

ISSA Proceedings 2010 - Argumentology About The Possibility Of Dialogue Between New Logic, Rhetoric, Dialectics



1. What is Argumentology?

Firstly, the term “*argumentology*” was sporadically used in 80-ies by Dutch scholars E. Barth, E. Krabbe, and J.L. Martens as a synonym of *theory of argumentation* (Barth & Martens 1981). But the term did not receive a strong support in theorists’ of argumentation circles. [i]

In 80-90-ies of XX century there were a lot of theories of argumentation, and formal dialectics (Barth & Krabbe 1982), the Amsterdam pragma-dialectic theory of argumentation, as well as the linguistic theory argumentation of J. Ascombe and O. Ducrot were the examples (Van Eemeren, Grootendorst & Kruijer 1987, Ascombe, Ducrot, 1983). Some of these theories had a proper philosophical component. A philosophical component of formal dialectics was connected with analytical philosophy, and pragma-dialectic theory of argumentation had orientation to K. Popper’s critical rationalism. However, even in 90-ies there were a lot of old and new theories of argumentation with unclear and unexpressed philosophical foundations. In that context a necessity in a relatively independent domain of philosophy of theory of argumentation research was emerged. For a philosophical domain of argumentation study I have proposed to use such term as “*argumentology*”.

Argumentology is a *philosophy* of theory and practice of argumentation. The term “argumentology” does not refer to an empirical study or theory of argumentation, but to the ultimate *social-historical backgrounds* of the theory and to practice of argumentation. It is not a concrete scientific theory or empirical model, but a philosophy of argumentation. It means than argumentology studies any kind of backgrounds, or ultimate presuppositions of theory and practice of argumentation. Argumentology is a philosophy of a Homo arguer (in Henry Johnstone’s Jr. sense of the word).

As is widely shown, in contemporary theory of argumentation at least three conceptual models of argumentation were formed. These models are logic, dialectics, and rhetoric. They were carried out by ancient Greeks, Chinese and Indians (Tchouechov 2003, p. 34-39). For instance, Aristotle while using these models divided arguments into three classes - demonstrative, dialectical, and rhetorical. He taught that the aim of demonstrative (logical) arguments was to reach certainty; dialectical arguments - to reach acceptability; and rhetorical arguments - to reach cogency. The Dutch scholars F. H. van Eemeren, R. Grootendorst, and T. Kruiger paid special attention to this and showed that all these arguments assumed the use of premises of the following kinds: for the first ones - evidently true premises; for the second class - acceptable premises; and for the third - premises which could persuade a certain audience, or premises cogent for the audience. Aristotle determined the characteristics of deduction of arguments in the same way. According to him, for dialectical arguments "*it is possible to use either deductive or inductive syllogisms. The premises of a dialectical argument are generally accepted or are acceptable to "the wise - that is, to all of the wise or to majority or to the most famous and distinguished of them"* (Aristotle, Topics)" (Van Eemeren, Grootendorst & Kruiger 1987, p. 59).

In analysing the results of an elaboration of ancient argumentation theory - especially its way of evaluating aims, character, models, and other aspects of argumentation - it would be correct to conclude that not only theoretical or empirical, but also a philosophical - or in my terms, an argumentological - approach to argumentation analysis were found. This means that the ideas of the Dutch scholars that Aristotle was one of the first theorists of argumentation need to be formulated more widely. In my opinion, Aristotle was the first argumentologist, i.e. a philosopher of the theory and practice of argumentation who strictly distinguished at least three of its theories - *logic, rhetoric, and dialectics*. Taking into consideration the *preconditions* of Aristotle's ideas about argumentation reflected in the views of his forerunners (Thales, Socrates, Protagoras etc.) together with similar ideas developed in the East, in the Nyāya and Mozi schools, it is correct to stress the existence of argumentology in *traditional society*.

But what was argumentology in traditional or pre-modern society? It was more than the logical-rhetorical-dialectical apology of historical tradition, or demands the truth submit to authority, or the substantiation of the insuperable force of

habits etc. In the argumentology we find coherent (to our views) ideas about the human and democratic nature of argumentation, peculiarities of its free verbal organization and communicative specificity in the philosophical heritage of Parmenides, Socrates, Aristotle, Mozi etc. The best illustration is Aristotle's "Organon", first philosophy, rhetoric and topics - and, of course, the specific character of his methodics, which has not survived.

