ISSA Proceedings 2014 – Euro: Past Arguments For The Contemporary Debate On European Currency

Abstract: My paper aims to investigate the debate on European currency and the connection between two different rhetorics: one emerged during the last French presidential election in 2012 and the other occurred during the transition from franc to euro in 1998-2002. My paper underlines that the contemporary crisis of the European monetary construction has been represented by some types of arguments emerged when euro was proposed, on 1998. I explore the relation between definition and argumentation.

Keywords: argumentation in discourse, definition, discourse analysis, euro, French language, presidential election.

1. *Introduction*

My contribution will first expose a short history of the European currency so as to underscore the principal and more recent steps of the euro. A place will be given to the confidence value of the European money which is one of the main items of the related debate. Later on, I will show two main characteristics of the corpora that I analysed: the discursive nature of the construction of the euro transition and the two different political and economical periods of time in France (2002 and 2012) covered by data in my hand. After this comment, I will introduce the theoretical framework of my analysis based on the idea of the argumentation as a call-back mechanism: some argumentative designations, used during the latest French presidential election linked to the euro crisis, recall the previous debate on euro. I will express and explain this circularity through some examples. I will then conclude looking at the semantic intersection between argumentation and lexicon.

2. *The European currency*

In December 1991, the European Council decided to shape an economic and monetary union in the Dutch city of Maastricht and later confirmed it in the

Treaty on European Union (the so-called Maastricht Treaty). Economic and monetary union brought the European Union (EU) one step further in its process of economic integration, which started in 1957 when it was founded. In 1998, the European Central Bank (ECB) was established and, six months later, the stage three of Economic and Monetary Union was launched. On 1 January 1999 the euro replaced the former European Currency Unit (ECU). Euro banknotes and coins began to circulate on 1 January 2002.

The monetary shift from national to European currency is part of contemporary history and of the construction of Europe, not only from a monetary point of view. Since the creation of the ECB in 1998 until the introduction of the euro in 2002, the European currency has been a political challenge, which had peoples to be first convinced, reassured and trained. This event, taken in the history of European integration, required two different but quite complementary efforts.

On the one hand, the protagonists of monetary integration of Europe pursued and built confidence, which is essential in making people confortable with the new currency. I can consider national currencies, in fact, as symbols of national identities. Money thus embodies a range of cultural and memory references. The first problem with the new currency has been that euro is not immediately identifiable to a single nation: so, it needed bigger endeavors in order to enforce trust and identity. For these reasons, its "discursive" aspect, associated to its material presence**[i]**, is relevant for my analysis.

On the other hand, European citizens from the first eleven member countries have permanently changed an age-old practice: the use and, therefore, the name of their national currency. In France, this change sounded even more complicated by the etymological triad "Franc-France-Français" (Franc-France-French) which was at stake. We will see now how important is the time factor conceived as a sort of link between the present and the past argumentations.

3. *The corpus*

3.1 *Subject of the discourse*

From our perspective, the study of the euro cannot be separated from the speeches that had been produced and characterized its birth and launch. The transition to the euro in terms of its discursive construction means to examine the role of language. More specifically, it means to analyse the emergence of events

related to memory, culture and history of a given society. The construction of the monetary Europe went through the use of language. Moreover, its existence, until 1 January 2002, was linked to the discourse of economic and political actors who either supported or opposed to its launch. Nowadays, the debate related to the European monetary union is deeply linked with the topics that have been used during its launch: political and monetary sovereignty, supranational bank (ECB), national and European identities, etc.

During the first period, from 1998 to 2002, the major aim of the euro defenders analysed was to build confidence on Euro: his creation, launch and arrival occupied, from a discursive and media point of view, an important period of time giving rise to mass production and circulation of discourse. In a similar way, the euro opponents tried to destroy the arrival of the new currency by emphasizing the lacks of the new currency. Both positions had to develop a discourse which had largely preceded the arrival of the euro. With reference to the studies of Sitri, we can consider the transition to the euro as an *objet de discours* (subject of the discourse) which reveals aspects of traceability in history:

l'objet de discours est conçu ici comme une entité constitutivement discursive, et non pas psychologique ou cognitive: constitué de discours et dans le discours – discours où il naît et se développe mais aussi discours dont il garde la mémoire – il est par là-même pris dans la matérialité de la langue (Sitri, 2003, p. 39).**[ii]**

In 2012, during the French presidential election, political speakers recovered some arguments used ten years before. The members of the political parties as well as the argumentative recycle were in fact the same; sometimes candidates in 2012 election simply used same arguments of the past confirming the memorial value of these arguments.

3.2 *The French context*

Two issues pushed Jacques Chirac to request a new ballot in June 1997: on the one hand, European targets, including introduction of the euro and, on the other, different positions within the government. The victory of the left coalition (PS, PC, Left Radicals, Greens) inaugurated the period of the third political cohabitation with Lionel Jospin as Prime Minister. The presidential election took place between April 21 and May 5. In the first round, Jean-Marie Le Pen was positioned behind Jacques Chirac and before Lionel Jospin who suddenly announced his withdrawal from political life. On May 5, Jacques Chirac was re-elected President for five

years. During the government of Lionel Jospin, there have been three ministers of Economics: Dominique Strauss-Kahn, Christian Sautter and Laurent Fabius. On January 1, 2002 the euro officially began circulating.

The tenth birthday of the European currency in 2012 has been characterised by a strong financial and political crisis which reinforced the opponents of the euro project. During the French presidential election, the first round ended with the selection of François Hollande and Nicolas Sarkozy. Hollande won the second round. The candidates' discourses had to face up the financial topic of the crisis of the euro mostly because of the lower political legitimacy of the monetary Europe. The tenth anniversary of the euro and the argumentative strategies used during the presidential election make this period of time particularly intersting for my research.

In 2012, the presidential election permitted me to investigate the debate on European currency within the electoral discourse of the French candidates. Therefore, my choice emphasizes the time factor of the discursive event 'euro' and highlights the abundance of media production, following the notion of *moment discursif* (discursive moment) elaborated by Moirand (2007) which means:

étudier la circulation des mots, des formulations et des dires, en particulier la façon dont "ça " parle, "ça" circule d'un article à un autre, d'une émission à une autre, d'un genre à un autre, d'un média à un autre. Mais si l'on s'interroge sur la façon dont ils circulent autant que sur ce qu'ils "disent", c'est parce qu'on s'interroge également, au-delà de la traçabilité des mots, des formulations et des dires, que l'on vise, sur la mémoire, le rappel et l'oubli des dires qui sont produits, ou transmis, par les médias. (Moirand, 2007, pp. 4-5).**[iii]**

Although the two moments analysed have produced different amount of speeches on euro and the European challenges are varied from 2002 to 2012, I consider the political event of presidential election and the evolutive progression of euro as relevant subjects in order to build a comparative study.

4. *Argumentation in discourse*

In regards of the theoretical framework, my study investigates the arguments in discourse by casting light on the processes that users implement. Namely, the discourse can be considered as the concrete result of the statement in context.

My methodological approach addresses the debate on the euro as a game of positioning, a dialogic process and a resistance to challenge. As quoted by Plantin,

L'argumentation est la confrontation, sur un mode polémique ou coopératif, d'un discours et d'un contre-discours orientés par une même question. (Plantin, 1996, p. 72).**[iv]**

The issue (*question*) mentioned by Plantin corresponds, in my case study, with the acceptance or refusal of the euro. The two periods of time analysed and the speakers involved in the debate produce discourses with an argumentative *visée* or purpose as stated by Ruth Amossy:

la simple transmission d'un point de vue sur les choses, qui n'entend pas expressement modifier les positions de l'allocutaire [dimension argumentative], ne se confond pas avec l'entreprise de persuasion soutenue par une intention consciente et offrant des stratégies programmées à cet effet [visée argumentative] (Amossy, 2009, p. 33).**[v]**

Both in 2012 and in 2002 the speakers analysed had to persuade their audience of the political position they occupied in supporting or opposing euro. In 2002, speakers were involved in the monetary transition; in 2012, the financial crisis of euro and European monetary construction pushed candidates to express their position on euro. Therefore, we need the context in which discourses are produced in order to understand their creation and use and for this reason I consider argumentation dialogical and rich of intertextual and interdiscursive elements.

4.1 *Definition and argumentation*

We need now to highlight two kinds of arguments which play their role on the notion of definition. On the one hand, the argument by definition concerns the concepts as such with specific distinguishing features (such as legal definitions).**[vi]** It is sometimes called argument by essence. On the other hand, the argumentative definition recaps a significant amount of data that clearly expresses the speaker's position.**[vii]** Through this kind of argument one can recognize opponents and their replies as well as express his/her own position, infering so the dialectic value of the argument. Following Plantin,

la définition argumentative consiste à définir un terme de telle sorte que la

définition exprime une prise de position, favorable ou défavorable, vis-à-vis de l'objet défini (Plantin, 1996, pp. 53-54).**[viii]**

Far from being comparable to the argument by definition or to the argumentative definition, I think that the adjectival designations assigned to the euro summarize two opposed political positions and involve different interdiscursive references. Given that, any argumentative analysis should question the words used by speakers, as Plantin remembers in 1996:

la présence structurante du discours de l'un dans le discours de l'autre est à la base de l'hétérogénéité du discours argumentatif apparemment le plus monologique (Plantin, 1996, p. 75)**.[ix]**

The corpora analyzed are, in fact, made by monological speeches which maintain an argumentative mechanism which links past and present by linking one corpus to the other. Moreover, as stated by Robrieux,

certains termes du vocabulaire politique fournissent sans doute les meilleurs exemples d'imprécisions sémantiques due à leur charge affective et aux connotations qui s'y rattachent (Robrieux, 2007, p. 149).**[x]**

I want to underline that speakers use evaluative terms in order to drive the comprehension of their audience and, on the other hand, in order to clarify the meaning that they assign to a word. We cannot talk about definition based on etymology or dictionary definition but I argue that the lexical and semantic choices made by the speakers analysed reveal consensual or debatable reactions. As pointed by Amossy in 2009:

le mot est à prendre aussi bien dans le cadre de l'interaction […] que des rapports consensuels ou polémiques qu'il entretient avec les autres mots du discours dans un espace où les énonciations se croisent et se répondent (Amossy, 2009, p. 158).**[xi]**

In order to explain this specific perspective, I will present two different pair of adjectives which summarize similar argumentative positions.

5. *"Single" or "common" currency*

The first set of examples is linked to the difference between two adjectives referred to currency: "single" and "common." During the launch of the euro, the

European currency went through a sort of 'definitional step' which led to the use of the word "euro". From the 1960s until the early 2000s, the value of the currency name has been the subject of debate among Member States of the European Union. The adjectives associated with the euro (e.g. "community", "parallel", "common" and "single" currency) reported thus fundamental passages in European history, economics and politics. They photograph explicitly different visions of Europe. Until the December 1995, when the name was chosen,**[xii]** each European official document took explicit position by choosing one term instead of another.

For example, the quotations from the opponents, determined against economical "supranationality" of the euro, defended the "common" currency and not the "single" currency. On the other hand, the contemporary debate on European currency regenerates past arguments associated with the issue of supranationality and financial reliability of the euro. Indeed, the political programs of the French candidates to the presidential election of 2012 contained the topic *la sortie de l'euro* (the withdrawal from the euro) linked to the financial crisis of the PIIGS countries (Portugal, Ireland, Italy, Greece, and Spain). The lack of economic solidarity among the members of EU as well as the increasing method of austerity enforced by the ECB renew the debate on euro in 2012.

The following examples are organised as a double track which confirms the cyclic nature of the argumentation even within the same political party, as for example the National Front. Marine Le Pen, current leader of the party, uses the expression *monnaie commune* (common currency) and *monnaie unique* (single currency) as his father, former leader of the party, did more than ten years before:

Nous envisageons la possibilité de conserver l'euro monnaie commune […] ça n'aurait pas les inconvénients qu'à la monnaie unique […] la possibilité de conserver une monnaie commune ce que nous rejetons, contestons formellement c'est cette monnaie unique. (M. Le Pen, 27/11/2011).**[xiii]**

Oui à une monnaie commune, symbole de la coopération fraternelle des Européens. Mais alors franchement, très franchement, non, mille fois non, à la monnaie unique." (J.-M. Le Pen, 1/05/1998).**[xiv]**

Even if the political context of the French presidential election of 2012 has

changed, the use of the adjectives “common” and “single” revitalised the former debate of 1998. The circularity of these argumentative signals is useful to the persuasive aim of the speakers. In other words, they exploit some of the most common arguments of the past against euro to concentrate their speeches and to underline the interdiscursive value of their political position.

The same mechanism is stated within another couple of examples linked to the Citizens’ Movement, a party guided by J.-P. Chevènement :

une mutation si possible harmonisée de l’euro qui de monnaie unique pourrait devenir monnaie commune (Chevènement, 24/06/2011).**[xv]**

The speaker postulates the need to switch from a single currency to a common one. He is using the same couple of adjectives of the past, as reported in the following example:

S’agissant de l’euro, aujourd’hui monnaie commune, je m’interroge sur le fait de savoir s’il ne serait pas raisonnable d’y regarder à deux fois avant de plonger, le 1er janvier 2002, dans la monnaie unique (Chevènement, 21/05/2000).**[xvi]**

Here I want to emphasize the role played by a problematic link between the ideas of single and common currency. As mentioned above, the single euro is, according to the Marine and Jean-Marie Le Pen, the currency of the capital markets and ECB while the common currency could become a slogan for cooperation between European countries. In other words, a common currency means to them an exchange other than financial transactions.

Other contemporary political French speakers enrich the adjectival meaning of “common” and “single” by adding other adjectives, as Jean-Luc Mélenchon did in 2011:

la France devra œuvrer au renforcement de la coopération monétaire en proposant le passage du SME à la “monnaie commune européenne” (et non plus “monnaie unique”) (Mélenchon, 10/04/2011).**[xvii]**

The speakers of 2012 regenerate the previous debate of 1998-2002 by using the definitional contrast between “common” and “single.” The use of dictionary in this case has not great interest: what is really important is to take into account the political interdiscourse which can better define the value of the words “single” or

"common."

