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FACULTY OF LETTERS

TRADITION AND CHANGE IN LEGAL DISCOURSE: A PRAGMATIC DESCRIPTION OF THE CONTRACT IN ENGLISH, FRENCH AND ROMANIAN BASED ON A CORPUS OF COMPARABLE TEXTS

ABSTRACT

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Keywords: legal linguistics, contractual communication, standards of textuality, intertextuality, legal discourse, formalism, clarity, vague, speech acts

In 1963, one of the first books devoted to legal language, *The language of the law* by David Mellinkoff, was describing the observation made by legal historians that "(legal) language is no mere instrument which we can control at will; it controls us". This surprising remark has made us reconsider the relation between language, the legal system and professional practices.

The legal language and the science of the law are so closely interconnected that it is almost impossible for the researcher to break them apart. Legal language has been the expression of the law and it is the most crucial mechanism for creating and recreating a body of rules. But it is equally true that the law has continuously influenced the means of legal expression simply because the legal language had to adapt to new situations and to the demands of clarity, precision and concision of the law.

Considering this particular aspect of the legal language, our research addresses from a multidisciplinary perspective a type of legal document which has been ignored over the years by the literature but which is relevant in all legal systems and in everyone's daily life: the contract. Designed as a pragmatic and linguistic analysis, our project provides a complete description of the linguistic features of contracts and argues in favour of recognizing a separate legal text typology of private law documents in the hierarchy of legal genres.

In our project, contracts written in three different languages, English, French and Romanian, drafted according to the legal norms specific to different legal traditions, are analysed so that we may identify which are the linguistic constraints related to the genre and which are the features specific to each of the three legal traditions.

The comparison between the contract written in English, in French and in Romanian begins with the basic structural unit of the contract: the contract clause and continues at macro-structural level where the contract is a analyzed in relation to the realization of the seven standards of textuality.

Overall, the thesis is structured in 5 chapters, 325 pages and 9 appendix. The analysis of the data is also presented with 37 tables, 13 illustrations and 231 examples extracted from the research corpus. The research was done in two steps: a first step dedicated to the creation of a corpus of private law documents (chapter 1) and to the theoretical comparison between the three

legal systems (chapter 2) and a second step dedicated to the linguistic analysis of the three sub-corpora (chapter 3, chapter 4 and chapter 5).

The first chapter, **The creation of a corpus of private law documents**, discusses the advantages and the limitations of corpus-based studies of legal language, presents an overview of the legal corpora already designed and reveals the need for a representative corpus of private law documents. Therefore, the chapter is dedicated to the creation of a corpus of comparable texts, it addresses the problems encountered during acquisition and edition which are inevitable to the legal domain and it presents the research tools adequate for a comparable, multi-language corpus.

The corpus includes contracts written in English, French and Romanian and consists of 657 authentic contracts (1,171,924 words) written by notaries and solicitors between 1950 and 2014. Although the size of the corpus may seem insufficient, especially in comparison with other massive legal *corpora* which are used in legal research, the corpus remains representative for contractual communication because the contract is a form of institutionalized communication which follows recurrent patterns of language and which presents only slight variation from a type of contract to another. The form-function correlations being almost formulaic, a small and carefully targeted corpus is representative.

The second chapter, **Overview of the English, French and Romanian legal systems**, describes the socio-pragmatic situations in which contracts are drafted and applied. The chapter presents some of the factors influencing the language and the structure of contracts: 1) **the legal systems,** which govern both the conditions for the conclusion of the legal document and the legal effects produced by the document. 2) **the legal professions** involved in the legal negotiation and in the drafting of legal documents as the language of the law is highly influenced by those who produce the law and by those who are involved in creating and describing legal relationships, 3) **the courts of law and the judges** which may have an active role in interpreting the contract.

This chapter explains the construction of the corpus, the choice of the sources and the type of documents selected and anticipates the uneven use of linguistic devices between the three languages due to the differences revealed by the professional know-how.

Chapter 3, **The contract as a legal text and as a legal genre**, describes the individual profile of the contract which is on one hand anchored in the legal drafting tradition but which is equally in a process of continuous evolution and modernity.

The first part of the chapter 3 is dedicated to a description of the different taxonomies of legal text-types described by Werlich, De Beaugrande, Reiß, Bocquet, Cornu, Gémar and Kjaer in order to observe whether the contract is assimilated to other categories of legal documents and therefore does not need a separate linguistic description or whether it belongs to an individualized category and consequently should be described as having particular, text-specific linguistic features. None of the taxonomies described refers to private law documents, or to contracts in particular as part of a separate category. Therefore, on a basis of two criteria: 1. the function of the legal text in the legal culture and 2. the type of legal relationship established, we argue in favour of a tripartite hierarchy of legal texts which includes the contract in the third category: 1. *normative prescriptive* texts, 2. *judicial applicative* texts, 3. *private law mainly prescriptive but also informative* texts.