The ultimate conditions of all existence, or the ultimate backgrounds of being, cognition and, strictly speaking, human activity for Aristotle were in some senses common *verbal models* as well as schemes and arguments. In correspondence with the study of the four causes (material, formal, efficient, and final), Aristotle determined the nature and objects of argumentation. According to Aristotle, "All instruction given or received by way of argument proceeds from pre-existent knowledge. This becomes evident upon a survey of all the species of such instruction. The mathematical sciences and all other speculative disciplines are acquired in this way, and so are the two forms of dialectical reasoning, syllogistic and inductive; for each of these latter make use of old knowledge to impart new, the syllogism assuming an audience that accepts its premises, induction exhibiting the universal as implicit in the clearly known particular. Again, the persuasion exerted by rhetorical arguments is in principle the same, since they use either example, a kind of induction, or enthymeme, a form of syllogism. The pre-existent knowledge required is of two kinds. In some cases admission of the fact must be assumed, in others comprehension of the meaning of the term used, and sometimes both assumptions are essential " (Aristotle, 2007, p.2).

In his opinion, to provide argumentation to any point of view meant the following: providing *valid arguments* in order to demonstrate any true premise (according to the laws of contradiction and the excluded middle and etc.); *explaining* the sense of any problem interesting to a human being by asking *appropriate questions*; *grounding acceptability for experts* to solve any difficulty; *persuading an audience* of the expediency of a given opinion etc.

As it was shown by Stephen E. Toulmin, *Aristotle's Prior Analytics* was connected with thinking, acting, and talking in accordance with laws of *formal logic*. Aristotle's *Posterior Analytics* reflected thinking and talking based on laws of *natural science*. Aristotle's *Special Topics* was a model of *informal logic*, and Aristotle's *Art of Rhetoric* was a *theory of arguing* with the standpoints of the auditors or readers (for details see: Toulmin 1992, p.6).

There are at least four pluses and one minus of Aristotle's argumentology. Plus 1. There are strong reasons to consider that Aristotle actually implemented the idea of possibility of special practical-methodological orientation of metaphysics which we define as "argumentology". Plus 2. We should take into consideration the close connection of Aristotle's argumentology with antique polis conditions, which turned out to be not local and regional but global, i.e. related to the life of the whole of humanity. Plus 3: Aristotle's first philosophy as well as argumentology was not knowledge based *above* or *apart from* real problems of science and practice, but on its inner component. This fact became a reason for the apportionment of adequate communicative and cognitive levels of analytics (logic), dialectics (topic), rhetoric, poetics, and hermeneutics etc. Plus 4: Aristotle's philosophy of argument also included analysing human rationality, and the connection between true, valid, convincing and persuasive arguments and their initial premises (Van Eemeren, Grootendorst, Kruijer 1987, p.59). Minus 1. However, we should remember that Aristotle developed a concept of *eternal* and *constant* ultimate conditions of all existence and cognition, which was urgent in respect of pre-modern society's values. Consequently, there are strong reasons to consider that Aristotle actually implemented the idea of possibility of special practical-methodological orientation of metaphysics which we define as "argumentology".

When evaluating Aristotle's argumentology we should not treat it as modern. Moreover, we should remember that Aristotle developed a concept of eternal and constant ultimate conditions of all existence and cognition. Nevertheless Aristotle's first philosophy was not knowledge based *above* or *apart from* real problems of science and practice, but its inner component. This fact became a reason for the apportionment of adequate communicative and cognitive levels of analytics (logic), dialectics (topic), rhetoric, poetics, and hermeneutics etc.

The ancient understanding of the nature and objects of argumentation is still a necessary precondition of contemporary argumentology; and the gradation (scale) of methods of argumentation developed therein still has great cultural and civilizational significance.

According to Aristotle's *Prior Analytics* there was a *deductive (mathematic) proof* on one edge of the scale of rationality where true conclusions could be received with the assistance of valid forms of reasoning and true premises. On the right-hand edge of that gradation of communicative rationality or *logos* (in the words of

ancient Greeks) there was the procedure of *scientific explanation* (useful to explain the laws of nature and phenomena of natural sciences). On the right-hand side of scientific explanation were procedures of *ethical and political warranties* (argumentation schemes of transition from moral norms and political imperatives to tactics and strategies of human activity). To the right of this were *dialectical arguments* as an instrument of understanding based on *topoi* of science, art and common sense discourse about the true or the verisimilar for given experts or wise representatives of the community. To the right of dialectical arguments there was *rhetorical argumentation* - a means of persuading a concrete audience about any opinion offered - and also rules regulating the holding of any dialectic critical discussion (these are the main aspects for rationally overcoming differences in opinions).