6. *"Strong" or "weak" euro*

A second topic which summarizes another argumentative value refers to the strength or the weakness of the euro. On the one hand, the strength of the euro against the dollar is assigned to different degrees: behind the dollar, at the same level of importance, or in a contrast to it. This comparison is taken by opponents to the euro as a scale of "monetary subordination" against the dollar. Both can be measured only in relationship with the dollar and, occasionally, with the yen. Fabius explained this concept in 2001:

l'euro est à la fois un symbole politique majeur de l'Europe qui se construit, un gage de paix, un pôle de force face au dollar et demain sans doute face à une monnaie ou à un panier de monnaies asiatiques (Fabius, 23/01/2001).**[xviii]**

According to its supporters, euro embodies the European alternative to the dollar and the yen and it is presented as the currency of the first world power. Therefore, if one refers to the opponents to the euro, it is considered as a subaltern currency compared to the dollar. From an argumentative point of view, the lexical selection of the adjective "strong" or "weak" implies that two visions of the euro project are subsumed: on the one hand, a currency which can defend Europe from financial crisis, unemployment, increase in the price of consumer goods; on the other, the second vision of euro is linked to the idea that a money cannot survive outside a state, as De Villiers argued in 2001:

Si l'euro est si faible aujourd'hui, c'est non seulement parce que les banquiers ne s'entendent pas entre eux sur la baisse des taux d'intérêt, mais que derrière cela, une monnaie qui n'est pas adossée à un Etat, un peuple, une nation, n'a pas de chance de survivre autrement que comme une monnaie faible (De Villiers, 7/04/2001).**[xix]**

I think that the topic of the euro strength or weakness can be analysed by using the previous argumentative protocol. In other words, we can extrapolate the argumentative inference of each quotation through the interdiscursive relation existing between the single adjective and the persuasive aim of the speaker. As we may read in the following quotation, the strenght and the weakness of euro are related to the dollar :

La faiblesse de l'euro fait couler beaucoup d'encre, mais le MDC l'ayant souhaitée

ne la déplore pas. Nous l'avions posé comme une des conditions de possibilité de l'euro, avec l'inclusion des pays d'Europe du Sud. Un euro large devait immanquablement contribuer à ce qu'il fût faible. […]

Depuis deux ans, ce qui se passe montre clairement que la faiblesse de l'euro n'est que l'envers de la force du dollar. En effet, il suffirait d'un dollar faible pour des raisons décidées par le trésor américain (ce fut le cas au début de la décennie 90) pour que l'euro remonte. Ce n'est pas nous qui décidons, en dernier ressort, de la force ou de la faiblesse de l'euro. Cette faiblesse révèle surtout l'inconsistance de l'idée politique qui sous-tend le projet de l'euro (Chevènement, 21/05/2000).**[xx]**

The opposition to euro expressed by Chevènement is linked to the political inadequacy of the project of the monetary Union. On the contrary, during the past French presidential election, some candidates used these adjectives in order to renew the opposition between euro and franc, as Sarkozy did in 2012:

Si nous sortions de l'euro pour revenir au franc, nous devrions rembourser notre dette en monnaie forte avec une monnaie faible (Sarkozy, 29/03/2012).**[xxi]**

The use of the adjectives "strong" or "weak" are then linked to the political context in which they are used. In short, the semantic referent within the speech of Sarkozy is completely opposite to the trop forte (too strong) within Marine le Pen's quotation:

le problème majeur de l'euro c'est que c'est une monnaie beaucoup trop forte pour notre économie (M. Le Pen, 27/11/2011).**[xxii]**

The positive semantic charge of the adjective "strong" (the euro according to Sarkozy) becomes a negative semantic shift for the argumentative aim of the speaker (the euro according to M. Le Pen). The leader of the National Front prompts for a sort of monetary equality between euro and franc. The argumentative purpose of the speakers analysed needs to be redefined on a regular basis and adapted to the political context and position of the candidate.

7. *Conclusion*

In conclusion, I want to highlight two main points of my paper. First of all, the study of a discursive object as the euro requires special attention to the periods of time analysed and to the selected speakers. The periods of time and the speakers

in my paper are linked insofar as they condense chronological differences but very close political and economic issues. Moreover, even if the speakers produce monologic speeches, at the same time they mobilize other discourses pronounced before their single utterance.

Secondly, from a theoretical point of view, I assume that I cannot use the argumentative typology based on the definition and I think that the argumentative analysis does not investigate the lexicon itself. Though, I think that the lexical selection operated by a speaker makes possible her/him to guide and model her/him the argumentation. As stated by Perelman and Olbrechts-Tyteca,

Parfois le choix d'un terme sera destiné a servir d'indice, indice de distinction, de familiarité ou de simplicité. Parfois il servira plus directement à l'argumentation, en situant l'objet du discours dans une catégorie mieux que ne le ferait l'usage du synonyme (Perelman and Olbrechts-Tyteca, 2008, p. 201).**[xxiii]**

The adjectives "common" and "single", "strong" or "weak" represent a choice I made to explain my analysis, but the two corpora present many other possible "couples" which testify that a public debate can generate circular argumentative strategies.

NOTES

i. In 2002, notes and coins of the euro showed an iconographic message of 'subtraction.' In other words, images and templates chosen by the ECB will leave no room for heated debates. On the one hand, the representation of monumental works of different architectural styles demonstrated the desire to build a strong and sustainable image of eternity. On the other hand, the notes and coins 'empty' of architectural images left a space of 'non-recognition' among citizens within the euro area. As explained by Carbonnier (1998), the images printed on the notes and coins represent sovereignty.

ii. "The subject of discourse is considered here as a constitutively discursive entity, not psychological nor cognitive. Since it is produced by speeches and within the speech – where it was born, developed and memorized – it is thereby rooted in the materiality of language." (All the following translations from French to English are by the author).

iii. "Studying the movement of words, formulations, and sayings, particularly how 'it' speaks, 'it' flows from one article to another, from one issue to another, from one genre to another, from one medium to another. But if we ask ourselves about

how they circulate as much as what they 'say', it is because we are also asking about the recall and the oblivion of sayings produced and transmitted by media, beyond the traceability of the words, formulations and sayings."

iv. "The argumentation is the confrontation – either on a controversial or on a cooperative manner – of a speech and an opposite speech oriented by the same issue."

v. "the mere transmission of a point of view on things – which expressly does not intend to change the positions of the addressee [argumentative dimension] – needs to be not confused with the will of persuasion supported by the conscious intention and strategies programmed for this purpose [argumentative purpose]."

vi. As an argument by definition we propose the following article of the Madrid European Council (december 1995): "the specific name euro will be used instead of the generic term 'ecu' used by the treaty to refer to the european currency unit."

vii. We propose two conflicting examples of argumentative definitions: "L'euro est une victoire de l'Europe" (Euro is a victory for Europe – Chirac, 31/12/2001) and "L'euro, c'est le vol de la démocracie" (Euro is the theft of democracy – Pasqua, 02/01/2002).

viii. "The argumentative definition is made in order to define a term so that the definition expresses a position, favourable or unfavourable, related with the object defined."

ix. "The structuring presence of someone's speech in the speech of others is the basis of the heterogeneity of the argumentative discourse, even in the apparently most monological discourse."

x. "Certain terms in the political vocabulary probably provide the best examples of semantic inaccurrancies due to their emotional charge and connotations which are attached to it."

xi. "The word needs to be taken in the context both of the interaction […] and of consensual or controversual relationships that it has with other words of the discourse in a space where enunciations/utterances cross and reply to themselves".

xii. The debate on the name of the European currency was resolved during the Economic Council of Madrid in 1995 where the European currency was finally called "euro." The point 2 of the final resolution stressed the importance of the name of the new European currency.

xiii. "We envision the possibility of keeping the euro as a common currency […] it would not have the disadvantages that the single currency has […] the possibility

to preserve a common currency, what we reject formally it is this single currency."

xiv. "Yes to a common currency, a symbol of fraternal cooperation of Europeans. But then frankly, quite frankly, no, a thousand times no to the single currency."

xv. "A possible harmonized mutation of the euro which will become, from single currency, common currency."

xvi. "Speaking about euro as a common currency today, I wonder whether it would be unreasonable to think twice before diving in the single currency on 1 January 2002."

xvii. "France must work to strengthen monetary cooperation by proposing the passage of the EMS to the 'common European currency' (rather than 'single currency')."

xviii. "Euro is a major political symbol of Europe that we are making: a promise of peace, a pole of strength against the dollar and, tomorrow, maybe, against asian currency or against a bunch of asian currencies."

xix. "If the euro is so weak today is not only because bankers do not agree among themselves on the lower interest rates, but also because, behind that, a currency which is not supported by a state, a people, a nation has no chance to survive except as a weak currency."

xx. "The weakness of the euro spilled much ink, but the MDC do not regret it. We had set it as a condition of possibility of the euro, with the inclusion of southern European countries. A large euro would inevitably contribute to his weakness […] For two years, what is happening clearly shows that the weakness of the euro is only the other side of a strong dollar. Indeed, a dollar weak for reasons decided by the United States Treasury (as was the case at the beginning of the 90s) would be enough to let the euro rise. We do not decide, eventually, about the strength or weakness of the euro. This weakness mostly reveals the inconsistency of the political idea behind the euro project."

xxi. "If we leave the euro back to the franc, we should pay back our debt in a strong currency with a weak currency."

xxii. "The major problem with the euro is that it is a far too strong currency for our economy."

xxiii. "Sometimes the choice of a term is intended to serve as an index, index of distinction, familiarity and simplicity. Sometimes it will serve more directly the argumentation, placing the object of discourse in a better category than it would have been the use of a synonym."

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ISSA Proceedings 2014 – The Agentive Approach To Argumentation: A Proposal

Abstract: This paper outlines an agent-centered theory of argumentation. Our working hypothesis is that the aim of argumentation depends upon the agenda agents are disposed to close or advance. The novelty of this idea is that our theory, unlike the main accounts of argumentation, does not establish a fixed function that agents have to achieve when arguing. Instead, we believe that the aims of argumentation depend upon the purposes agents are disposed to achieve (agendas).

Keywords: Agent, agent centered theory of argumentation, function of argumentation

1. *Introduction*

The main goal of this paper is to outline an agent-centered theory of argumentation. Our working hypothesis is that the aim of argumentation depends upon the agenda agents are disposed to close or advance. The novelty of this idea is that our theory, unlike the main normative accounts of argumentation (i.e., rhetorical, dialogical and epistemological theories of argumentation), does not establish an a priori function that agents are expected to achieve when arguing. Instead, we believe that the aims of argumentation depend upon the purposes agents are disposed to achieve (i.e., their agendas). The problem with fixing an a priori function for argumentation is that some argumentative practices do not fit into the proposed end. Our concern is that when an agent does not aim for the fixed function of argumentation, his/her argumentative practice could be misunderstood or overlooked. That is why our agentive theory suggests that the agendas agents are disposed to close or advance by means of argumentation determine the goal of such communicative activity. If our intuitions are right, our account shows some promise understanding of a broader diversity of argumentative practices than each of the normative theories of argumentation individually considered.

Given the formal constraints of this presentation, we are not going to do a

thorough reconstruction of each of the normative theories of argumentation. Instead, we are going to do cautious generalizations. First, we are going to make explicit the principle that normative theories of argumentation use to fix the putative goal for argumentation. Then, we will use a counter-example showing that the methodology of fixing an a priori function for argumentation is wrong. Finally, we will present the main concepts of our approach and show how it deals with the proposed counter-example.

2. *The normative theories of argumentation*

The normative theory of argumentation is an account providing responses to different issues concerning the analysis and evaluation of arguments. In dealing with the problem of the function of argumentation, normative theories fix an a priori goal that agents are suppose to satisfy. Three main claims are the object of our analysis.

(1) The goal of argumentation is to persuade (e.g., Perelman & Olbrechts-Tyteca, 1969; Tindale, 2004, Zarefsky, 2014).
(2) The goal of argumentation is to achieve a consensus resolving a difference of opinion (e.g., van Eemeren & Grootendorst, 1984, van Eemeren, 2010).
(3) The goal of argumentation is to establish truth and justified belief (e.g., Lumer, 2005a; 2005b)

The problem with fixing the aim of argumentation beforehand, is that some argumentative practices do not adjust to the fixed goal, and, consequently, the theory analyzing and evaluating argumentation tends to misunderstood or overcome such argumentative practices.

Let's take a look at one fragment of the following counter-example proposed by Marianne Doury in the paper "Preaching to the Converted. Why Argue When Everyone Agrees?" For future reference, we will refer to Doury's case as CAR RESTRICTION. In Doury's words, this case is meant to show that "the goal of persuasion is but one goal among others that can be assigned to argumentation, and that, as a result, persuasion cannot be considered as the central element in the definition of argumentation" (2012, p. 100). To contextualize, CAR RESTRICTION is a transcription of a conversation between a vendor (hereafter *V*) and two clients (hereafter *C1* and *C2*). All of them have seen each other before, but they know very little about each other.

CAR RESTRICTION

V: Actually, what do you think of the law, er … we were actually talking about er… this law, there, that was just voted, that is in effect, you know, the law about traffic restriction for odd-even numbered license plates for the cars.
C1: Listen, I will tell you what I think, for Paris, we should be doing this all the time.
V: All the time.
C2: Exactly. We all agree then.
C1: I find this a great idea. First of all because at last, every day, there is already a maximum number of people who could find a way to organize their transportation… People do not need their cars all the days!
V: The opposition parties, actually, were against it at the beginning and we do not hear them speak anymore, now.
C2: They showed women who…who were actually commuting in the car of their friends, of a friend who came to pick them up; they can do this all the time.
C1: Of course! There are people…well, the problem is, that there need to be jobs or… or certain obligations that allow one to leave at a fixed time and to return at a fixed time. For example, in my case, this is not possible. But, ninety-nine percent of the time, I do not take the car!
V: Yes, you are all the time using public transportation.
C1: Exactly. … (Doury, 2012, p. 101).

According to Doury, CAR RESTRICTION is just an example of argumentative situations in which a controversy is proposed, and even though all the arguers agree on one same view, they provide arguments for their positions (p. 103). To be sure, the controversy is posed by the vendor when asking "what do you think of the law … about traffic restriction for odd-even numbered license plates for the cars?" The agreement between the arguer becomes explicit when C1 states "… we should [impose the restriction for odd-even numbered license plates for cars] all the time," V assents saying "All the time," and C2 responds claiming "Exactly. We all agree then." Finally, without a detailed reconstruction, some of the arguments put forward are the following. C1 "finds [the idea of imposing restriction for odd-even numbered license plates for the cars all the time] great" because, in her words, "at last, every day, there is already a maximum number of people who could find a way to organize their transportation". Additionally, from her perspective "People do not need their cars all the days." C2 agrees with [the

idea of imposing restriction for odd-even numbered license plates for cars all the time] because [with this restriction "[t]hey showed women who … were actually commuting in the car of their friends [that] they can do this all the time."

For Doury, CAR RESTRICTION is a counter-example against the idea that the aim of argumentation is persuasion. Shortly, if "to persuade" is defined with the Merriam-Webster dictionary as "to move by argument, entreaty, or expostulation to a belief, position, or course of action," then persuasion is not the goal of argumentation in CAR RESTRICTION. The reason for this is that one cannot "move" someone to believe something that he/she already believes. To clarify, the point is not that persuasion is never the end of argumentation, but to provide a negative instance for the claim that all argumentation aims to persuade.

We believe that CAR RESTRICTION also is a counter-example for the claims that all argumentation aims to resolve a difference of opinion, and that all argumentation aims to the establishment of justified true belief. To recall, from the pragma-dialectical approach, argumentation arises from a disagreement and ends with the dissolution of the different of opinions. Yet, in CAR RESTRICTION the argumentation does not finish with the agreement. Rather, that is trigger for the arguments put forward by the participants of the conversation. Similarly, CAR RESTRICTION presents a counter- example for the epistemological theories of argumentation because in it the arguers are not epistemically justified in believing that the restriction for odd-even numbered license plates for the cars should be imposed all the time. One of the features of knowledge is that it is factual, but the aforementioned proposition is not. Therefore, there is not knowledge to be established in CAR RESTRICTION.

3. *The agentive proposal*

Our proposal is that the problems posed by CAR RESTRICTION are explicated if we understand argumentation as a type of agenda an agent has. Briefly put, for our presentation purposes here, an arguer is an agent, and the purpose or objective he/she is trying to attain by arguing is his/her agenda (cf. Gabbay & Woods, 2003; 2005). The closure of each of these agendas is bound by a group of *conditions of execution* (CE). That is, requirements that, if satisfied by the agent, would count as an achievement of the agenda. These requirements include, in the case of epistemic agendas, things like time, information, computational capacity, and methodological strategies (Woods, 2013). Notice that CE are found in varying degrees. Broadly speaking, the most stringent extreme of the spectrum only

authorizes belief formation when all possibilities of error are ruled out – including miscalculation – and/or complete information is achieved, while the other extreme allows for fallibilist belief formation with incomplete information. For instance, when argumentation takes place in scientific discovery, its aim can be taken to be the fixation of a justified (and, optimistically, true) belief. Yet such a demanding goal is not a requirement for argumentations that are directed towards practical purposes, such as putting a hypothesis under probation or justifying a practical decision against a background of incomplete information.

