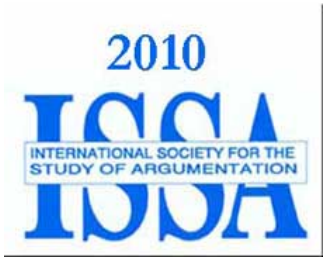
ISSA Proceedings 2010 – The Absence Of Reasons



In 2003 I started my fieldwork in two law firms. As a part of a comparative ethnographic research project, my objective was to follow criminal cases in their preparation and performance. In addition, one of my own research questions was, how argument themes are prepared and tested during this course of preparation. I was looking for the becoming of arguments. The very first case I encountered was one of child killing. A young woman, already mother of two and married, hid her pregnancy, gave birth in a back yard, covered the newborn with leaves and left. The child was found dead three weeks later. This was certainly a case, especially as my first case, that was difficult to deal with for emotionally. But also with respect to my research question, this case was remarkable: What first frustrated and then struck me as quite significant was the lack of reasons given in this case. It is this absence of reasons that I want to explore in this paper.

In legal procedures argumentation is often viewed as the central means to establish rationality and legitimacy. This assumption is important, even if one would take issue with it, as it has meaning in the field, if only counterfactually. The professional participants in the field work on the assumption that the giving of reasons is essential for the legal procedure, especially in criminal cases.This notion that is at work in the field can be explicated by Habermas' notion of procedural rationality (1998). This procedural rationality in the legal realm incorporates the concept of communicative rationality. Similar to Habermas, Alexy's work in legal argumentation (1983) and also the work done in the context of Pragma-Dialectics can be conceived of as subscribing to a procedural rationality (see Feteris, 1999, pp 163). Following this notion, legal proceedings can claim to be rational, if they adhere to certain (normatively formulated) rules of communication as in the ideal speech situation or the rules for critical discussions. One of the basic rules is, that interactants have to give reasons when asked for them. It is through reason giving that legal procedures attain legitimacy.

This is especially true for German criminal cases with guilty verdicts, where

reasons are attached to motives and where the motivation of the defendant is central for the evaluation by the judge. An acquittal, on the other side, is never accompanied by reasons: it presents normality. The legal system thus demands good reasons and provides them in verdicts. For reasons to enter a case and a courtroom they have to be made explicit. Thereby the German criminal system rests on the assumption that people not only have reasons for what they did and do, but that they can name them.

This suggests that the failure to provide reasons might pose a problem for the legal procedure. I am now interested in the ways this failures are dealt with, thus in the how, not the why. In the following I shall first briefly describe my methodological take as well as the data this analysis rests on. My approach can be termed ethnography of argumentation in the sense introduced by Prior (2003). For the analysis I shall then concentrate on one case, the earlier mentioned case of child killing. In conclusion I will discuss my findings in the light of Wohlrapp's notion of argumentation as imposition. I will argue that the professional participants cope with the lack of reasons by prompting them to the accused.

1. Ethnography of argumentation

This study is part of a broader project on the „Comparative Microsociology of Criminal Proceedings"(see Scheffer, Hannken-Illjes, & Kozin, 2010). The project comprised three case studies from three different countries, England, US, and Germany, thereby included two different procedural systems in criminal law: the adversarial and the inquisitorial. The case analyzed here stems from the data I collected in two extended periods of field-work in two defence-lawyer's firms. My objective during this fieldwork was to follow the development of criminal cases from their first appearance in the law firm to the final decision. The data consists of copies of files, audio recordings of lawyer-client meetings, ethnographic interviews, protocols of court hearings and field notes.

My overall research interest here is: how do argumentative themes develop towards arguments, how are they mobilized by the participants in criminal cases, how do they become strong and resilient. Hence, I am interested in the becoming of arguments. In Marcus (1995) sense of a multi-sited ethnography, I follow "the thing" through the different data and sites. Thus, different from classic ethnographic studies my focus is not on the site (I am not writing an ethnography of the law firm) but on a single phenomenon. In this case I follow the reason given for a deed through different places in the criminal procedure: the files, witness

testimonies, notes, but also field notes and the local newspaper.