It is necessary to stress that the argumentological gradation of rationality of pre-modern society was not a characteristic peculiar to the West or Europe. For example, more attention was devoted to ethical and political warranties and dialectical grounds, but not a classic deductive proof, in ancient India and China (this concerns especially the studies of Confucius, Vedanta etc).

The objects of many contemporary theories of argumentation first formulated by Aristotle were in some sense re-discovered not only in traditional medieval society, but in modernity as well. It seems that even nowadays this process is dynamic. It could be explained by the open and incomplete character of human history, its communicative precondition and social-historic standards of human rationality.

Consequently, the term 'argumentology' does not refer to an empirical study or theory of argumentation, but to the ultimate social-historical backgrounds (concepts of man, rationality etc.) of the theory and practice of argumentation. In pre-modern society those backgrounds warranted the possibility of producing valid arguments in order to warrant any true premise. Among them were the concept of an appropriate question, explanation of the sense of a problem, substantiation of the acceptability of solving any problem for experts, and the study of audience persuasion. Consequently, such levels of argumentology as analytics (logic), dialectics (topics), methodics, rhetoric, poetics, hermeneutics, and others existed in pre-modern society.

2. Argumentology: Modernity and Postmodernity

If we readdress our attention from pre-modern argumentology to the

argumentology of a society in the process of modernization (XVI-XIX century modernization) we will not find that ethical and political warranties, dialectical arguments, and rhetorical argumentation are of main interest in such a society. In historical-philosophic processes this lack of interest manifests itself as a kind of oblivion to the canons of antique ethical-politic warranties. This is reflected first of all in attempts to create a new or modern hierarchy of ethical and politic values with the assistance of deduction (mathematical demonstration).

Argumentology of modernity was connected with attempts to create a new (modern) hierarchy of ethical and politic values with the assistance of *deduction (mathematical demonstration)*. Detailed research work on the nature of *scientific explanation*, especially its inductive method, has become the opposite side of that process. Argumentology of modernity has been transformed into the *logic and methodology of science (maths as well)*.

Consequently, starting in the XVIIth century attempts to introduce problems of dialectical arguments and rhetorical argumentation to the cultural environment by using the word "logic" were usually treated by contemporaries as a historical misunderstanding (for example, Hegel's and Marx dialectical logic).

Only in the twentieth century did a gradual transformation to the global or postmodern world refresh interest in the continuous gradation of human rationality, discovered in times of pre-modern society. A new interest in argumentology problems was the consequence.

That interest is most fully formed in the works of Belgian and British scholars by the end of the 1950s. Nevertheless it also was treated initially as a historical misunderstanding. A real unity of contemporary humanity into one global system, which demanded a combination of different parts of humanity which cultivate non-similar values of pre-modernity, modernity and postmodernity, was only formed in the late 1990s (Tchouechov 2006, p. 91-136). That fact demonstrated to everyone not only the urgency of antique argumentology, but also the need to develop it according to contemporary objective and subjective ultimate conditions of human existence.

Argumentology of post-modernity were presented by Ch. Perelman's new rhetoric; J. Habermas's concept of communicative activity; St. Toulmin's historical-epistemological logic; formal dialectics theory of E. Barth and E. Krabbe (the term argumentology was first used but only in technical sense by E. Barth

and E. Krabbe).

There are some examples of post-modern argumentology: pragma-dialectic theory of argumentation (F. H. van Eemeren, R. Grootendorst), problematology (M. Meyer), informal logic (R. H. Johnson), new dialectics (D. Walton), critical thinking (R. Paul). They are directly and (or) indirectly connected with contemporary theory of argumentation (TA). There is a difference between these types of argumentation concepts. The former distinguishes between various levels of argumentation analysis. Pragma-dialectical concept distinguishes a *philosophical level* of argumentation study (K. Popper's concept of critical rationalism), as well as theoretical, dialectical (according to K. Popper's interpretation of dialectics as well), empirical (i.e. reflecting practice of verbal communication within contemporary Western society) and others.