In contrast with other approaches mentioned above, we think the purposes of arguing vary accordingly with the agendas and sub-agendas advanced by the agents. This implies that arguing is an activity performed by agents embedded in other activities and as a part of the requirements of the fulfilment of other agendas. By the same token, arguing presupposes other agendas agents need to achieve if they want their argumentation to be successful. For instance, agents need to capture the attention of their addressees, as well as being warranted that these addressees do understand their arguments. For our present concerns, however, it suffices that we distinguish four kinds of agendas in which the act of arguing can intervene. These agendas are not presented in the spirit of showing an exhaustive list, but only as an example of the fruitfulness of our approach. The agendas in question are:

* *Agendas of epistemic arrival* (AEA), which aim at forming a particular belief. This is the case where people argue in order to create a belief (cf. Peirce, 1877). To be sure, a paradigmatic case of this kind of agenda is the verification of a scientific hypothesis, and in this sense, there must be some expectations about the grade of strictness of its justification and veracity. Of course, normative epistemological approaches provide an account of these kinds of examples. But not all *AEA* are so. If you have to engage in argument in the absence of complete information in order to take an immediate course of action, as e.g. in an emergency room, then to maintain the strictness of a scientific epistemic arrival would demand more time and, accordingly, the delay would turn out to be fatal – literally. There are times when, given the risks at hand, to aim at effecting an immediate educated guess is better than to wait for a warranted but temporally mediated truth. Still it is also true that sometimes you can try to close an *AEA* by simply asking somebody for information, as in the case of looking for an address in a new city (testimony references). As this last example shows, however, not all

AEA are accomplished via argumentation.

* *Agendas of epistemic defensibility* (AED), which intend to present and defend (to other agents) a belief previously fixed by the arguer via the closing of an *AEA*. This includes the cases of political harangues, prosecutor accusations, and attorney's allegations among others. Notice that these agendas do not seek to fixate the arguer's own beliefs, but those of others. In this sense, *AED* are paradigmatic cases of persuasion. As such, they naturally fall under the jurisdiction of rhetorical theories of argumentation. Of course, an *AED* can be sincerely pursued or not. Thus, one can defend a belief, or defend a pretended belief, as in the case of the counsellor who does not believe in the innocence of his/her client.

* *Agendas of epistemic maintenance* (AEM), which aim at ratifying a belief previously fixed by the arguer via the closing of an *AEA*. This is clearly a case in CAR RESTRICTION. Yet it is important to stress that in this example, it is simply not part of the arguer's agenda to review whether the belief is proper knowledge (the epistemological way), whether it ought to persuade others (the rhetorical way), or whether there is a difference of opinion to resolve (the pragma-dialectical way). On the contrary, the arguers advance their arguments in order to have a surplus of reasons for maintaining and preserving a particular epistemic position. And the peculiarity of this scenario is due to the fact that multiple agents carry out the agenda in a joint manner. But there are no obstacles for an *AEM* to be an individual agenda (as in Peirce's 'tenacity' method for fixing belief) or a collective one (as many Colombians agreeing with the conclusion that James Rodriguez is the best player of the first round or stage of the 2014 World Cup – we imagine the Dutch people might feel the same about van Persie or Robben). In any event, the collective case can become a mechanism of ideology preservation.

* *Agendas of epistemic obstruction* (AEO), which aim at preventing the proper attainment of epistemic agendas by other agents. For instance, when you distract someone in order to avoid them from focusing on some problem (e.g. by arguing about some irrelevant topic), or when one prepares a diversion (e.g. by admitting herrings as premises in the argumentative scenario) you are preventing the proper attainment of epistemic agendas by other agents. In the first case, the obstruction consists in hindering or delaying a proper belief formation on the part of the other agent. In the second, it consists of facilitating the other agent in the formation of a false belief. However, in the last case, there is no pro or con

persuasion as such, in the sense that it can be any of them. Notice that what is at stake is an epistemic agenda, yet not because the agent has an intrinsic epistemic agenda, but because he/she is interested in the epistemic agendas of his/her addressee. Of course, this instance of an *AEO* is a source of possible error in epistemic agendas and as such it does not need to always be achieved by means of arguing.

Let us observe that all these agendas (*AEA, AED, AEM*, and *AEO*) are actually sub-agendas, that is, agendas that are carried out as a means with respect to an ulterior end. In this sense, their role is primarily 'methodological' (in the etymological sense of the word). Indeed, in the examples discussed above, *AEA* serves as a means for determining truth, saving a life, or arriving at some place. In the *AED* examples, persuasion is pursued in order to obtain votes or to make a decision about the innocence or culpability of someone. In *AEM*, arguing serves the self-assertion of the arguer's belief system. And in *AEO*, arguing functions as a strategy for weakening the potential course of action of other agents. In this sense, this approach explains why arguing is not an end in itself most of the time. Although it can be imagined of as an immediate agenda, as when agents argue as a way of training in argumentation; argumentation is an activity agents engage in order to obtain things different to more arguments.

Finally, our proposal is encompassing enough as to admit different types of epistemic agendas, but equally it is rigorous enough as to not admit relativism: insofar agendas are things that can be achieved totally, partially, presumptively, etc., their fulfilment can be evaluated as adequate or inadequate, better or worse, properly or improperly closed, etc.; and by keeping in mind the *conditions of execution* (CE) and the *degrees of strictness* with which an agenda has to be undertaken, our proposal helps to clarify, in an unified perspective, why there are different epistemic 'contexts', what they are and how to identify them (issues that Doury leaves underspecified), and why they bring varied —although, occasionally, mixed – results. All these topics, however, deserve another paper.

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ISSA Proceedings 2014 – The Legacy Of The U.S. Atomic Superiority, Supremacy And Monopoly: Dispelling Its Illusion In Barack Obama's Berlin Speech

Abstract: The nature of the dilemma facing the world living with nuclear weapons is not technical, but political. This study reflects upon the extent to which the U.S. nuclear policy has been influenced by the mistaken assumption that the nation's

nuclear supremacy should be enduring. The study focuses specifically on the speech delivered by the U.S. President Barack Obama, who calls for international cooperation on nuclear matters, in Berlin on 19 June 2013.

Keywords: Atomic diplomacy, Barack Obama, Berlin speech, nuclear policy, nuclear weapons

The nature of the dilemma facing the world living with nuclear weapons is not technical, but political. To a certain extent, the end of the cold war changed reliance on nuclear weapons into their further proliferation. On the one hand, in negotiations between the United States and Russia, the desire to reduce dependence on nuclear weapons corresponds with the determination to cut back on either their number or variety. On the other hand, atomic diplomacy holds on to the position of strategic superiority. This study reflects upon the extent to which the U.S. nuclear policy has been influenced by the mistaken assumption that the nation's nuclear supremacy should be enduring. The study focuses specifically on the speech delivered by the U.S. President Barack Obama, who advocates international cooperation on nuclear matters, in Berlin on 19 June 2013.

The U.S. nuclear supremacy has been founded upon a "popular fallacy"- a cause of the false sense of security and power. Nuclear weapons after the destruction of Hiroshima have not yet convincingly proved themselves to be an asset. However, the atomic superiority has locked the U.S. administration into a policy of trying to outrace other nations in the development of new and more means of mass destruction. Such efficaciousness in diplomacy as much as unforeseen events might lead to another fallacious assumption concerning the utility of nuclear weapons. That is, their alleged capacity to avert military confrontations. Since the collapse of its atomic monopoly in 1949, the experience of the U.S. foreign policy has confirmed that nearly the opposite of these political assumptions is true. Nevertheless, it survives as myth to the present by giving impetus to the nuclear arms race.

1. *The end of the U.S. moral leadership*

A month after the uranium bombing of Hiroshima, on 12 September 1945, the *New York Times* article, "Atomic Bomb Responsibilities," questioned whether the U.S. sacrificed its moral leadership of the world for the achievement of the atomic fission (Baldwin, 1945, p. 4). Regardless of the validity of arguments that try to

make war moral, the scientific achievement of manufacturing the atomic bomb changed the world. Even though Defense Secretary Forrestal described the duration of the U.S. nuclear monopoly as the "years of opportunity," the emphasis of monopoly on secrecy discouraged the U.S. administration from taking progressive steps for the international control of atomic energy. Instead, the U.S. monopoly encouraged its strategic thinking and planning to hold on to its political, diplomatic and military advantage.

Taking for granted the Soviet large conventional forces, the United States relied heavily on nuclear weapons in its defense and alliance policies. As a matter of fact, the threat of the atomic bomb was institutionalized in the U.S. military doctrine, and even in its operational planning. On the one hand, the United States is the only country that actually used the bomb, giving such reasons as patriotism, the advancement of science and technology, and the protection of the free world. On the other hand, the United States had no justification for integrating the atomic bomb into its foreign policy because it had come into being not as a result of open debate, but as the result of a secret project (Mendelsohn, 1990, p. 343). Wartime security indeed prevented the members of Congress from knowing the Manhattan Project – not to mention its funding hidden in the military budget. Overall, that the threat of the atomic bomb came to be the U.S. master card in diplomacy turned out to be a *fait accompli*.

After failing to reshape the real world in the nuclear age, the United States had to keep reviewing its nuclear strategy significantly in response to changing technologies, advancing nuclear weapons, and evolving political contexts. In spite of its primary responsibility for safeguarding public health and safety from the hazards of the peaceful application of nuclear energy, the U.S. Atomic Energy Commission (AEC), a predecessor of the Nuclear Regulatory Commission (NRC), thus promoted the viewing of a nuclear test as an exciting holiday event. Such an official attempt to celebrate the status of the nuclear power resulted in more than 200 atomic explosions above ground with witnesses present between 1945 and 1962.

These explosions went beyond sublimity to sheer terror, leaving trauma and a life of radiation poisoning as much as for the victims at Hiroshima and Nagasaki. As the U.S. federal agency continued to insist the nuclear tests were safe, thousands of civilians who lived downwind of the AEC's Nevada test site – in Arizona as well as in Nevada – were subjected recurrently to radiation exposures for two decades.

In spite of its unique position of power and responsibility in history, the U.S. government integrated the atomic monopoly to its strategy for containing Soviet expansion with wishful thinking.

With the end of the cold war, mutual nuclear deterrence embedded in the bipolar structure came to be dysfunctional as a legitimate practice in making a stable hierarchical nuclear world order. During the opening decade of the atomic age, the United States and the Soviet Union issued nuclear threats. The U.S. officials seriously considered using nuclear weapons until the 1962 Cuban missile crisis (See Betts, 1987), which was to repulse the Soviet threats by the U.S. atomic deterrence. Moreover, the antinuclear stand of many developing countries promoted disarmament politics at the United Nations (UN) general assembly. Such Third World movements failed to delegitimize nuclear weapons either as "weapons of mass destruction" or as "inhumane weapons," but to embed deterrent practices in the means and motives of U.S. foreign policy in the cold war. Over time the non-use of nuclear weapons after the U.S. use of the plutonium bomb on Nagasaki has been symbolic of a *de facto* prohibition against the first use of nuclear arms.

For the damage control of moral leadership, the U.S. Presidents began taking a conciliatory attitude of getting rid of nuclear arsenals towards the world, especially towards the Soviet Union (later Russia). John F. Kennedy advocated that nuclear weapons "must be abolished before they abolish us." Ronald Reagan called for their "total elimination." In a 2009 Prague speech, which for the first time brought the Novel Peace Prize to the incumbent U.S. President, Barack Obama declared the nation was to take "concrete steps towards a world without nuclear weapons." Nevertheless, after four years those steps became shrouded in a series of steps towards disarmament along with a promise to impose restrictions on the country to trigger its nuclear strikes. In addition, the quest for a nuclear-free world was shrunk merely into four out of the twenty-six paragraphs. There President Obama required consent from Russia to reduce both sides' deployed strategic nuclear weapons and from Republicans in the Senate to ratify the 1996 Comprehensive Nuclear Test Ban Treaty (CTBT).

2. *A declining symbolic power of nuclear weapons*

In the development of nuclear strategy, the legacy of the Manhattan Project appears in a plethora of acronyms like MAD (mutually assured destruction) and NUTs (nuclear-use theorists). These puns contribute to playing down not merely a

historical significance of the new weapon, but also a unique position of the U.S. power and responsibility in history. In the opening of the cold war world system, the United States alone took up nuclear supremacy. Instead of founding an international control scheme for atomic energy, its administration sought to make political use of that monopoly as a bargaining card. Hence the Truman administration launched a project on making the hydrogen bomb soon after the Soviet Union succeeded in making its first nuclear test. As a result of such arms race, the two superpowers began stockpiling nuclear bombs as well as undertaking research on and development of more sophisticated nuclear weapons.

The Soviet challenge to the U.S. strategic superiority confronted the U.S. presidents with difficult choices as commander-in-chief. During the Truman administration, the United States held out to the Soviet Union a set of selective and incomplete norms to delegitimize nuclear weapons at the UN. By representing them as a credible threat of punishment, the United States enabled to put deterrence into practice. Its reliance on nuclear weapons gave rise to a hierarchical, but increasingly contested global order along with the U.S.-Soviet nuclear stand-off (Kaufman, 1956, p. 19). Then its victory in the 1991 Gulf War marked a drastic change of the U.S.-Russia bilateral relationship from confrontational to cooperative in the theater of operation. On the one hand, the risk of a superpower confrontation dramatically declined. On the other hand, the breakdown of the bipolar structure in the cold war came to fall on further nuclear proliferation in making bilateral and multilateral nuclear deterrence dysfunctional.

Even after the cold war ended, the United States explored a way to enjoy nuclear superiority to give force to its diplomacy. In the name of national security, President Obama hence framed the United States and Russia in the lower levels of nuclear weapons on both sides by calling for “a new international framework for peaceful nuclear power.” For the reduction of global nuclear arsenals, he associated his moral and policy agenda with that of John F. Kennedy. By reciting a phrase – “peace with justice” – from Kennedy’s address in Berlin half a century ago (Entous & Barnes, 2013, p. A8; Nicholas & Boston, 2013, p. A12), Obama attempted to remind his audience of Kennedy’s call for “nuclear-arms control and nonproliferation.” In an optimistic tone, he sought to raise his hopes for moving the world as well as the country further away from nuclear arms race.

In spite of being criticized as naïve at home and abroad, Obama indeed held on to mutual nuclear deterrent for post-cold war contingencies. “Report on Nuclear Employment Strategy of the United States,” released with his Berlin speech, made it clear: the United States would never unilaterally disarm without comparable changes by Russia. In other words, the United States continued to display “nuclear folly” to see nuclear inferiority as imminent threat against national security. Yet the latest data exchange spelled out the U.S. nuclear superiority to Russia. In addition to the factual predominance of nuclear weapons, the Obama administration, supported by the Joint Chiefs of Staff and U.S. Strategic Command, concluded that 1,000 warheads would be sufficient with the triad of strategic forces for a nuclear capability (Blechman, 2013, p. A13). In the military and political perspective, Obama might take the proper steps to balance the equally important goals of nuclear safety and the U.S. world prestige.