The mobilization and making available of themes can be grasped methodologically by the approach Prior (2005) has outlined under the heading of an ethnography of argumentation. By stressing Toulmin's theory as one that is interested in historically dependent knowledge processes rather than in the mapping out of universal argument forms and by linking it to works in Science & Technology Studies, Prior argues for a focus on the production of premises rather than the description of inferential relationships. "Perhaps it is time to give the diagrams a bit of a rest and consider seriously the implications of seeing argumentation as sociohistoric practice, to ask how pedagogies can help attune students to the work of appropriating situated knowledge practices, to open up the ethnography of argumentation as a branch of the larger ethnography of communication" (p. 133). The underlying interest is to study the production of premises. The idea of focusing on the preparation of arguments and the conditions of a lack of argumentation falls in the same line of interest.

2. Demanding reasons

The following analysis is sequential, thus I am focussing on the build up in time. The data for this case stems from the discovery file and the lawyers file, also from informal talks with the defence lawyer. It is a case of child killing: A young woman, let's call her Lena, kills her child – she gives birth and then leaves the baby behind. The baby dies and is found three weeks later. The woman is identified within 24 hours due to information by witnesses.

In her first questioning by the police Lena remains silent.

This silence is not remarkable in itself. The accused executes a right and behaves strategically prudent. By remaining silent she leaves room to maneuver for the defence, as she is not binding the lawyer too early to given statements (on the binding mechanisms of early statements see Scheffer, Hannken-Illjes, Kozin 2006). As she does not make any statement, there is also nothing reasons could be attached to. In this sense no reason is missing at this time. Hence, one way – and probably the only unproblematic way – to avoid giving reasons as a defendant is to remain silent. Once the defendant gives a statement and has to admit to the charges as Lena has to, not giving reasons would leave a blank noticeable for all professional participants in the procedure.

At the same time as the accused different witnesses are questioned by the police. Lena was identified this quickly due to witnesses, namely two students at her school. The first informed the police that she has a co-student who looked pregnant but when asked stated that she just had weight problems. One day she left the school sick and returned four days later, stating that she lost 16 pounds. Similar statements are given by other witnesses: many suspected the pregnancy, all of them bought into the explanations given by Lena.

It is striking that all witnesses were asked if they could name a reason for the killing. None of them could. Her father-in-law, her sister, her husband, her friends – always the same answer: "no, there is no reason I can think of." The police however, does not only ask one closed question: "Can you think of any reason why she did what she did" but rather make offerings: they offer good reasons that might explain why a woman leaves her baby behind. Marital problems? No, the sister says, they were very close, the perfect couple. The father says: "Always one heart, one soul". Did the woman have trouble with the two girls she already had? No, everybody says, she is a loving mother, nobody would think she has any problems with her kids. Some witnesses, as the father-in-law, explicitly state that they cannot think of any reason. Hence, the police suggest "good reasons" but none is taken up. This suggestion already hints at the necessity to find a reason. The answer "no, there is no reason" seems to be an uneasy answer for the police officers.

The case quickly drew the attention from the local media. They, too, start to suggest reasons. A local newspaper states that there is only one plausible reason: the husband was not the father of the baby. Hence, not only the police and prosecution look for reasons but also the media and hence the greater public. A week later the accused states that, yes , the baby was hers and denies that her husband is not the father. The husband agrees to a DNA-analysis: the results show that he is the father.

Now the missing reasons on the side of the accused first become apparent: she talks and gives a statement. This would be the first option for her to name her reasons. But she does not do so. This blank will become even more prominent in later statements.