It is important to pay special attention to the fact that majority of the concepts are not even pure argumentological, but only contain some elements of argumentology (in my opinion, critics of argumentation theory and informal logic should show why these concepts cannot be considered as strict theories at all). Perelman's new rhetoric, D. Walton's new dialectics, and the pragma-dialectics of the Dutch argumentation theorists, together with M. Meyer's problematology and A. Fisher's critical thinking schemes of argumentation analysis do indeed differ from logic, rhetoric, and dialectics of pre- and modern society.

This difference is reflected not only in the changing scope of the terms "formal logic", "rhetoric", and "dialectics" with the assistance of prefixes such as "non-", "in"-, and "new-".

It also illustrates indirectly that the formation of contemporary argumentology is far from completion even when including problems of attempts to offer new democratic schemes of communication which could be useful in overcoming political, economic and other discords, controversies and conflicts.

Nowadays, unfortunately, we are witnessing an increase in the use of the most inhuman methods of overcoming cultural civilization discords. Consequently the degree of interest in analysing the potential of various paradigms of argumentology in the contemporary world will increase.

For example, rhetoric of modernity was realized as the theory of oratory and literary style in the middle of the XIX century. At the XXth century beginning under the influence of positivist philosophy most scholars thought the nature of

convincing (persuasive) affect (argumentation) could be explained by instruments of formal logic. According to Ch. Perelman, new rhetoric should be opposed to formal (deductive) logic, as well as to the dialectics of Hegel and Marx developed in modernity. However, Perelman was the first to propose that the discipline could be defined in terms of “dialectics” and “topics” (the terms were not to our regret used and as a result in the 1960s argumentologists were unable to answer the questions of what the new dialectics and new topics were), but later he preferred the term “new rhetoric”). According to Perelman, it better reflected the role of persuasive phenomena and the audience in argumentation. The final reason for preferring the term “new rhetoric” was that it enabled him to ignore discussions about the essence of the “new dialectics” (Perelman 1986, p.8). Unlike the forerunners, Perelman combined an implicit philosophical model of rhetoric with the possibilities and needs of particular (local and regional), and even universal audience. According to Perelman, the existence of inactive, irresponsible and incompetent subjects of communication and cognition discredit the idea of a universal audience. Perelman included supporters of opposing views and opinions (in respect to the rhetor) in the structure of an audience. The measure of their responsibility was determined by their treatment of universal values. The rhetor (argumentator) as a part of a universal audience is intent on increasing the level of its adherence to those values. Obviously, using weapons, advertising techniques and propaganda and manipulating peoples’ consciousness are not considered methods suitable to new rhetorical argumentology. Argumentology perspectives nowadays are connected by the vast majority of scientists with the development of the dialogical approach or its *dialectical paradigm*, that is *new dialectics*. Linguists, artificial intelligence specialists, rhetoricians and psychologists insist on the attractiveness and reliability of this paradigm (see: Van Eemeren, Blair, Willard & Snoeck Henkemans, 2003). But it is strange that today almost nothing is said about the future of dialectics by Marxist philosophers.

3. Contemporary Argumentology: Four Paradigms are a Final List?

The contemporary understanding of the nature of different paradigms of argumentology assumes that we consider their close connection with ontological and epistemological types of subject-object relations.

Different paradigms of studying argumentation correlate with unequal functional types of ontological and epistemological relations.

That is what is difficult to understand for many authors of contemporary textbooks on logic, who mix problems of mathematical or deductive

demonstration and argumentation. Their main fault is the lack of attention paid to the subject, the object and the communicative aspects of proved knowledge. It is obvious that such a model is a basis for explaining communication processes by intercourse of some *passive objects* without influence on the process of demonstration.

In postmodernity a *formal-logical* paradigm of argumentology is not the only possible variant. The restriction of this paradigm is gradually being overcome within a *rhetorical paradigm* of analysis and implementation argumentation. Rhetoric is a direct broadening of and addition to formal logic. If we consider rhetoric on the basis of its etymology we will see that its philosophical foundations point to *subject-object* ontological and epistemological relations between an orator and audience.

The rhetorical paradigm of argumentology allows us not only to overcome different impasses of formal-logical paradigm but also to create a relatively new research programme of the philosophical study of the essence and objectives of argumentation.