On the other hand, the inferiority of its conventional as well as its nuclear forces compared to those of the United States pressured Russian President Vladimir Putin to modernize Russia’s nuclear forces and to modify its nuclear war plans. While showing no interest in delegitimizing nuclear weapons, Putin carefully calculated a formula that would meet this challenge to both national security and fiscal responsibility. Such speculations might resonate with U.S. President Dwight Eisenhower’s emphasis on massive nuclear retaliation in order to deter Russia from attacking the United States. The Russian unwillingness to go further explicated its legitimate needs of nuclear weapons not just as the instruments of national power, but also as active rather than passive nuclear defense measures. On the whole, the U.S. supremacy in science and technology served only to heighten international tensions mainly because no country would disarm at the expense of its national security.

3. *A shift in nuclear politics*

In spite of ruling out any actual use of nuclear weapons, the UN permanent security members – the Non-Proliferation Treaty (NPT) conferred a privileged status to those five members that possessed nuclear weapons on January 1, 1967 – could employ a variety of veiled nuclear threats. The United States carried on the policy of neither confirming nor denying the presence of nuclear weapons even though the end of the cold war shifted a focus from the East-West to the North-South issue. Such a drastic shift lost the multilateral context of equivocating Western deployments, and public and diplomatic statements. Thus,

in response to Obama's requesting a "struggle for freedom and security," the Third World nations called into question asymmetrical obligations imposed by the non-proliferation regime, in which the NPT system helped legitimize the practice of "rational" nuclear deterrence (e.g., prohibitions on possession, acquisition, transfer, and testing of nuclear weapons).

By taking on the leadership of a world, Obama expressed grave concern about the spread of nuclear weapon-making materials around the globe. Here the president redefined John F. Kennedy's phrase "peace with justice" as "the security of a world without nuclear weapons." By adding the magic word "security" to his vision of a post-cold war world pledged in Prague four years ago, he suggested his limited ability to influence the country's dependence on nuclear arms. Instead, he drew the analogy between horizontal nuclear proliferation and "fear of global annihilation" so as to center the North-South conflict on the proliferation and non-proliferation agenda. With the diplomatic overture, he framed the number of invisible tensions in speaking of rejecting "the nuclear weaponization that North Korea and Iran may be seeking." Nevertheless, Obama fell short of providing a basis for a deal on "a new international framework for peaceful nuclear power."

The rise of the developing powers not only weakened the rationality of strategic deterrence, but also prevented the United States from playing an "exceptional" role on the world stage. While keeping hold of the non-proliferation regime, Obama advocated for democratic principles. His conciliatory words sounded a cautiously optimistic tone in the call for diplomacy. Nevertheless, the NPT world system could no longer cover up the inequality between a "system of deterrence" and "system of abstinence" with regard to the acquisition and production of fissile materials for nuclear weapons (Walker, 2000). On the one hand, the U.S. "efforts to secure nuclear materials around the world" reflected the diminished threat of superpower nuclear use. On the other hand, the United States failed to confront the non-nuclear states that viewed the special status of the nuclear powers as double standard and increased political pressure on them for delegitimizing nuclear weapons.

President Obama called those non-nuclear powers to take a constructive approach in "the struggle for freedom and security and human dignity." In diplomatic terms, his pursuit of security interests replaced "Kennedy's stirring defense of freedom." Obama then rephrased "the security of a world without nuclear weapons" as "dream," and furthermore dissociated "a new international

framework for peaceful nuclear power" from military ambitions to build a nuclear weapon. In making a case for "global security," he sought to carry out a prudent and peaceful exploration of the U.S. nuclear programs. Overall, Obama balanced strategic interests with moral opprobrium by taking into compelling account the role of moral restraint in international politics and the non-use of nuclear weapons that evolved through the cold war.

4. *Fallacy of atomic diplomacy*

The development of the "super bomb" in the early 1950s marked an important turning point in the nuclear age. Along with international pressure for nuclear restraint, the morality of nuclear weapons and deterrence became an unwritten rule through a pile of bilateral and multilateral arms control agreements. In his remarks at the Brandenburg Gate, President Obama called on Russian President Putin to reduce the danger of nuclear confrontation. However, Russia formally abandoned the 1982 Soviet no-first-use policy in 1993. China, which had maintained a no-first-use policy since its first nuclear explosion in 1964, also changed the defensive nature of its nuclear use in response to the U.S. plans for a national missile defense. While the capacity to use nuclear weapons remains confined to a small number of states, a greater variety of actors are getting involved. Therefore, the global arms control process is becoming not only more multilateral, but also more transitional and pluralistic.

Despite the U.S. diplomatic approach, Russia and China rely more on nuclear weapons than on conventional strength for national security. Yet neither of their post-cold war nuclear policy is more pro-nuclear than the U.S. foreign policy that emphasizes the role of power rather than the rule of law. In the call for the full delegitimization of nuclear weapons, President Obama implicitly confirmed that the United States believes firmly in the benefits of retaining nuclear capabilities. As a whole, the failure of nuclear arms control might be the problem of forgetting what actually took place in Hiroshima and in Nagasaki. In the post-cold war world, the fear of nuclear war recedes entirely from public memory, thereby eroding inhibitions on the use of nuclear weapons for the cause of self-defense.

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ISSA Proceedings 2014 – On What Matters For Virtue Argumentation Theory

Abstract: Virtue argumentation theory (VAT) has been charged of being incomplete, given its alleged inability to account for argument validity in virtue-theoretical terms. Instead of defending VAT against that challenge, I suggest it is misplaced, since it is based on a premise VAT does not endorse, and raises an issue that most versions of VAT need not consider problematic. This in turn allows distinguishing several varieties of VAT, and clarifying what really matters for them.

Keywords: virtue argumentation theory, argument quality, validity, conflicting virtues.

1. *Introduction*

Virtue argumentation theory (henceforth, VAT) is a relatively new contender in the arena of argumentation theories – a martial metaphor that some virtue theorists may not be ready to endorse without reservation, by the way (see, e.g., Cohen, 1995). To the best of my knowledge, the name was coined by Andrew Aberdein as late as in 2007, in a paper where he outed Daniel Cohen as a sort of closeted virtue argumentation theorist, quoting persuasive textual evidence from Cohen's previous work (2004, 2005). However, Aberdein (2007, 2010a) has made also abundantly clear that VAT is but the latest offspring of an illustrious scholarly tradition, to wit, virtue theory in general, dating back to ancient philosophy, and most notably to Aristotle's ethical writings. As it is well known, that particular approach has been gaining a lot of momentum in recent years, in the context of virtue ethics (Foot, 1978; MacIntyre, 1981; Hursthouse, 1999) and positive psychology (Seligman & Csikszentmihalyi, 2000), as well as in the area of virtue epistemology (Sosa, 1991; Zagzebski, 1996), which share many topics of concern with argumentation theories. So it should not come as a surprise to see that VAT is currently prospering: for instance, "Virtues of Argumentation" was the topic of the latest international conference of the Ontario Society for the Study of Argument (Windsor, 22-25 May 2013), with Daniel Cohen featuring as one of the keynote speakers; nor is the relevance of VAT confined to argumentation theories, given that a non-specialistic high-profile philosophy journal such as Topoi is currently preparing a special issue on "Virtues and Arguments", guest edited by Andrew Aberdein and Daniel Cohen.

In spite of all these indications of success, the surest sign of the growing importance of VAT is the fact that it also attracted a fair share of criticism and doubt. Some of these were relatively mild, and would be better understood as constructive efforts to improve on this recent approach: so, for instance, Heather Battaly (2010) has argued that the frequent efforts at distinguishing fallacious and non-fallacious *ad hominem* arguments (e.g., Walton, 1998; Tindale, 2007; Woods, 2007) should be framed in the context of virtue epistemology. If Battaly is right, then also several scholars who do not currently regard themselves as virtue theorists ought to take argumentative virtues into greater consideration. Other critical commentaries, however, have been less kindly disposed towards VAT: this

is the case with a recent article by Tracy Bowell and Justine Kingsbury (2013), in which VAT was charged with an inability to offer an alternative account of what a good argument is, and in particular of validity. That challenge was later answered by Aberdein (2014), and the present paper also intends to address the same problem, although from a very different angle. In fact, in what follows I will engage in a modest effort at meta-argumentative reconstruction (in the sense of meta-argumentation detailed in Finocchiaro, 2013), to make the following points:

* the key problem with Bowell and Kingsbury' criticism is that it aims at the wrong polemical target;
* in contrast, taking that criticism as central and thus responding to it in details, as Aberdein did, has the undesirable consequence of further derailing the discussion on VAT towards issues that are tangential to its aims and unlikely to be productive;
* since there are more pressing theoretical concerns with VAT, priority should be given to those matters, by both proponents and critics of VAT;
* ironically, the whole debate analysed here exemplifies one of those key concerns, to wit, how to establish the virtuous path when multiple argumentative virtues conflict with each other.

While my analysis is intended to defuse Bowell and Kingsbury' attack against VAT, it does not end up making their criticism useless. On the contrary, along the way I will show that it works well as a litmus test: how one reacts to their argument reveals the kind of virtue theorist that person is prepared to be.

2. *A case against VAT – and why it doesn't matter*

Bowell and Kingsbury set out to prove that "virtue argumentation theory does not offer a plausible alternative to a more standard agent-neutral account of good argument" (2013, p. 23). In order to make that point, they employ an argument (denoted as BK from now on) that can be reconstructed as follows:

1. They *define a good argument in terms of validity,* as "an argument that provides, via its premises, sufficient justification for believing its conclusion to be true or highly probable, or for accepting that the course of action it advises is one that certainly or highly probably should be taken" (p. 23).
2. They argue that considerations on the arguer's character can be pertinent to establish the *truth* of her claims, including the premises of her arguments (e.g. in legitimate *ad hominem*), but are never relevant to evaluate the *structure* of the

argument – which is what matters for validity.
3. They consider and reject *two apparent counterexamples* to 2*:* inductive arguments whose validity may be affected by unstated facts, and arguments based on reasoning too complicated for the untrained to follow (such as the Monty Hall puzzle).
4. They conclude that argument assessment cannot be reduced to considerations on the arguer's character: "*virtue argumentation theory cannot be the whole story* when it comes to argument evaluation" (p. 31, my emphasis).

In his response to BK, Aberdein (2014) mostly focused on points 2 and 3 above: that is, he tried to show how the arguer's character can provide insight on the structure of the argument and its validity (contra 2), and how this happens also in those counterexamples that Bowell and Kingsbury thought to have rejected (contra 3). I will not discuss here whether Aberdein is successful in his efforts, because I want instead to put pressure on step 1 of BK, as well as inviting further reflection on 4.

The starting point of BK is in how argument quality is defined: this is a truly pivotal move, because the attack is aimed at *argument evaluation*, but it hinges on alleged limits of VAT in dealing with *validity*. So, unless validity plays a key role in argument assessment, the whole criticism falls apart. Bowell and Kingsbury are of course aware that VAT is unlikely to endorse a definition of argument quality that reduces it to validity, and this is how they frame the issue: "This [i.e., their own definition of argument quality] is not an account of good argument that a virtue argumentation theorist would accept. The virtue theorist thinks that what makes an argument good is that the person presenting it has argued well, whereas we think that what makes it the case that an arguer has argued well is that they have presented an argument that is good in the sense described in the previous paragraph" (2013, p. 23). Unfortunately, this strikes me as a particularly unhelpful way of describing the situation, akin to the proverbial dilemma "which came first, the chicken or the egg?" – we all know how that sort of discussion leads nowhere. In particular, here Bowell and Kingsbury overlooks the substantive reasons that prompted VAT to focus on the arguer's character in the first place.

Looking at the literature, it is absolutely clear that VAT was borne out of a deep-seated suspicion towards a definition of good argument limited to validity, given the latter inability to justify people's intuitions on argument quality. Consider for

instance the following (real) textbook example of an allegedly good argument: "Both Pierre and Marie Curie were physicists. Therefore, Marie Curie was a physicist" (quoted in Cohen, 2013, p. 479). If we look at this piece of text with a rich notion of "quality" in mind, we find it hard to hold it in high esteem, since it does not seem very "good" in any meaningful sense. On the contrary, it is manifestly *bad* in a variety of respects: uninformative, trivial, pedantic – you name it. That is why some people may even have what I like to call "a Cohen's reaction" to it – something like "*Really? That's your example of a good argument?!"* (again, Cohen, 2013, p. 479, emphasis in the original).

Let us name this the *problem of balidity:* it hinges on the fact that some inferential structures, in spite of their unquestioned validity, are still terminally bad *qua* arguments. Nor is balidity a rare affection: as a case in point, consider the-mother-of-all-enthymemes (assuming enthymeme to be a female gendered noun, which is something I was unable to establish): "Socrates is a man, therefore Socrates is mortal". If reconstructed as a truncated syllogism with the implicit premise "All men are mortal", it is perfectly valid – yet it is still not a good argument, other than for the purpose of illustration (which is, not surprisingly, the only use it ever had). Could anyone seriously picture Aristotle, or anyone else, using this line as a piece of real-life arguing, e.g. to persuade an interlocutor of the mortality of Socrates? Certainly not: it is only meant, and always was, as an example, not an argument.

Someone might object to the whole idea of balidity, on the ground that instances like those mentioned above are best understood as *non-argumentative at all*. Simply put, the idea would be to claim that a certain linguistic expression, even though it conveys a clear (and, in this case, valid) inference pattern, may serve a function that has nothing to do with arguing – e.g., exemplifying what an argument is. However, this view has two main flaws: first, it is inconsistent with presenting similar sentences as tokens of the type "argument", and it fails to explain how they could exemplify what is supposed to be "good" in an argument (by comparison, consider an example of a delicious apple, which is typically an apple with the appropriate qualities, not something else entirely); second, scholars have been treating similar cases as arguments (in fact, prototypical ones) for several centuries, so a very convincing error theory would be required to explain how we were all so deeply mistaken. Absent such a theory, it is much more parsimonious to treat these cases as arguments that are valid and yet bad

(*balid*, for short), and therefore try to provide an account of argument quality that does not reduce it to mere validity.

In this perspective, which is the one endorsed by VAT, balid arguments are instances in which validity does not rescue the argument from its badness. As Cohen quipped, only someone with logical blinders on (2013, p. 479) could fail to see their spectacular lack of value, in spite of their validity. What Bowell and Kingsbury omit to notice is that balid arguments are also the main motivation for VAT. So, a better reconstruction of the VAT standpoint on argument quality would be the following: the virtue theorist thinks that what makes an argument good *cannot just be validity* (given the existence of balid arguments), and thus conceives argument quality as depending on the act of arguing well. This is not just a matter of perspective, but rather a substantial disagreement on what counts as good argument, based on a verifiable appeal to people's intuitions.

The upshot is that Bowell and Kingsbury give us a definition in which validity is necessary and sufficient for quality, whereas virtue theorists reject sufficiency, and may also reject necessity, depending on how radical they are (more on this later on). So BK argues against VAT from a premise that VAT explicitly rejects: it is not hard to see that this is unlikely to produce much progress.

3. *Varieties of VAT*

Turning to step 4 of BK, one notes that Bowell and Kingsbury (2013) tend to shift aim across their paper, or at least leave open multiple interpretations of it. Sometimes their critique of VAT is framed in terms of failure (e.g., "VAT does not offer a plausible alternative to a more standard agent-neutral account of good argument", p. 23), but more often it is presented as a *charge of incompleteness*: e.g., "any agent-centered account that cannot accommodate [a validity-based characterization of argument quality] will be unable to offer a complete account of good argument" (p. 24). Bowell and Kingsbury may not consider these two positions as truly distinct, since in their view validity is the crux of argument quality, therefore if VAT cannot give us validity, then it is a failure at evaluating arguments, period. However, for virtue theorists, who do not consider validity as the crux of argument quality, the two charges are clearly different. In what follows I will stick to the more modest reading of Bowell and Kingsbury' accusation, as it is spelled out in point 4 of BK (taken from their own conclusions): "virtue argumentation theory cannot be the whole story when it comes to argument evaluation" (p. 31).

