>respetar</i>	X (CAP1)			reflecting speaker's attitude
<i>ser responsable</i>	X (CAP2)			committing
<i>solicitar</i>	X (CAP2)			exercising authority
<i>tener informado</i>	X			asserting

Table 3 Actions in Spanish *capitulaciones*

However, as already mentioned, differently from the American prenups, Spanish texts better distinguish participants and actions using different lexical expressions to identify the actors according to the specific performative act they are carrying out in a particular context within the stipulation of the agreements: they do not act simply as parties agreeing on financial matters through a contract, but they take on the role of parents and legal custodians of minors who make provisions for their children's future life and legal rights. For example, the verbs "*EXPONEN*" and "*CONVIENEN Y PACTAN*", capitalized in the introduction of both texts, in the third person plural, underline the parties' joint action of meeting to present and explain some facts, to reach an agreement and to make decisions which will rule their relationship in case of separation or divorce.

One of the most evident differences between the American prenups and the Spanish *capitulaciones matrimoniales*, despite the brevity of texts if compared to the lengthy American documents, is the higher number of acts exercising authority such as *acuerdar*, *convenir*, *pactar*, *ejercer derechos*, *permitir*, *reconocer*, *solicitar* (see Table 3). This is due to the fact that in CAP1 much space is devoted to the management of children's issues, and thus to the parents' obligations as a couple or as divorced parents, counterbalanced by their rights. Instead, in CAP2, the listing of the future spouses' specific rights and responsibilities is given with reference to the administration of each spouse's property, stating that each

"podrá ejercer todos los derechos y acciones inherentes a dicha libre administración, judiciales o extrajudiciales, como cobro de rentas, intereses y cupones, celebración de contratos, rescisión de los mismos, efectuar pagos y saldar cuentas (...)".

On the contrary, while asserting acts are higher in number, stipulating ones are definitely lower. Thus, the text results less formal, a little more personal, but gives the parties, in particular, fewer opportunities to choose.

Official authorities, as already seen in American prenups, function as an intermediary entity between the spouses, making sure that what is included in the documents is expression of the future spouses' wills and is carried out in observance of the standard legal procedures and in compliance with one's duties. The only speech act "*yo, el Notario, DOY FE*" (CAP2) exercised by the notary, is at once his sole intervention and the most relevant and significant act without which the other actions cannot have substance or validity, since it guarantees for the truth and legality of the document. Throughout the text, the role held by the notary in the stipulation of the contract is expressed through other word classes, such as "*ante mí*", before me, "*a mi juicio*", in my opinion, more than through actions or performatives.

The only actions performed by children in their role of active participants, and not passive recipients, are instances of exercising authority act as, in Fraser's words (1975, 192), "the speaker's proposal" is "to create a new state of affairs by exercising certain rights or powers". Examples from (CAP1) are "*Los hijos mayores de 12 años permanecerán bajo la custodia del progenitor que libremente elijan*" in which children older than twelve can exercise their right to choose their parental custody and "*En la medida en que los hijos cumplan la edad de 14 años el régimen de visitas será el que libremente pacten los hijos y el progenitor no custodio*", in which fourteen-year-old children can even "*pactar*" or arrange and stipulate with the non-custodian parent the schedule for visits.

6. Modal verbs

Modal verbs require a separate discussion which integrates the previous paragraphs. They often enforce, but sometimes change, the meaning of the verb they accompany.

Prenups belong to the genre of contracts, they contain rules of conduct to regulate the consequences of certain conditions. They are also "normative texts which prescribe a specific course of action than an individual ought to conform to or (...) will be subject to sanction" (Šarčević 2000, 9). They lay down what the parties *shall, shall not, may* or *may not do* (PREN1 and PREN2), i.e. obligations, prohibitions, authorizations.

Many scholars have argued that Spanish does not really have modal verbs apart from *poder* and *deber*, identifying a certain degree of possibility and necessity. It is also true that *haber de, haber que* and *tener que* followed by the infinitive express obligation, while *deber de, tener que, venir a* followed by the infinitive also express possibility/probability (Klein 1968, 7). In the sentence

“(...) *Que siendo el deseo de los reunidos convenir las condiciones por las que se habrán de regir ante una eventual separación legal o de hecho o divorcio de su matrimonio*”
(CAP1),

se habrán de regir expresses the parties' obligation to rule their potential separation or divorce through the terms agreed upon in the *capitulaciones matrimoniales*.