In chapter 3, the analysis focuses on the textuality of the contract. The research describes the realization of the seven standards of textuality – cohesion, coherence, intentionality, acceptability, informativity, situationality and intertextuality – and discusses their production in relation to the legal language in general and in relation to the features of the individualized legal system. The premise is that while cohesion, coherence and intertextuality are achieved in different ways in the three languages because of the different norms of reception and interpretation of the contract imposed by the law, the other standards will be shared by all the contracts under scrutiny.

The last part of the chapter is dedicated to the description of the contract as a legal genre. The legal agreement is a recognizable communicative event expressed in writing for the purpose of creating or extinguishing legal obligations. The contract is drafted by a member of the professional community according to conventionalized constraints which explain why the contracts drafted in all three languages share a complex macrostructure, a certain type of phrase structure and a specific typography.

The similarities and the discrepancies between the three sub-corpora are closely linked to the professional practices established within the professional community of notaries and solicitors and to the functional macro-structure of the contract. For instance, on one hand isolate a common macro-structure in all three languages: *title*, *general provisions*, *special provisions*, *signatures.* On the other hand, we have identified a number of differences which are the result of the interaction between the legal language and the legal system: the use of a table of contents and of a section of definitions in English contracts, the use of conclusive descriptive clauses in French and Romanian contracts.

Concerning our observations regarding the macro-structure of contracts, one of the most obvious system-adapted-drafting-techniques is the uneven use of titles: the French and the Romanian contracts begin with a precise title "*contract de vânzare/ contrat de vente*" which defines the legal relationship described while the English contract begins with a generic title *"1) *** and 2) *** Agreement relating to the ***"* which is more opaque and less rigid.

In chapter 4, **The language of contracts: a linguistic comparison with normative discourse**, the researcher argues that some features described by the literature regarding the legal discourse in general do not apply to the contract as well. The data collected confirms the linguistic singularity of the contract: the linguistic mechanisms used by the legal drafter in the contract accomplish the requirements of formalism and clarity but unlike other legal genres which are written in an impersonal and generic style, the contract reveals itself as subjective and specific.

Overall, the data reveals that the legal discourse of the contract is formal due to a complex phraseology and a consistent use of specialized vocabulary without being defined by an extensive use of archaic formulations and Latin expressions which are rather frequent in legislation for instance. These archaic expressions are obsolete in Romanian contracts, very rare in French contracts. They do occur in English contracts but their use is limited to expressions which have become rather frequent in common English and therefore, do not confer an obscure and inaccessible style to the contract.

A second feature extensively described by the literature is the question of impersonality and objectiveness of the legal language. The data provided by our corpus has revealed a number of passive constructions which occur in all three language but only in legal clauses where the agent is not important or when the main focus of the text-receiver must be on the object of the legal action. Moreover, the use of nominalizations is linked to the efforts of the legal drafter of producing a legal text which is not excessively redundant in expression and where the terminological variation still provides for clarity and consistency. One is therefore persuaded that neither passive constructions nor nominalizations are used to confer impersonality to the contract. The contract remains one of the few legal texts written in a personal and subjective style.

The inquiry regarding the features of clarity and precision in the legal agreement has revealed two rather surprising methods used by the legal drafter. At first, the legal drafter includes complex and complete definitions, repetitions and enumerations which are meant to clarify the content of the written legal agreement. However, in trying to produce the most comprehensive and litigation-proof document, the legal drafter mistakenly or intentionally introduces linguistic devices which may confer ambiguity and vagueness to the contract.

In chapter 5, **Speech acts and Contract formation**, the contract is described a type of legal document which creates or extinguishes legal rights and obligations. The individuality of the contract in comparison with other legal documents and all the linguistic observations anticipated above are closely connected to the functional roles of the contract which are *to perform* and *to inform*. This particular kind of legal document is designed to accomplish two objectives: 1. to create legal relationships in which the parties commit themselves to exchanging rights and obligations and 2. to inform the general public and other legal specialists that a relationship has been established and produces legal effects.

Considering the performative nature of the contract, the last objective of the research is to describe the contract as a series of cooperative speech acts which enable the parties to perform legally binding actions.

Analyzed at first from an integrative perspective, the accomplishment of the written contract is perceived as an interaction between two cooperative master speech acts: the formation of the contract depends on the meeting between the offer and the acceptance of the offer. The research continues in an expository perspective where the contract is an amalgamation of speech acts expressed through individual contract clauses, each of them endowed with illocutionary force. This analysis of illocutionary acts reveals the fact that the contract has a performative function as long as the parties sign the written documents and confirm its content in writing; and the legal professional confirms the accomplishment the legal procedure necessary for the validity of the contract.

To conclude, the present research on an institutionalized form of contractual communication describes a continuous interaction between the law and the legal language which must comply with tradition and adapt itself to change.

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