The question I want to pose is the following: *Should virtue theorists be worried* by this charge of incompleteness? The answer depends on what kind of virtue theorist one is prepared to be. To simplify, let us distinguish between:

* *Moderate* VAT: *validity is necessary* but insufficient for argument quality; hence it is perfectly possible for an argument to be balid, whereas all good arguments are also valid.
* *Radical* VAT: validity is *neither sufficient nor necessary* for argument quality – hence looking at validity is a non-starter to assess argument quality.

In a moment I will turn to the empirical question of what kind of virtue theorists are to be found "in the wild", taking as prime examples the leading proponents of VAT, Daniel Cohen and Andrew Aberdein. But first let us note that radical virtue theorists are by definition immunized against BK: if validity is neither sufficient nor necessary for argument quality, who cares whether or not it depends from the arguer's character?

Looking at textual evidence, it would seem that Daniel Cohen takes precisely that stance: "Valid reasoning is apparently neither necessary nor sufficient for an acceptable argument" (2013, p. 479). Although Cohen is quick to add that "acceptable" is not synonymous of "fully satisfying", this certainly sounds as an endorsement of radical VAT. Now, denying the sufficiency of validity for argument quality is not especially hard, since balid arguments make a pretty strong case in that direction, as discussed. But to reject necessity too, one must produce at least one instance (and possibly several) of an argument which is indisputably good, and yet invalid – what I suggest we call a *goodacy*, i.e. a good fallacy. This strikes me as something much harder to do. Yet Cohen thinks he can deliver on this, so let us turn again to his work for elucidation.

Unfortunately, I do not think his treatment of this particular point can really win the day for radical VAT. This is how Cohen argues against the necessity of validity for argument quality: "Under certain circumstances, it is not necessarily unreasonable to overlook an argument's flaws. One might, for example, resort to a meta-argument like this: 'I can see that the argument doesn't work as it stands, but the conclusion is so attractive that I'm sure someone will be able to fix it. I'll accept this flawed one for now.' The French mathematician and physicist Henri Poincaré suggested that he sometimes operated this way: accepting a formula as a provisional lemma in proving theorems before he had any proof for that lemma"

(2013, p. 479).

If we look at this as an example of a goodacy, I believe we are bound to be disappointed. After all, what is being accepted as good here is the *conclusion,* not the argument for it: while this is indeed a fairly common instance (we often have clear intuitions on certain matters, even when we lack the means to prove them to our satisfaction), this has little to do with the quality of the argument. In fact, by *provisionally* accepting something as a lemma, Poincaré was certainly not suggesting that he had a good proof for it – and indeed, the whole point of provisionality is because you can get away with it for the time being in light of practical considerations, but sooner or later you will have to deliver "the whole thing". So I do not see meta-arguments of the kind suggested by Cohen as convincing cases of goodacies.

In my view, if one really wants to be radical on VAT, then the most promising direction to take is looking at cases where *validity does not matter* for the interested parties, rather than being objectively absent. Goodacies may or may not be the unicorns of argumentation, but there is no lack of instances in which people (i) experience an argumentative exchange as being fully satisfying, while (ii) bypassing entirely any consideration of validity, or even (iii) regarding such considerations as a threat to the optimal flow of arguing they are currently experiencing. When you are having the time of your life animately discussing with your friends, scrutinizing the validity of each other arguments may very well be considered a fatal *faux pas*. Granted, presenting similar instances as evidence against the idea that validity is necessary for argument quality is not without problem: a predictable, but far from trivial objection would be to note that, as long as mutual rational questioning of each other arguments is out, then it is hard to see why we should insist in calling that particular activity "argumentation" at all. Still, it seems to me that similar cases are more promising for radical VAT than instances were lack of validity is fully acknowledged, like the one discussed by Cohen, because in the latter situation the notion of "quality" does not truly apply to the argument, but rather to its conclusion.

However, my purpose here is not to defend a radical version of VAT, but rather to note that (i) it is not easy to be a radical virtue theorist, yet (ii) if you manage to hold to that particular position, then you do not need to worry at all about BK. This, in turn, provides us with the intellectual resources to offer a streamlined, and possibly more informative reconstruction of BK. As far as I can see, Bowell

and Kingsbury line of argument can be summarized as follows:

BK, compact version: Unless radical VAT can be defended, either it can be explained how validity is determined by the arguer's character, or it must be conceded that VAT does not provide a complete theory of argument evaluation.

Radical virtue theorists deny the premise (they are ready to defend radical VAT), so they can ignore the disjunctive conclusion. Moderate virtue theorists, in contrast, have to decide whether they want to take the first or the second horn of it. Again, their choice in that respect will tell us something on the kind of virtue theorist they intend to be, differentiating two sub-types of moderate VAT:

* *Modest moderate VAT*: validity is necessary, albeit not sufficient, for argument quality, and moreover it is an aspect of quality that does not require considerations of character to be established.
* *Ambitious moderate VAT*: validity is also considered necessary and non-sufficient for argument quality, but it is conceived as determined by virtue theoretical considerations, like any other facet of quality.

Aberdein, in his reply to BK (2014), clearly endorses the latter position: so here I am taking the liberty of outing him as an ambitious virtue theorist, in spite of his moderation. It is also worth noting that virtue theorists of Aberdein's persuasion, i.e. ambitious moderates, are the only ones that need take issue with BK. For the radicals, the challenge it poses is non-existent; for the modest moderates, accepting the charge of incompleteness is not a problem to start with, since they agree that argument evaluation, while requiring an appeal to the arguers' virtues to establish quality in general, does not need to make use of similar means in dealing with the specific problem of validity. But, to paraphrase Bowell and Kingsbury, since validity cannot be the whole story when it comes to argument evaluation, then leaving validity outside of the scope of virtues does not make VAT any less necessary to understand argument quality. That is what makes modest moderates immune to BK.

But is modest moderate VAT a genuinely interesting theoretical option? I believe it is – or, at least, I want to argue that, *prima facie*, there is *nothing wrong in being modestly moderate*, when it comes to VAT. Two main reasons stand out for that claim: first, modest moderation is a very natural theoretical stance to have, with respect to VAT; second, one can be moderate in a very ambitious sense, that

is, without making virtues any less crucial to argument evaluation. The first point I take to be rather self-evident. As discussed, from day one VAT presented itself as an attempt to move *beyond* validity in assessing argument quality: as such, it was never necessarily committed to providing a complete theory of argument evaluation, especially for what it pertains validity, because that is precisely what VAT is not interested in – at least not primarily. This brings us to the second point: VAT may be "modest" in that it leaves validity to non-virtue-based considerations, but it also denies any special role to validity in determining argument quality, to get a fresh look at *everything else that matters* – open-mindedness, fairness, sense of proportion, contextual appropriateness, mutual respect, etc. So modest moderate VAT may not give us the whole story of argument evaluation, but it certainly provides the bulk of it, relegating validity to little more than a footnote, albeit a necessary one.

4. *Conclusions: do not feed the validity buffs!*

If my reconstruction is correct, BK does not fare particularly well as an attack against VAT: it is based on a definition of argument quality that virtue theorists universally reject, and its conclusion needs to worry only one version of VAT, i.e. ambitious moderation, out of three – too bad for Aberdein, but good for the rest of us! On the plus side, diagnosing BK helped us uncovering different varieties of VAT, which hopefully may prove useful to foster the debate.

However, I think BK and Aberdein's reaction to it (2014) epitomize a potential stand-off in the dialogue between proponents and critics of VAT, so I would like to try and intervene as an interested third party in the debate. At risk of caricaturing a serious dispute, the whole affair reminds me of the following hypothetical dialogue between Dan, a virtue theorist, and Bo, a "validity buff", that is, a stalwart defender of validity as the key to argument quality:

Dan: *Look, there are plenty of valid arguments that are not good in any reasonable sense. That's fascinating! It means we need more than validity to capture argument quality.*
Bo: *Well, maybe so, but what about validity?*
Dan: *Are you not listening? I have no beef with validity – keep it, for all I care! I want to talk about everything else that matters for argument quality, and yet has nothing to do with validity.*
Bo: *AHA – then you cannot account for validity!*
Dan: *Jeez, some key argumentative virtue is missing here…*

This is just a cartoon, of course, but it emphasizes a real problem: by insisting on validity as key in argument evaluation, Bowell and Kingsbury (2013) focused attention on something which is, explicitly, of very little interest for the general rationale and purposes of VAT; in turn, by taking up their challenge and dealing with it, it could be said that Aberdein (2014) allowed the debate on VAT to be momentarily derailed towards matters that are, at best, tangential to it. Nor my present efforts should be regarded as being beyond reproach, since what I am doing is to argue that we should not care much whether validity is analysable in terms of virtues, and this is tantamount to deny that we have to address the worries raised by Bowell and Kingsbury – an attitude that many argumentation theories would not find especially commendable.

It seems that what we have here is a *conflict of argumentative virtues,* in which nobody can honestly claim to have upheld all relevant virtues at once: no matter what the actors of this minor academic drama do, they will violate at least some argumentative virtue. To put it simply, Bowell and Kingsbury, by exerting the virtue of careful critical scrutiny (focus on any unclear or defective details in a target argument), violated the virtue of relevant engagement (i.e., avoid focusing on what is manifestly of minor importance in your target argument): this, in turn, risked side-tracking the discussion on VAT. Aberdein, by closely addressing their line of attack, exerted the virtue of dialectical responsiveness (address all potentially sound criticism), but failed to apply the virtue of maximal relevance in theory construction (focus primarily on what is most significant), and thus allowed the discussion to be side-tracked. Finally, my own approach tried exerting maximal relevance, but thereby failed to demonstrate dialectical responsiveness: in fact, readers will notice that whether or not VAT can account for validity is not discussed anywhere in this paper, so Bowell and Kingsbury' arguments to that effect are simply not answered.

Whether or not my reconstruction of this minor scholarly debate is correct, a general point should be apparent by now: there is no guarantee that, by exerting an argumentative virtue, the arguer will not also violate another virtue. This raises an obvious and yet crucial question for VAT: in similar conflicts of argumentative virtues, what is the virtuous option? On what grounds?

Now, *that* is a good challenge for VAT, not quibbling on something that VAT was never inclined to consider central, i.e. validity. If VAT cannot deliver a solution to the frequent conflicts of argumentative virtues we encounter in everyday life,

then it has a serious problem, one that applies to all varieties of VAT. Besides, the theoretical means to engage with that particular problem are within the province of VAT, and two possibilities immediately come to mind: either assuming some *ordering of virtues*, so that certain virtues should have precedence over others, whenever a conflict arises, or adopting some *doctrine of the mean*, following in Aristotle's footsteps. The former solution lends itself nicely to neat formalisms, but it raises the thorny issue of establishing criteria to generate (and possibly change over time and/or across contexts/cultures) the relevant ordering. As for the doctrine of the mean, it certainly fits nicely in any virtue-theoretical framework, but it is not easy to spell out in sufficient detail to handle real-life conflicts of argumentative virtues, which in turn may severely limit the scope of application of VAT.

Not surprisingly, Cohen listed conflicts of argumentative virtues in his to-do-list, at the end of his keynote address on VAT at OSSA 2013: "Questions such as just which virtues are needed for the different roles in arguments, how they might relate to one another, *how conflicts among them might be resolved,* and how they differ from skills" (p. 484, my emphasis). To explain why none of these problems were taken up in that particular paper, Cohen noted that "all of them have been addressed at length by others elsewhere" (p. 484). Unfortunately, he did not provide any exact reference for that claim, and I was unable to locate a satisfactory treatment of conflicts of argumentative virtues in the relatively small literature on VAT. Thus I suspect that Cohen here was slightly exaggerating: while some of the problems he mention (e.g., distinguishing between virtues and skills) have been addressed at length by other scholars (e.g., Aberdein, 2007), some others have not, and I think conflicts of argumentative virtues belong to the latter group.

In fact, it is only in Cohen's own work that I could find a brief discussion of conflicting virtues in argument, both before (2005) and after (2009) that Aberdein "invented" VAT in 2007. In a nutshell, Cohen tends to think of conflicting argumentative virtues as *counterbalances:* for instance, he sees an interlocutor that concedes too much and too readily to the counterpart (the "Concessionaire") as the opposite in a spectrum that starts with the "Deaf Dogmatist", that is, someone who never concedes the opponent's point, no matter what. This leads him to explicitly invoke Aristotle's doctrine of the mean, albeit only in passing: "If Aristotle is right and the golden mean is found by aiming for the opposite extreme

from our natural inclinations, then we could do worse than trying to emulate the Concessionaire. The Concessionaire does, after all, listen well and has the honesty and self-confidence to acknowledge good points. If we hope for as much in our fellow interlocutors, we should cultivate it in ourselves" (2005, p. 62). In a similar vein, Cohen discusses open-mindedness and sense of proportion as two key virtues of argumentation, regulated by the same sort of balancing act; in his own words, "although it is a necessary precondition for getting the most out of our arguments, open-mindedness can also be a counterproductive trait of mind in argumentation. The problem is that arguments are open-ended in a number of different ways with the potential to be extended *ad infinitum*. Open-mindedness exacerbates matters. It needs the counterbalance provided by a sense of proportion" (2009, pp. 59-60).

While I have much sympathy for this counterbalancing view of conflicting virtues, Cohen's remarks are still far from providing us with a general, detailed theory of what the relevant counterbalances are, and how they are supposed to work: as far as I can see, a well-structured map of argumentative virtues is still missing. Until that map is sketched out in greater detail, the jury is still out on whether or not VAT can deliver a satisfactory understanding of conflicts of argumentative virtues. Still, the point remains: this is a worthy quest for virtue theorists, as well as a suitable target for their critics. With so much yet to be done, no energy should be wasted on less essential matters, and virtue theorists should stop feeding the validity buffs.

Acknowledgements
As Daniel Cohen noted in personal communication, the presentation of this paper to the ISSA 2014 conference was graced by a truly virtuous audience, whose critical suggestions later helped me in writing down more clearly my ideas on the subject. Any residual shortcomings, however, is to be blamed on my numerous argumentative vices.

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ISSA Proceedings 2014 – Access Denied: Crafting Argumentative Responses To Educational Restrictions On Undocumented Students In The United States.

Abstract: The state of Georgia has enacted laws restricting the access that undocumented Latino/a students have to universities. The restrictions are comparable to those imposed on African-Americans in the old South. The students have formulated a set of argumentative responses to challenge the legitimacy of the restrictions. The strategies include enrolling in Freedom University. This underground university helps to both humanize the students for the public while affording them the opportunity to join an educational community.

Keywords: DREAMers, Freedom University, Georgia Undocumented Youth Alliance, immigration, public argument, and student protests.

1. *Introduction*

Over the last decade a number of jurisdictions in the United States have enacted laws to restrict the access undocumented college students have to in-state tuition and scholarship opportunities. While some states have pushed back against this nativist impulse and enacted laws affording undocumented students access to post-secondary education, there continue to be students who are denied educational access. The most severe educational restrictions are found in the old segregated South, and they are often part of a larger package of laws intended to control the behaviors of the entire undocumented population in that state. The

states of Alabama and South Carolina have instituted a total ban on the admission of undocumented students to state-funded colleges. My home state of Georgia has banned students from attending the most competitive schools and stripped undocumented students of the right to pay in-state tuition.