Whereas most witnesses do not take on one of the offered reasons, one witness – the mother in law – brings up a reason by herself, taking the blank space left by

the accused's silence. In a letter to the prosecution she writes, that her daughter-in-law must have assumed that the baby was dead already and buried it lovingly under the leaves

"You don't go to school as always in order to have a baby on the street"

The mother-in-law argues with a model of normality against possible other reasons.

Up to this point several actors have tried to prompt Lena with reasons: the police, the media and most obvious her mother-in-law. The lack of a reason seems to be intolerable for the participants.

The accused herself is asked several times: why did you do it? She explicitly states, that she had no reasons. Later in the interview she is asked: "Why did you not want the baby to be found? She says that she does not want to say anything about this." Here an important difference becomes apparent: the accused answers some questions for reasons by executing her right to silence. These are treated as unproblematic in the following procedure: again she leaves space to maneuver in order not to narrow her options for defence too early. But she answers the question for she left the baby behind: by stating that she had no reason. As one can see in the following, this blank is an imposition not only for the prosecution, but – probably even more so – for the defence attorney.

90 days after Lena's arrest a reason lurks up, first appearing in a preliminary hearing: after stating once more that she does not know why she did not take the baby with her she states that she had to make a decision: either the baby or her professional training as planned. This reason, however, is not presented as a response to the question why she did what she did. They are developed later in the interview and are not presented as reasons but more or less as circumstances.

30 days later this circumstance is restated in an expertise by a psychologist, to which Lena agreed. Lena describes how, when she looked at the baby, she knew that it is either this baby or her training: she decided for the latter. Again this account is not given in response to the demand of reasons but later told in different context. Rather, she restates that she had no reasons.

The statement however, is taken up by the defence lawyer. When I asked him about the lacking reasons for the killing he quickly rejected that this lack existed,

claiming that the defendant feared to have to leave school. Hence, he took up a statement by the defendant, explicitly labelled by her as “not the reason” and turning it into the main reason he would rely on. The defence lawyer prompts his client with reasons. This reason can already be ascribed to her, but not as a reason. It is the defence lawyer who at last manages to attach a reason to the action.

3. Conclusion

Wohlrapp (1995) argued that argumentation as a procedure is limited in its fidelity due to the fact, that interactants cannot give reasons for everything that might become controversial. Giving reasons for an action implies to distance oneself from this action in the sense that by giving reasons one would implicitly take into account that there are counter reasons and that thus, the action was false. Wohlrapp states that this distancing can be an imposition for a person, especially with respect to validity claims of truth. But also validity claims of right can, as the example of the child killing shows, can become impossible. What might be rather unproblematic in everyday conversations, becomes highly problematic in criminal procedures that cannot refrain from asking from reasons, even if the reason eventually given is explicitly claimed as not “the reason”.

In this case we face a double imposition: for the defendant the imposition to give a reason. In the preparation of the case the accused claims that she has no reason: she seems to be unable to just insert “something” (as for example her fear to have to leave school) as a reason. This might point to a difficulty the defendant in understanding the procedure she is part of: the criminal procedure does not need “the real reason” or even a “very good” reason, it needs a reason it can work with, hence a reason that allows (especially for the defense layer) for a certain strategy.

On the other side, the missing reason is an imposition for the criminal procedure, especially in a case like manslaughter. As the mother-in-law put it: “You don’t go to school as every day in order to have a baby on the street”. And in this sense this lack of a reason is not only an imposition for the prosecution or the judges but, maybe even more, for the defence lawyer. He is the one who finally attaches a reason to the action.

A methodological implication has probably become apparent: had I just looked at the trial in this case, the argument would have been entirely unproblematic to me.

But all professional participants know what career this argument has had in the file and in the testimonies. They, as I, could follow “the thing” through the proceeding. The focus on how arguments are produced can reveal mechanisms that are often not at the scope of legal rhetoric or court-room studies. And also the focus on the blanks and missing reasons can shed light on the production of legal rationality.

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