The earlier one considered that the rhetorical paradigm of argumentology was only reflected in *argumentative-centric* rhetoric. Nowadays its role in explaining the nature of *expressive-centric* rhetoric, which concerns the study of figures and tropes of thought and words are explained. It is possible to detect similarities between the two types of rhetoric if we take into account the fact that the technological side of argumentative-centric rhetoric is not a mechanical addition to verisimilar opinions or political and moral values. This is the main and irreplaceable form of conceptualization and *imitation* of the latter (Tchouechov 2005, p.100-150). Argumentative rhetoric and expressive rhetoric usually disclose *subject-object* relations, and the rational and emotional connections of the arguer and the audience. They are closely connected with hermeneutics.

As H.-G. Gadamer said, a text to be understood becomes concrete only during interpretation but nevertheless the latter deeply concerns the sense of that text. This means that our freedom to interpret a text is strictly constrained. This is the main source of *pararhetorical phenomenon* i.e. pararhetorical character of argumentology, based on poetics and lead by hermeneutics.

Hermeneutics cultivated the study of object-subject relations, i.e. connections between the text and its interpreter. Hermeneutics connects with pararhetorical paradigm of argumentology. The connection of the philosophical foundations of

hermeneutics and rhetoric can be described with the assistance of the “complementarity” principle until hermeneutics is realized as a particular science which studies understanding, but not as a methodology of humanitarian sciences or even a type of metaphysics of human existence (H.-G.Gadamer, M.Heidegger).

The pararhetorical character of argumentation evaluation is overcome in the process of reconstructing, broadening, adding to and critically revising argumentation from the *dialectical* point of view. So even the practice of publishing books and interior reading stipulate not the transformation of rhetoric to hermeneutics as Gadamer supposed, but the necessity of including new dialogic relations in the subject of rhetoric. We do not pretend to have solved the problem, but we should testify that it is necessary to distinguish formal-logical, linguistic, psychological and other *scientific approaches* to dialogical argumentation research, and also to distinguish formally and informally oriented trends therein and to remember that the distinctions between the latter are not always equal to distinctions between the corresponding sciences.

The main problems of contemporary dialogical argumentology (new dialectics) could be overcome by using the argumentation potential of M.M. Bakhtin’s philosophical dialogical concept. In that the philosophy of argumentation may be regarded as an intercultural language or, an argumentology begins when “strict scientific character”, in Bakhtin’s words, is of no use and the “Otherness of science” is used. Consequently, it is possible to unite, for example, the results of various dialogical studies of argumentation only by using common philosophical language (according to our hypothesis this should be a new language of dialogical argumentology – the terms argumentator, audience etc. are examples). This indicates that a dialogical approach to argumentation is always connected with some philosophical (dialectical) ideas. There are some contemporary dialectical theories of argumentation, and pragma-dialectic theory of argumentation (initially formulated at Amsterdam school by Professors Franz van Eemeren and Rob Grootendorst) first of all.

There are a lot of empirical (scientific) dialectical models of argumentation – linguistic, cognitive, logical, rhetorical etc. But they should be founded by contemporary argumentology, or a philosophy of theory and practice of argumentation to provide dialogue between new rhetoric, new dialectics, and new argumentative logic as well as.

Argumentology is not an empirical study or theory of argumentation, but is a

philosophy of ultimate social-historical backgrounds of argumentation.

In pre-modern society those backgrounds warranted the possibility of producing valid arguments in order to warrant any true premise. Among them were the concept of an appropriate question, explanation of the sense of a problem, substantiation of the acceptability of solving any problem for experts, and the study of audience persuasion. Such levels of argumentology as analytics (logic), dialectics (topics), methodics, rhetoric, poetics, hermeneutics, and others existed in pre-modern society. Its best examples are based on the idea of the absence of ontological gaps in human rationality.

In modernity argumentology has been constituted mostly by the concept of logic and the methodology of science, based on the strict contraposition of scientific and ordinary-practical rationality.

Postmodern argumentology is, on the one hand, a kind of rethinking of the most developed examples of pre-modern and modern argumentology; but on the other hand it is constituted by a philosophical dialogic concept of new rhetoric, and new dialectics coordinated with contemporary standards of scientific and human rationality.

Argumentology is a practical philosophy. Practical philosophy, like philosophy in general, aims to reveal the ultimate backgrounds of human activity and behaviour by concretizing them in recommendations as to their organization and optimization.