The suppression of an immigrant population is not a problem confined to the United States. France, for example, has struggled with political conflict resulting from a rising Islamic population and fear that French traditions could be lost. In the Netherlands, young immigrants have found themselves at risk of being ejected from the country, as they become adults. In France and the Netherlands, advocates for the undocumented have attempted to redefined the controversy by highlighting the ways in which restrictions would negatively impact families by tearing them apart (Nicholls, 2013, p. 176). This is consistent with a recurrent pattern employed by opponents of legislative restrictions on non-citizens – the redefinition of the conflict to focus on the values of community and family.

This essay hopes to make two contributions to the on-going immigration debate by reviewing actions take by undocumented youth in Georgia to reestablish access to public universities. The argument choices made in this local controversy could have ramifications for the larger immigration debate in both the United States and Western Europe. Against the backdrop of state restrictions, advocates have formulated a set of communicative responses that suggest that the immigration debate can be shifted to better protect the interests of the undocumented. First, by moving the dispute from a focus on border security to educational access, the argumentative ground may be tilted in the favor of those advocating immigration reform. The narrative of individual hard work leading to success is a long-standing appeal in American culture. The undocumented students themselves tell stories of aspiring to achieve professional success by chasing the American Dream. These moving stories are slowly replacing the tales of the faceless illegal immigrant skirting a fence on the border of Mexico and the United States. Second, in response to requests from undocumented students, professors have played a role in this controversy by facilitating educational opportunities for them. This paper will review local efforts, including the establishment of Freedom University and the ways in which Freedom University's communicative campaign contributes to the effort to humanize students, afford them educational opportunities, and reverse state restrictions. Additionally, Freedom University provides the students access to the rhetorical trappings of

the educational system including academic garb, graduation exercises, and student protests at administrative offices to use in the conflict with state legislators.

The essay is divided into three sections. The first section traces the recent trend in the United States to impose restrictions on undocumented residents. The second section describes and assesses the argument strategies deployed by students to push their position with both legislative decision-makers and the public. The final section suggests lessons that other groups might take from the strategies deployed by the students in Georgia.

2. *History of immigration restrictions*

The roots of the recent immigration debate can be traced back to a series of policy decisions made in both the Clinton and George W. Bush administrations and the ensuing political gridlock that has dominated American politics since 2005. In the 1996 Personal Responsibility and Welfare Opportunity Act, the Federal government singled out undocumented residents and precluded them from receiving food stamps and welfare benefits. The legislation legitimized the process of carving out exceptions to basic social service access and erasing undocumented residents from the social safety net. This marked the resurgence of the nativist impulse in the United States and came a decade after Democrats and Republicans joined together to pass comprehensive immigration legislation.

In the 1990s, there was an on-going struggle in the United States between groups with divergent views of immigration. On one hand, there were political advocacy groups lobbying for in-state tuition for undocumented students; on the other hand, there were think tanks calling for stricter rules for undocumented residents. A rhetorical characteristic shared by both sides of the debate was that the youth did not rhetorically represent their own interests in the dialogue (Nicholls, 2013, p. 48). In many cases, both Democrats and Republicans lobbied on behalf of comprehensive immigration legislation that would both secure the Mexican/U.S. border and liberalize the patchwork of laws that drove the undocumented underground. The extension of rights for the disenfranchised was justified by discussion of what immigrants would do for the citizenry and the economy. The rhetorical turn to argumentation that justified the extension of personal rights based on the potential benefits to the voting public and the economy was a legacy of the Reagan revolution and permeated the discourse of policy advocates (Aguirre & Simmers, 2011, p. 15). These lines of argument have

been found in the debates about the Development, Relief, and Education for Alien Minors (DREAM) Act dating back to August of 2001. The DREAM Act would provide resident status to undocumented graduates of high schools who are in good legal standing.

The DREAM Act and other policies intended to benefit the undocumented have suffered from political complications arising from the War on Terror. Immigration policy was rolled into the jurisdiction of the Department of Homeland Security following the 2001 terror attacks. The Mexican/US border was redefined as a site that was susceptible to border crossings by Islamic terrorists and the militarization of the border was enhanced. The politics that suborned immigration policy reform to national security interests was followed by rapid changes in the politic climate. Despite the support of George W. Bush, immigration legislation that would have further strengthened border security and liberalized immigration rules for non-citizen residents did not make it through the Congress. The last effort, the Comprehensive Reform Act of 2007, was stalled by a series of procedural votes in the Senate. The DREAM Act was attached to this comprehensive policy, and this was the last time the act was debated in a serious fashion by the government in Washington D.C.

While the DREAM Act remains a promise unfulfilled for undocumented students in the United States, it has played a rhetorical role in the struggle for student rights. The act had the effect of constituting the largely Hispanic undocumented youth in the United States into a defined rhetorical community. While legislators and public policy advocates formulated the legislation, the proposed act effectively established the undocumented youth as a distinct political force. Those youth built upon the framework articulated by others and took on their own fight to attain the American Dream.

The pattern of national legislative failure also left conservatives in border-states concerned about border enforcement and security. As early as 2007, states began to pass legislation making it more difficult for employers to hire undocumented residents. A burgeoning population of undocumented workers in conjunction with federal inaction led the Arizona legislature to expand its role in enforcing immigration statues. The appropriation of immigration enforcement by Arizona became a full-blown international controversy with the passage of SB 1070 in 2010. After the law was tested in court, the state was allowed to check the legal status of anyone involved a law enforcement stop, including routine traffic stops.

The pattern of passing aggressive anti-immigrant statutes in Arizona was modeled by a number of states. In the case of Georgia, legislation and rules passed by the state have targeted undocumented college students and pushed this group to aggressively advocate their case in the public sphere.

While Arizona provided a model, additional political conditions led to Georgia to pass Board of Regents (BOR) Rule 4.1.6, which restricts the ability of undocumented students to attend select universities, and the Georgia Illegal Immigration Reform and Enforcement Act of 2011 (HB 87), which imposes significant penalties on prospective employers. First, the 2008 recession and ensuing economic insecurity led many to assert that the undocumented were a drain on the economy by reducing the employment opportunities available to Georgians. The neo-conservative line of argument used to pass the immigration legislation of 1986 was rendered ineffective by the recession and the fear of job loss. Additionally, Georgia's the demographics were changing quickly. The Hispanic population increased from 8% of the population in 2000 to 16% of the population in 2010. Fewer job opportunities in conjunction with a spike in the Hispanic population led politicians to use statutes to protect voters. The anti-immigrant climate worked in conjunction with the restrictive policies to drive immigrants from the state.

In October of 2010, BOR Rule 4.1.6 was approved and it prohibited undocumented students from attending colleges that had rejected qualified citizens of Georgia in the preceding two years. The adoption of the rule was followed by a broader set of restrictions outlined in HB 87. This law made it illegal to transport or harbor undocumented residents. The law also created an obligation for employers with more than ten employees to use an electronic verification system to certify a worker's legal status. It crippled agricultural sectors of the Georgia economy and drove undocumented residents into the shadows (Peña, 2012, p. 247).

The students responded in a more assertive fashion than others in their community. They risked arrest and deportation and spoke in the public sphere. The risk was magnified by the repeated stories found on social network sites that reported deportation checkpoints in and around the city of Atlanta. The students organized into a number of groups, including the Georgia Undocumented Youth Alliance (GUYA), a group that used both traditional local networking techniques and contemporary social networking sites to push back against the restrictions.

During the 2011-2013 period, GUYA was the immigration group with the most active Facebook presence in Georgia. While other groups, including the Georgia Dreamers Alliance, have pushed against the laws in Georgia, it was the GUYA that led the initial charge for student rights. GUYA organized and participated in marches, protests, and delivered speeches in public space. The students protested their political dislocation by occupying areas reserved for citizens. Nicholls has labeled the use of distinctive public space, born of legislative restrictions, as the strategy of creating niche-openings to establish rhetorical opportunities for the undocumented (Nicholls, 2013, p. 11).

Undocumented students in the United States were constituted into a group by the anti-immigrant policies, and their identity was cemented with the drafting of the DREAM Act. Nationally, the group is commonly referred to as the 'Dreamers.' The policy advocates portrayed the students as the best and the brightest who embodied the cultural values that made the United States great. The phrase "the best and the brightest" is a long-standing term in American culture with roots in 18th century British literature. The youth were differentiated from other immigrants in an effort to move political moderates to support the act. The students were young, intelligent, and hardworking. And, most importantly, they were in the United States illegally due to no fault of their own.

In the period immediately following the constitution of the Dreamers, some students followed the rhetorical path of their advocates and worked to distinguish themselves from other undocumented residents. This had two important effects on their argument patterns. First, by narrowing the scope of the controversy to providing educational opportunities for students, the appeals were more likely to be considered by moderates and conservative citizens. The students were motivated and smart, and as such, they could make positive contributions to society. Second, the narrowing of the issue to education had the unintended negative effect of providing a marker to distinguish deserving from undeserving immigrants. The deserving population aspired to improve themselves through education. The undeserving worked as domestic labor in hotels and restaurants. In many cases, these undeserving who knowingly broke the law to enter the country were the parents of the 'deserving' students.

The public argument strategy of the students has evolved over time and is more sophisticated than it was when the Dream Act was formulated in 2001. The early representations have been replaced by a more sophisticated approach that

celebrates the entire immigrant community. By looking at the ways the students redefine the controversy to include more than a narrow set of legal definitions of citizenship and student, one can observe the role that youth play in empowering a subjugated community (Anguiao & Chávez, 2011, p. 82). While there have been a number of research projects in the communication field attending to the development of discourse in the Latino/a population, there has been limited attention paid to the rhetorical approaches of the youth in this oppressed community. Specifically, the undocumented students are a distinctive population. They have been defined as having no 'legal' rights, which traditionally eviscerates a group's opportunity to mobilize support for political reform (Anguiano & Chavez, 2011, p. 81). Yet, today they are an influential political group in Georgia.

3. *Rhetorical responses in Georgia*

The students used a variety of communicative tactics in their fight to re-establish their right to education in Georgia. The rhetorical devices reflect a merger of 1960s protest strategies and the use of social media, as well as a commitment by students to advocate their own case in restricted public space.

The group affirms the values of protest and civil disobedience found in the struggles of the 1960s. Given that Georgia was a segregated state, the students draw heavily from the civil rights movement when crafting public argumentation. In a reference to the segregationist Jim Crow laws of the 20th century, the students describe educational policies as "Juan Crow" laws on the GUYA Facebook page. In November of 2001, their page highlighted a panel the group co-hosted with the Georgia Latino Alliance to describe the modern resegregation of the South. According to Lovato, Juan Crow is the "matrix of laws, social customs, economic institutions, and symbolic systems" used to impose psychical and psychological isolation on the undocumented (Lovato). The Jim Crow laws similarly called for racial separation in education, housing, public businesses and transportation. African-Americans were often met, for example, with signs indicating that they were not welcome guests in even the poorest of businesses.

The use of the phrase "Juan Crow" is a powerful rhetorical device in the effort to decriminalize the status of being "undocumented" in the United States. Both the African-Americans of the 1960s and today's Latino/a's have been made to feel like criminals by laws and statutes passed in Georgia. A dominant theme is that the undocumented Latino/a residents have violated the law and should be categorized as criminals. This illegal/legal dualism has focused the debate on the question of

whether the undocumented immigrants have broken the law. This framework obscures racial undercurrents and limits civic dialogue about immigration. For example, this debate does little to uncover the motives for migration from Central America. Proponents of a secure border do not discuss the reasons why someone might flee their home country. The dominant rhetoric works to perpetuate a society in which nonwhites are "controlled, marginalized and disciplined" (Lawston & Murillo, 2009, p.50).

The GUYA Facebook page also has several posts and pictures of undocumented students meeting in 2011with the civil rights icon John Lewis, further drawing the comparison to the civil rights battle. Since the Lewis-GUYA meeting, Lewis has called for the reversal of the educational restrictions on undocumented students. Lewis remains a force in American politics, and those with even a cursory awareness of the civil rights movement have seen the picture of a bloodied John Lewis on the Pettis Bridge. His support of GUYA reminds the public that the struggle of the undocumented shares many of the characteristics of the civil rights battle. And, this relationship benefits the curators of the civil rights legacy by reminding people that the civil rights battle is part of a larger human rights struggle that includes the undocumented student movement in Georgia.

GUYA protests have taken the form of the marches of the 1960s. For example, GUYA, just like the activists of the 1960s, protest at the Arch at the University of Georgia and regularly find themselves on the steps of the President's office protesting their exclusion from the campus. Prior to rallies, posts on networking sites call for marchers to dress in academic robes. The students celebrate their academic performance and their language reflects the values we hope to see in any young person in society. The use of the Arch is particularly significant. It is a cultural symbol at the University of Georgia. When constructed in the 1850s, the Arch was part of a fence and gate built to secure the campus from the town. The gate disappeared shortly after the structure was built and the border between the town and the campus was open to all. To this day, the Arch is a location where people from the university and the town express political viewpoints.

A tradition at the university is that a student should not pass through the Arch until completing the requirements for graduation. Students continue to step around the Arch more than 100 years after the tradition was initiated. Each year, graduates line up in their caps and gowns to have a picture taken as they first walk through the Arch. GUYA members and other students graduating from

Freedom University appropriated that tradition with the graduation of their first class in 2012. More than twenty students dressed in caps and gowns and marched through the Arch to celebrate their academic progress. This is an interesting case study in how the Latino/a population crosses a border in the struggle to craft a political identity (Cisneros, 2014, p. 20).

The Arch also has been a site of some of the more painful moments in the history of the University. The use of the Arch by the graduates of Freedom University recalls the protests of the early 1960s in the United States. For example, in 1961 some in the UGA community protested the admission of two African-American students at the Arch. The Arch was a place where the struggle between the Jim Crow South and an integrated University played out in 1961. The symbolism of that moment echoed as the graduates of the Freedom University and victims of Georgia's Juan Crow laws paraded through the Arch to celebrate their accomplishments.

Drawing a further parallel to the civil rights movement, GUYA has promoted the use of non-violent protest techniques. In 2011, for example, members of GUYA participated in a panel on the use of non-violent protest techniques by contemporary protest movements at the King Center. The students pushed the boundaries of citizenship by embracing the notion of educational citizenship as defined by classroom performance, and this type of tactic is something espoused by advocates at the King Center. The meeting was held in the King's Center Freedom Hall. The use of the King's Center location for the GUYA panel is interesting; it is both a monument to the bravery of the 1960s civil rights movement and a national park that is policed by the Federal National Park Service. The students navigated the conflicted space in their effort to craft better messages.

While the student's adapted tactics used by other groups, an important characteristic of their campaign was the willingness to speak on their own behalf. While politicians and policy advocates constituted the undocumented students as a political force with the drafting of the DREAM Act, it is the students themselves who serve as the most effective advocates today. The students have delivered speeches in hostile situations and exhibited a willingness to put themselves at risk. The work of Keish Kim, a long time student advocate, highlights the forceful nature of student rhetoric.

In November of 2011, Keish Kim was granted the opportunity to speak against Rule 4.1.6. She affirmed that the undocumented were hard working students who came from tax paying families who made great sacrifices to come to the United States. She and her supporters attended the meeting wearing a scarlet U to signify their compromised legal position. Her speech contained many of the arguments found in the rhetoric of other undocumented students. The students suffer from hardship as children. In some cases, that hardship takes place in their country of origin. In other cases, the hardship is tied to struggling in the United States. The work and determination of the students to advance in society is recognized and celebrated. An important change in the narrative over the years is the role that parents are prescribed in the story. In early iterations, some claimed that the students were victims of decisions made by their parents and should not be held accountable for the illegal actions of their parents (Nicholls, 2013, p. 128). Students, like Keish Kim, now regularly celebrate the sacrifices that parents made to afford them the chance to live in the United States.