Moreover, tense variation may lead to a sort of correspondence between the two languages. For example, *puede* (present indicative) translates "can/may", while *podría* (conditional) stands for "could/would be able to", and *podrá* (future) means "will be able

to". In the statement "*Por tanto, cualquiera de los dos futuros esposos, (...), podrá ejercer todos los derechos y acciones inherentes a dicha libre administración (...)*" (CAP2) "*podrá ejercer*" entails that each spouse will be able to/will be allowed to freely administer his/her personal property. This is supported by the quantitative analysis of our documents, that highlights primarily the use of the future tense to express prescription in Spanish, very common in *español jurídico*, and of *shall, will, may* in English. We found the following main instances: *podiesen* 1, *puedan* 1, *pusieran* 1, *podrá* 2, *podrán* 1, *ha de* 2, *habrán de* 1 (CAP1,2); *be to* 2, *could* 1, *may* 29, *must* 5, *shall* 66, *should* 5, *will* 44 and *would* 3 (PREN1 and PREN2).

In legal English, the form *be to* has a semi-modal function (Williams 2005, 114), as it can be inferred from the following example:

"(...) all property designated as "Separate Property" in this agreement shall be exempt from claims, and is not to be classified, as "community property", "quasi-community property", or "marital property" under state law" (PREN1).

Shall is the most frequent modal, as we would expect having to deal with legal texts. It represents an order, a direction such as in "The Parties agree that each of them shall retain full possession, control, and management of his or her separate property" (PREN2). *Will*, instead, is normally used just as a marker of future tense, opposed to *shall* "which normally conveys an unmistakably prescriptive quality to the verbal construction" (Williams 2005, 114):

"The Parties agree that the property listed above and all increases in value of all such property (...) shall remain the separate property of the Party owning it. The Parties agree that they will use their best efforts to keep the property of the Parties as separate property by any means necessary" (PREN2).

May has the principal meaning to give discretionary power (Williams 2005, 121) as it happens in "This Agreement may be modified, superseded, or voided only upon the written agreement of the parties" (PREN1).

Must, which is the modal mostly associated with obligation in common English, is less common in legal English than *shall*. However, Williams (2005, 123) argues that being *shall* so frequent, "*must* tends to be preserved for cases where expressing strong mandatory obligation or urgent necessity". When foreseeing the possibility to modify the Agreement, it becomes essential to specify that "Such written Agreement must specifically refer to this Agreement" (PREN2).

Should is also hardly used as it implies some ambiguity, uncertainty and personal judgment and might sound as a suggestion of how to behave in certain circumstances, not having a binding character, as in the example "(...) any conflict or controversy that may arise regarding this agreement, its interpretation, or its application should be resolved amicably by the Parties" (PREN2).

As for the use of negative forms, *shall not* expresses prohibition as well as *may not*. *Shall not* is more frequent than *may not*: 4 instances in each prenup of the former against one single one of the latter in PREN2.

7. Conclusions

The contrastive study and the results obtained allow some conclusions to be drawn. The different legal systems and the different cultural background underlying the stipulation of premarital agreements in the different cultures certainly explain many of the linguistic features both at a textual level and at a lexical-semantic level. The employment of different terminology to refer to participants is strongly context-related: participants take on different roles and acquire different semantic connotations according to the different scenario in which they act: each section or article in the agreements sets up a different situation in which participants are supposed to perform a certain action. Contracting parties are therefore at one and the same time legal subjects, engaged pair, married couple, divorced couple, parents, owners, heirs or successors depending on the section or clause in the agreement under consideration.

The larger number of acts found in the documents under scrutiny are acts expressing authority, both exercised by the parties in their stipulation of a contract, as active participants, or by the legal rules under which they are supposed to act and behave in certain circumstances. Therefore, acts expressing authority are exercised not only by the official authorities such as notaries, attorneys, and legal counsels (especially in the American documents), as one could expect: parties themselves, in their capacity of legal subjects, are entitled to stipulate a contract and lay down provisions and conditions to regulate their future life and marriage. Moreover, the Spanish documents show how acts of authority can be exercised by children who are not only passive recipients of their parents' decisions, but can also become active participants in the settlement and organization of their future everyday life in case of family dissolution.

The very nature of premarital agreements is exploited in both American and Spanish texts: all of them provide for a series of performatives aiming at regulating marriage and its dissolution whilst helping parties to prevent, both consciously and responsibly, possible conflicts through anticipatory measures in order to avoid resorting to a tribunal for the resolution of a future dispute.

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