Having a student speak before the Board of Regents was an important moment for the movement. The students have availed themselves of the opportunity to speak at public meetings and in public locations, sometime at genuine personal risk. Ms. Kim spoke before a packed room at the Atlanta meeting. She told the group that at a time in life that students should aspire to great things, Rule 4.1.6 made the students feel naive for believing in the American Dream. In this speech, the position of the opposition is reduced to nothing more than a set of numbers. The technicality of the rule and the lack of a nine-digit social security number were all that prevented these worthy students from attending the college of their choice (Kim). In addition to the reference by Kim to the Regents' rule in this speech, the students in their campaign regularly used Rule 4.1.6. On the GUYA Facebook page there is a set of pictures in which a diverse group holds signs with 4.1.6 posted with a red slash through the numbers.

A recurrent element of the rhetorical campaign is the repeated use of the phrase "undocumented and unafraid." There are a number of blog posts, leaflets, posters, and YouTube videos, in which the students declare they will no longer be found in the shadows, rather they are undocumented and unafraid. This is an important statement in light of the risk of deportation, especially in the years 2011 and 2012. The phrase plays a role in the rhetorical redefinition of citizenship from simply a legal construct that excludes the undocumented residents to a cultural

one in which they fight for their educational rights. The students are unafraid because they are citizens of an intellectual community and are demanding the state recognize their place in that community.

The students are aware the risks involved in the strategy of public protest and the necessity of inhabiting public space. The social network sites that posted upcoming marches and protests regularly post stories about police roadblocks and of college age residents being deported. They regularly demand a place at the table at the annual Board of Regents meeting while simultaneously engaging in protests outside the meeting. They also protest on the campuses to which the law denies them access. Students engaged in self-risk in ways that recall the protests of the 1960s when the youth protested while risking being drafted into the Vietnam War.

In 2010, the GUYA inspired a small group of faculty at the University of Georgia to establish an educational program for them (Peña, 2012, p. 246). Freedom University opened its door in October of 2011 in Athens and initially serviced thirty-three students. The school took its name from the Freedom Schools of the 1960s that provided educational opportunities for young African-Americans in the segregated South. The students met in an undisclosed location and enrolled in one class during the first semester (Gutierrez & Tamura, 2011). By 2013, the university added a campus for students in Atlanta at the King Center. The college has an impressive array of activists and scholars on the board of directors. While the university received limited media coverage when it first opened, it received a burst of publicity when board member and Pulitzer Prize winner Junot Diaz discussed the program in a 10-minute segment of the Colbert Report. At the end of the interview, Stephen Colbert presented Professor Diaz with a Freedom University sweatshirt shirt he designed with FU prominently displayed on the shirt (Colbert). The dual meaning of the abbreviation was not lost on Freedom University supporters. Since that time, many have embraced the FU moniker and its implied message to state policy-makers.

Freedom University plays a role in the struggle to provide educational opportunities for its students. For example, the instruction the program offers students serves as a way for colleges across the nation to determine if a student is a good fit for their college. The school provides hope for students who fear that the restrictions have robbed them of their chance to attend college. The school also provides the students with a sense of community and an aspirational cohort

to work with on assignments. While college admissions offices do not officially recognize the coursework, it does help the students make their case for admission.

Once a student is accepted into a college, Freedom University engages in fundraising to help that student pay for college. The sacrifices made by the students are described in the fundraising efforts of Freedom University. Hugo M's story is a representative one. He talks about the ways in which his time at the University prepared him for college and the fact that the scholarship program allowed him to overcome educational obstacles and aspire to a college degree. He is a student holding down two jobs who is seeking a medical assistant degree. Other students Freedom University has placed at regional and national institutions have similar compelling personal stories and need for financial support.

In addition to these service-based commitments, Freedom University plays an important rhetorical role in framing the on-going immigration debate. First, the campus and its proximity to the University of Georgia help to alter the nature of the immigration border debate. Stories about Freedom University move the immigration debate from the securitized Mexican/US border to a focus on deserving students who find themselves at the border of a university. This locates the students as educational citizens based on their drive and intellect while highlighting their exclusion from the traditional university community by an unjust policy.

Second, Freedom University provides the students with a site that allows them to better challenge the exclusionary policies of the state. They share the local Athens community with the members of the University of Georgia community. While their classroom is a segregated one, they are members of the local intellectual community. They are receiving instruction from a gifted faculty and motivated volunteers. By continuing to pursue their education, these students are able to better deploy the symbolic trappings of the educational system in protests. The fact that students continue their struggle to achieve their educational goals adds to the story they share with others in a way that would be diminished if they were labeled dropouts.

4. *Conclusion*

While some immigrants have fled communities due to restrictive legislation and a

hostile political climate, the youth in Georgia have stayed to fight for their rights. They engage in effective public protests and stand in public to stake their claim to a college education while continuing to advance themselves educationally. The students have worked to network with a number of groups in Georgia and beyond when pressing their case. The rhetoric of the group has highlighted the ties to the civil rights movement that played out in Georgia in the 1960s. Additionally, they have reached out to student groups in other states with educational restrictions to share stories and communicative strategies. In Alabama and South Carolina students also are excluded from colleges and universities. In a number of Midwestern and Southern states, undocumented residents pushed for eligibility to in-state tuition rates. Undocumented students across the United States struggle to attain full legal and educational citizenship.

The locally based student movement in Georgia was a response to the restrictions imposed by state policymakers. With national action on a variety of public policy issues unlikely in the near future, local responses may be the best path forward for advocates of progressive politics. The narrow approach to the extension of rights and privileges used by the undocumented students in Georgia have some applicability to undocumented individuals in both the United States and in Western Europe. Governments have become better at restricting the effectiveness of large-scale protests. And, there are recurrent claims by the protesters that the traditional media outlets have been ineffective in sharing the stories of the undocumented in newspapers and on television. This condition when coupled with the inability of the national government to act has moved the students to engage in a targeted local approach. The tactics used by the Georgia students provide a potential pathway forward for the undocumented struggling for their rights in the United States and Western Europe. Specifically "in countries as diverse as France, the Netherlands, the United Kingdom, Belgium, Spain, and the United States, undocumented immigrants have launched high-profile campaigns for greater rights, less repression, and the legalization of their status (Nicholls, 2013, p.176)." In each case, the undocumented are stepping into the public sphere to assert their claims.

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ISSA Proceedings 2014 – The Symbolic Meaning Of Radbruch's Formula; Statutory (Non-)Law And

The Argument Of Non-Law

Abstract: Statutory "law" that "intolerably" (Radbruch) violates supra-statutory law is non-law. The content of the argument is not based on eternal and unchangeable natural law that positive law should conform to, but upon the fundamental (human) rights that prevail in a historical period. In the modern state the catalogue of fundamental (human) rights is so extensive that it offers a sufficiently broad basis for the removal of any legal incorrectness (including statutory non-law). Thus, the argument of non-law also has great symbolic value. It persuades us that legal thought should always make sense.

Keywords: legal positivism, Radbruch's formula, the argument of non-law, the symbolic meaning of Radbruch's formula, legal sense, sense of justice, mutuality, coexistence.

1. *Radbruch and his formula*

One of the most penetrating critiques of legal positivism is the so-called Radbruch formula. Already at the beginning of his theoretical path, Radbruch (Gustav Radbruch, 1878-1949) was aware "that it equally belongs to the concept of right law that it is positive as it is the duty of positive law to be right as to content" (Radbruch, 1914: 163, and 1999: 74). The basic characteristic of Radbruch's legal-philosophical thought was that, as a Neo-Kantian, he accepted value-theoretical relativism and advocated the standpoint that legal values cannot be "identified" (Germ. *erkennen*), but only "acknowledged" (Germ. *bekennen*) (Radbruch, 1914: 22, 162, and 1999: 15).**[i]**

An inevitable consequence of value relativism is that the sovereignty of the people and democracy are the central characteristics of the rule of law. The content of law has to be decided in a democratic, responsible and tolerant way. In the paper *Der Relativismus in der Rechtsphilosophie* (Relativism in Legal Philosophy), special importance is assigned to tolerance: "Relativism is general tolerance – just not tolerance of intolerance" (Radbruch, 1934: 21).

For Radbruch, law is a "*reality whose meaning is to serve the legal value, the idea of law*" (Radbruch, 1999: 34).**[ii]** The idea of law includes justice (in the meaning of the principle of equality), purposiveness (the idea of purpose), and legal certainty. The principle of equality (equal cases have to be treated equally and

unequal cases have to be treated in an adequately different manner) has an absolute value, but is only of a formal nature. Of a contentual nature is the idea of purpose, which is relative and extends over the three highest legal values, which, however, cannot be ranked. The starting point may be either man as individual, man as social being, or man as creator of cultural goods (Radbruch, 1999: 54 ff.).**[iii]** And finally, there is legal certainty, which in Radbruch's time before the Second World War had priority over justice (in the meaning of purposiveness). The circumstance that the highest legal value as regards content cannot be identified requires that this content be determined by the authorities with regard to legal certainty (Radbruch, 1999: 73-75).

The experience with Nazism made Radbruch intensify his standpoints and, after the Second World War, also complement them concerning the relation between individual legal values. His well-known paper *Gesetzliches Unrecht und übergesetzliches Recht* (Statutory Lawlessness and Supra-Statutory Law, 1946) also contains this characteristic passage:

"*The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice. It is impossible to draw a sharper line between cases of statutory lawlessness and statutes that are valid despite their flaws. One line of distinction, however, can be drawn with utmost clarity: Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely 'flawed law', it lacks completely the very nature of law. For law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice*" (Radbruch, 1946: 277).**[iv]**

Radbruch's formula has two derivations. *The formula of intolerability* (Germ. *Unerträglichkeitsformel*) states that when the conflict between statute and justice reaches an "intolerable degree", the statute as "flawed law" must yield to justice. *The formula of deniability* (Germ. *Verleugnungsformel*) applies when the statute deliberately negates equality. In this case, the statute "is not merely 'flawed law', it lacks completely the very nature of law" (Radbruch, 1946: 277).**[v]** The formula of deniability is considerably less important because the intention of negation is very difficult to prove.**[vi]** If the negation is intolerable, we have the formula of

intolerability again (R. Dreier, 2011: 42).**[vii]**

Radbruch does not give in to the temptation of revenge. Striving for decisions that are correct as to contents and for justice at the same time requires respect for legal certainty. "And we must rebuild a *Rechtsstaat*, a government of law", he states, "that serves as well as possible the ideas of both justice and legal certainty" (Radbruch, 1946: 281).**[viii]** Non-law must only be fought against legally (i.e. by legal means) and "with the smallest possible sacrifice of legal certainty" (Radbruch, 1946: 278).**[ix]**

Radbruch's formula of intolerability has often been invoked in the practice of German courts and the German Constitutional Court.**[x]** A very significant decision refers to the 11th Ordinance to the Citizenship Act (of 25 November 1941).**[xi]** The Constitutional Court decided that the Ordinance was null and void from the very beginning. The Ordinance had fatal consequences for Jews and their assets. As an example, I cite just the first sentence of the first paragraph: "A Jew having a habitual residence abroad cannot be a German citizen." The second sentence of the same paragraph accepts the assumption that one already has a habitual residence when it can be established in view of the circumstances that he does not live there just temporarily. In the decision of the Constitutional Court, the first item of the pronouncement comprises just expressions from Radbruch:

"*[L]egal provisions from the National Socialist period can be denied validity when they are so clearly in conflict with fundamental principles of justice that a judge who wished to apply them or to recognize their legal consequences would be handing down a judgment of non-law rather than of law.*"**[xii]**

After the fall of the Berlin Wall, Radbruch's formula was also invoked in the decision of the Constitutional Court dealing with the shooting of fugitives trying to escape from GDR across the Berlin Wall.**[xiii]** In the decision it was repeatedly stated that Radbruch's formula was only applicable to cases of extreme non-law. It was a majority standpoint that the killings of fugitives at the Berlin Wall were serious non-law as well.**[xiv]** What has been contentious is the issue of justifying the reasons authorising the use of firearms.**[xv]** The dilemma is whether it can be said retroactively that the justifying reasons (Germ. *Rechtfertigungsgründe*) were non-law. The Constitutional Court of the GFR did not completely answer this question. The court allowed that the strict prohibition of the retroactivity of justifying reasons was not valid when the gravest criminal acts clearly showing

contempt for human rights that are generally accepted in the international community were concerned.**[xvi]**

2. *Pitamic's view*

I mention the Slovenian legal theoretician and philosopher *Pitamic* (Leonid Pitamic, 1885-1971)**[xvii]** because his final view of law and the nature thereof comes close to Radbruch's. Both Radbruch as well as Pitamic deal with the problem of statutory (non-)law I am deal with in this paper.

Pitamic, from the very beginning, struck out on a new path: he was convinced that law could not be understood and explored by a single method aiming at a pure object of enquiry. He argued that it is necessary to employ other methods besides the normative method (especially the sociological and the axiological methods), which, however, should not be confounded. Methodological syncretism can be avoided by distinguishing clearly between different aspects of law and by allowing the methods to support each other (see Pitamic, 1917: 365-367).

Step by step, these results prompted Pitamic to combine the positive-law and the natural-law conceptions of the nature of law. For Pitamic, the essential elements of law are order and human behaviour. These elements are interdependent. The order is associated with legal norms regulating external human behaviour. It is also essential that law ceases to be law when its norms cease to be at least *grosso modo* effective (Pitamic, 1956: 192−193). However, not any order can function as an element of law; the condition is that it is an order which prescribes "only external human behaviour and does not prescribe or allow its contrary, 'inhumane behaviour', otherwise it loses its legal quality" (Pitamic, 1956: 194).

However, the legal norm "ceases to be law when its content seriously threatens the existence and social interaction of the people subject to it" (Pitamic, 1956: 199). For this it is not sufficient that there is some kind of inhumanity in the content of the legal norm (e.g. high taxes that are unjust); there has to be "a conspicuous, obvious, severe case of inhumanity" [such as the mass slaughter of helpless people (Pitamic, 1960: 214)]. There has to be a "crude disturbance" (for instance, the extermination of the members of another race), which interferes so intensely with law that its nature is negated (Pitamic, 1956: 199).**[xviii]**

Ulfrid Neumann convincingly observes that Pitamic "does not invoke ethical criteria beyond law, but appeals to elements of the legal concept itself"

(Neumann, 2011: 281). This form of justification is to some extent in accordance with Radbruch and his formula. The similarities between Radbruch and Pitamic consist predominantly in the fact that their projects both aim at the justification of the legal concept and that they both, in a similar way, explore the boundary which may not be transgressed by a conflict between single elements of law in order to remain within lawfulness. The Rubicon is crossed once the order is "blatantly inhumane" (Germ. *krass unmenschlich*). We are here faced with an obvious parallel to Radbruch's "formula of intolerability"
(Germ. *Unerträglichkeitsformel*)**.[xix]**

It cannot be concluded from Pitamic's oeuvre that he drew on Radbruch's theories. In the work *An den Grenzen der Reinen Rechtslehre* (On the Edges of the Pure Theory of Law), Radbruch's name is only mentioned once in association with heteronomous obligations (Pitamic 1918, 750). In Pitamic's most important book, Država (The State, 1927), Radbruch is not quoted at all. The majority of reasons for their affinity lie in the fact that Radbruch and Pitamic underwent a similar development, which ultimately led to similar results.

Pitamic encountered theory and philosophy of law as Kelsen's disciple and was impassioned by normative purism as a form. He was not very deeply affected by the sharp distinction between the *is* (Germ. *Sein*) and the *ought* (Germ. *Sollen*) since he also contemplated law sociologically and axiologically. From the very beginning, he was perturbed by the self-sufficiency of law as a normative system. In the face of the assertion that an ought can only be derived from an ought, he advanced the thesis, inspired by Aristotle, that man is by his very nature implanted into normative relations.**[xx]** His experiences with the barbarism of the 20th century certainly had an influence on Pitamic, who, just like Radbruch, placed law in relation to values. Radbruch argues that law strives for justice, while Pitamic seeks the solution in a concept of law that also has to be humane. Radbruch's formula is articulated more thoroughly than Pitamic's legal concept. However, Pitamic can also be understood as saying that conscious disavowal of equality is inhumane and that an inequality which is intolerably inhumane lacks legal character.

Thus, Radbruch and Pitamic are also in agreement by outgrowing the division into natural law and self-sufficient statutory law. It lies in the nature of law to include issues of correctness as to the contents as well as effectiveness of legal decisions. If we only deal with correct law, we can be utopian and miss reality. If we only

deal with positive law, we are in the centre of reality but can miss the values that represent the basis and give meaning to our dealings. Law is also a value phenomenon and consists of value decisions that must not fall below an adequate ethical minimum if they want to preserve the nature of law. If the ethical minimum is not achieved, we are at a point that is "intolerable" or a "crude disturbance" of law.**[xxi]**

3. *Some open questions*

The argument of statutory (non-)law has several facets that are worth dealing with in more detail. The argument is a radical critique of apologetic legal positivism and partially also of scientific legal positivism that closes its eyes to the true contents of law. Due to its positivist attitude, scientific legal positivism cannot be held responsible for the atrocities and abuses committed in the name of "law". The responsibility lies with those making decisions and carrying them out.**[xxii]** What may be objectionable regarding scientific positivism is the fact that it does not explicitly tell how far its range extends. If it does say it – this is what Hart does and also Kelsen in his own way – then one has to focus on the quality of the positivist approach itself.

The argument of (non-)law – I am talking about it in the sense of Radbruch's formula of intolerability – is a critique of self-sufficient statutory positivism. The content of the argument is not based on eternal and unchangeable natural law that positive law has to be in accordance with, but on basic (human) rights as implemented in a particular historical period. In Radbruch's case, these are the basic (human) rights that were established together with the modern state. These rights are summarised in the "so-called declarations of human and civil rights" and are so firmly anchored that "only the dogmatic sceptic could still entertain doubts about some of them" (Radbruch, 1945: 14).**[xxiii]**

Radbruch's formula of intolerability primarily functions so as to falsify a statutory law which is claimed to be law. Thus, the argument of (non-)law does not claim that something is law, but rather claims that something is not *law*. Kaufmann declares in a well-founded way that "our knowledge is much more reliable at falsifying than at verifying" (Kaufmann, 1995: 518). But one has to be careful also in falsifying. Legal certainty requires that only that is falsified which really strikes the eye, which is "intolerable" (Radbruch), which is a "crude disturbance" because it is "a conspicuous, obvious, severe case of inhumanity" (Pitamic), or which is "extreme non-law" (Alexy **xxiv**).

It would be naive to think that falsification is not based on a standard that has to be verified. We have just dealt with that and seen that the basis of falsification are basic (human) rights and generally valid principles of international law. Both cases concern rights and principles that are positive and, as such, legally stronger than the statute in contradiction with them. Being legally stronger gives them the character of *supra-statutory* law, which laws and other provisions have to comply with.**[xxv]**

The result of falsification is that statutory non-law is denied legal validity. If instead of the "law" being qualified as non-law, a new law is drawn up, this is an act of the verification of law. The verification act is substantially more difficult than the falsification act and, additionally, the results of verification "are much less precise" (Kaufmann, 1995: 521). Thus, we are dealing with a difficult issue that reminds us that one has to be as circumspect as possible and that no new wrongs may be done in the name of amending old ones. An absolute legal certainty does not exist. If we do not want to sacrifice legal certainty, we can only approach the noble aim of justice without ever being able to achieve it completely.

The argument of (non-)law is usually applied in the rule of law reacting to the non-law of previous periods that were lawless at least so to a certain extent. In such cases, the falsification acts are the responsibility of the legislature, which replaces the previously valid law with a new one. An important role is occupied by the courts, especially the Constitutional Court, which abrogates the controversial laws (and other general legal acts) or declares them non-law. Legal acts that are non-law cannot have any further legal consequences and hence individual legal acts based on them have to be annulled or at least abrogated.

The argument of (non-)law is a legal and/or moral argument. It is a moral argument for all those who sharply distinguish between law and morals; for them, moral unlawfulness is an argument that makes it legitimate that immoral positive law is changed in a legal manner. The most typical supporters are noble legal positivists. They state that, as scientists, they are not interested in the content of law. Thus, Kelsen says that he does not know what justice is, but immediately adds that behind the standard of legal justice there lies "the justice of freedom, the justice of peace, the justice of democracy, the justice of tolerance" (Kelsen, 2000: 52).

If the argument of (non-)law is also a legal argument, our standpoint is that "non-law" should not have any legal consequences. This thesis is compatible with those legal scientists who also deal with law from the point of view of contents and try to understand the legal participants (e.g. judges) who make legal decisions in concrete cases. *Mutatis mutandis*, this must also be said especially of legal participants who make authoritative legal decisions.

The typical legal participants making authoritative legal decisions are judges. In the rule of law where courts of law ensure the constitutionality and legality of legal acts, their role keeps gaining significance. If I limit myself to countries with constitutional courts (e.g. Slovenia), it must be said that countries of this type have set up a mechanism by which possible statutory non-law can be reacted to very effectively. A judge who believes that the statue he has to apply is non-law (i.e. statutory non-law) will stay the proceedings and make an appropriate request to the Constitutional Court.**[xxvi]**

In the modern state, the catalogue of basic (human) rights is so extensive that it offers a sufficiently broad basis for eliminating any legal incorrectness (including statutory non-law). The constitutional catalogue of basic (human) rights makes the achievements of rationalist natural law positive and thereby opens the door to Radbruch's formula becoming an element of valid law. It is not an exaggeration to say that thereby natural law enters into constitutional law, as is the title of Hassemer's paper (Hassemer, 2002: 135-150). Natural law entering into constitutional law is not suprapositive law, but an integral part of positive (constitutional) law.

4. *The symbolic meaning of Radbruch's formula*

Thus, Radbruchs's formula has another dimension, which nowadays is its most important virtue. In a very insightful manner, it reminds us that any law may be problematic as to its contents:

"*A good lawyer would stop being a good lawyer if he were not fully aware, at any moment of his career, that his profession is at the same time necessary and deeply problematic*" (Radbruch, 1999: 105).

"*Something very difficult is imposed upon us lawyers: we have to believe in our vocation and at the same time, within some deepest layer of our being, over and over again have doubts about it*" (Radbruch, 1999: 105).

In this sense, Radbruch's formula has a symbolic value; its value transcends the circumstances in which it was created and to which it reacted. It is not only intended for legislators and other lawgivers, it is also intended for understanding law and implementing it. A statute, also a criminal one, is only rarely (if at all) so unequivocal that its understanding is a pure reconstruction of the "thought" (i.e. norm) it imparts.**[xxvii]** It is in the nature of the interpretation of statutes that it is, sometimes more and sometimes less, also a "thinking through to the end of something that has been thought" (Radbruch, 1999: 108). Legal norms are not given automatically, legal norms are only the meaning of the statutory text. Smole's Antigone would say in a literary manner, as reported by the Page,**[xxviii]** that also the sense of the (written) thought has to be found.

Smole's above-mentioned Antigone is one of the excellent re-interpretations of Sophocles' Antigone.**[xxix]** The primary special feature of Smole's Antigone (1959) is that Antigone never appears on the stage: she is in the background all the time, behind the stage, behind the text, within us and behind us. Since Antigone is physically absent, the main persona is Creon, who – in contrast to Sophocles – is much less high-principled and therefore much more pragmatic ("you may trade and haggle/", he says, "make merry but abide by the city's laws and regulations;/ – within the law"**[xxx]**), philosophically and personally a sceptic ("even the/ king, who is, in spite of all, a man, sleeps sounder if he is first of all a/ human being and king only in the last account. But that's enough of chatter;/ we have work to do!"**[xxxi]**), yet in spite of his doubts, he is unrelenting when the foundations of power are in question:

"*But someone who seeks/ fundamental changes in our world, with abolition of the monarchy and/ other institutions, some overweening planner, with a new utopia, who is/ not thirsting for my blood, but questions the whole basis of the monarchy/ − that is the enemy.*"**[xxxii]**

Others, who keep going to see her and talk to her, report on Antigone. Of fundamental importance is certainly the above-mentioned report by the Page that Antigone keeps examining because she wants to obtain a deeper sense of the thought that makes her resist Creon's order that Polyneices should not have a grave. Finally, Antigone finds Polyneices and buries him. She is, as Ismene says, "a gentle flower that opens just to shed its petals."**[xxxiii]**

The symbolic power of Antigone's deed tells us that the range of legal

argumentation ends where the sense of law ends. It is in the character of law and its nature not only that so-called law is not law any more if it is humanly intolerable. These are extreme cases that are typical of authoritarian political systems. In political systems that accept the rule of law and are based on it, it is the opposite direction that is natural. Its basic characteristic is that it seeks to find the right measure, which is humane and takes into account that law is about mutual and interdependent relations that are tolerable to both sides.**[xxxiv]**

This bilateral tolerability is one of the basic aspects of the rule of law as a legal principle. Here the topic of a new paper can start. Its main thesis is that bilateral tolerability is the principle directing the definition of legal rules and the manner of their application. The principle of tolerability aims at a goal, has weight, and defines the scope (range) of the meaning within which the legal rules operate.

NOTES

i. See also Radbruch, 1934: 17-22.
ii. The English quotation is taken from Paulson, 2006: 31.
iii. Cf. also Radbruch, 1914: 101 ff.
iv. The English quotation is taken from Radbruch, 2006b: 7.
v. The English quotation is taken from Radbruch, 2006b: 7.
vi. See e.g. Kaufmann, 1995: 515.
vii. See also Saliger 1995: 5.
viii. The English quotation is taken from Radbruch, 2006b: 11.
ix. The English quotation is taken from Radbruch, 2006b: 8.
x. See e.g. BVerfGE 3, 225 (232 ff.); 6, 132 (198 ff.); 6, 389 (414 ff.); 23, 98 (106) and 54, 53 (67 ff.).
xi. BVerfGE 23, 98 ff., especially 106 ff.
xii. The English quotation is taken from Paulson, 2006: 27
xiii. BVerfGE 95, 96 ff.
xiv. See Kaufmann, 1995: 516. See also Alexy (1993: 486), who reasons in a very convincing manner: “Wenn aber alles zusammenkommt: ein ganzes und einziges Leben, das man führen soll, wie man nicht will, die Unmöglichkeit, sich mit Argumenten dagegen zu wehren, das Verbot, dem zu entfliehen, und der Todesschuss für den, der das nicht hinnimmt, dann kann an dem Urteil, dass extremes Unrecht geschah, als das Leben der zumeist jungen Menschen ausgelöscht wurde, die ihre Konzeption des guten und richtigen Lebens, ganz gleich wie immer diese aussah, selbst um den Preis ihres Todes realisieren

wollten, kein Zweifel sein."

xv. Kaufmann, 1995: 516: "The bone of contention is Art. 27 II 1 of the Border Act of GDR. The provision reads: 'The use of a firearm is justified when it may stop a directly imminent committance or continuance of a criminal act that, in view of the circumstances, is also considered a heavy criminal act.' This is the norm on the basis of which the killings at the Berlin Wall were considered justified and thereby non-punishable."

xvi. See pt. 3 of the operative part of BVerfGE 95, 96. See also the literature for and against the allowability of retroactivity (for justifying reasons) cited by Kaufmann, 1995: 518, fn. 16.

xvii. See Pavčnik, 2013: 105-129.

xviii. See also Pitamic, 1960: 215: "Es kann ja auch nach positivem Recht sogar eine rechtskräftige Entscheidung aus gewissen schwerwiegenden Gründen wegen krasser Verletzungen des positiven Rechtes angefochten und außer Kraft gesetzt werden."

xix. See Neumann, 2011: 281.

xx. See Pitamic, 1960: 212. See also Pavčnik, 2010: 93−94, 101.

xxi. More about Pitamic in the introductory study I wrote for the book Pitamic, 2005: 153-173. See also Pavčnik, 2013: 105 ff.

xxii. See Philipps, 2007: 195-196: "Der Ausdruck 'Stoppbedingung', den man anstelle von 'Grundbedingung' verwenden kann, erinnert mich an etwas, das fast ein halbes Jahrhundert her ist. Ein Freund von mir und ich – wir waren Assistenten von Werner Maihofer – sind damals von Saarbrücken nach Mainz gefahren, um einen Vortrag von Hans Kelsen zu hören. An die Einzelheiten des Vortrags erinnere ich mich nicht mehr, wohl aber an eine Szene, die sich daran anschloss. Ein Student fragte Kelsen in deutlich kritischer Weise, ob der von ihm vertretene Positivismus nicht wieder zu einer Diktatur wie der vergangenen führen könne. Kelsen antwortete: 'Ob eine solche Diktatur wieder eintritt, das hängt von keiner Rechtstheorie ab, sei sie nun positivistisch oder nicht. Das hängt nur davon ab, ob Menschen, jetzt die Menschen Ihrer Generation, rechtzeitig 'Halt!' sagen.'"

xxiii. See also Radbruch, 1948: 147: "Die völlige Leugnung der Menschenrechte entweder vom überindividualistischen Standpunkt ('Du bist nichts, Dein Volk ist alles') oder vom transpersonalen Standpunkt ('Eine Statue des Phidias wiegt alles Elend der Millionen antiker Sklaven auf') aber ist absolut unrichtiges Recht."

xxiv. Alexy, 2009: 159: "Extremes Unrecht ist kein Recht."

xxv. About generally valid principles of international law see Degan, 2000: 70-76,

Škrk, 2007: 281-289, and Türk 2007: 59.

xxvi. See the Constitutional Court Act, Art. 23.

xxvii. See von Savigny, 1840: 214. For him interpretation is "Reconstruction des dem Gesetze inwohnenden Gedankens".

xxviii. Smole, 1988: Verse 118: "[S]he seeks the inmost meaning of some thought."

xxix. Steiner, 2003: 170: "As I noted above, the Sophoclean chorus tends to fall away from spoken 'Antigones' after the sixteenth century and such scholarly treatments as Garnier's. There are exceptions. Among the most intriguing is Domik Smole's Slovene Antigone, first staged in 1960. Here, the heroine never appears. It is via the chorus and several secondary personae that we experience the terror and moral-political meaning of her fate."

xxx. Smole, 1988: Verses 142-143.

xxxi. Smole, 1988: Verses 947-950.

xxxii. Smole, 1988: Verses 643-648.

xxxiii. Smole, 1988: Verse 2259.

xxxiv. Cf. Sprenger, who builds upon the notion that law has to be based on an elementary pre-legal sense. Its main characteristic is that, at either side, an adequate "Answer-Behaviour" is built into mutual legal relations (Sprenger, 2003: 334). See also Sprenger, 2012: 87 ff.

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