According to Plato and Hegel, theoretical philosophy was also practical. Aristotle supposed practical philosophy to be an application of theoretical philosophy's ideas. According to J. Dewey, practical philosophy was at the core of theoretical philosophy. Other scholars were convinced that no philosophies other than practical ones were possible.

Logic, rhetoric, poetics (hermeneutics), and dialectics historically corresponded to the values of pre-modern society. Logic and methodology of science, poetics and hermeneutics were closely connected with modernity. Post-modernity has become a basis of globalization as many contemporary authors are sure. This fact presupposes a precise analysis of the following question: does it mean that a new rhetorical, pararhetorical, formal-logical and dialogical paradigms of argumentology are being formed together with a philosophy of post-modernism or

simply that postmodernist philosophy continues and strengthens the pararhetorical paradigm of argumentology which is connected with hermeneutics and the poetics of modernity.

Was a new rhetorical, pararhetorical, formal-logical or dialogical paradigms of argumentology indeed formed together with a philosophy of post-modernism? Even a cursory glance at the postmodernist philosophy convinces us that pararhetorical phenomenon is very close to it.

Post-modernists (for instance Lyotard) really appeal to the new values and introduce a new type of logic and rhetoric (firstly concerning the technique of counting and saying that context theory is unsatisfactory) (Lyotard 1979).

Postmodernists reject the old rhetorical idea about the compulsory addressing of a text and proclaiming deconstruction to be a postmodernist game. This game with argumentation is never dull for its fans, of course, as long as it is not a job or a profession. The sense of the post-modernist relation to rhetoric and game is vividly reflected in the following story by J. Derrida. It tells us that at 10 a.m. on the 22nd of August, 1979, someone phoned him. The US telephone operator asked the scholar if he would accept a reverse charges call from Martin ("Martini" as Derrida heard) Heidegger. As the author specified, the same thing had happened earlier when he had heard familiar voices on the telephone and had been looking forward to his reaction to a call from Heidegger's spirit. "It is a joke and I refuse to pay", replied Derrida (Derrida 1980). It meant that it was too dull even for the fan to play a very familiar game. No fan who takes a game seriously refuses to play. Derrida showed his post-modernist position: how to treat a game as *paragame*.

Consequently, the main philosophical method of post-modernism - deconstruction - is not a game (in the exact sense of the word), but is a paragame. Critics of post-modernism usually do not pay more attention to it. Consequently, the argumentological spirit of post-modernist philosophy could be evaluated in the conceptual frameworks of pararhetoric - not even the *hermeneutical*, but the poetic type of the *pararhetorical* paradigm of argumentology. It is confirmed by the wide prevalence of post-modernism in the spheres of art, politics, morality etc. We may suppose, however that there are more distinctions between rhetorical and hermeneutical, or pararhetoric paradigms of argumentology than it seems. This is why verbal communication is real and situational while written

communication is (in the words of J. Derrida) “dead” or independent concerning the context of communication, but complete and reversible. In this respect the argumentological hermeneutics is only one aspect (but a very important one) of the rhetorical paradigm of argumentology, firstly because society, according to the representatives of hermeneutics, is a community of interacting individuals, and a concordance of their interests and views is impossible without argumentation. It is not surprising that argumentology perspectives nowadays are connected by the vast majority of scientists with the development of the dialogical approach or its *dialectical paradigm*. However, under the mask of the dialogical approach to argumentation, different, often incompatible reports are presented and works are published. It means that M.M. Bakhtin’s philosophical dialogical concept is still up to date.

NOTE

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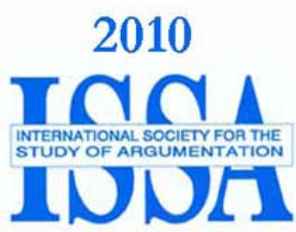
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ISSA Proceedings 2010 - Adversarial Principle And Argumentation: An Outline Of Italian Criminal Trial



1. Introduction

The object of this paper is to develop some critical considerations on the implementation of the principle of the judicial due process, restricting the survey to the Italian criminal trial. This will lead to further observations on the nature and structure of judicial argumentation.

This study is divided into three parts:

1. Firstly, I will define the scope of my research, proposing an examination of the principle of due process as principle of the trial;
2. Secondly, I will focus on the Italian judicial experience, examining the implementation of the principle of due process in criminal law. Clearly, it is by no means possible to analyse it in detail as we should examine the entire structure of today's Italian criminal trial system. To contextualize the principle, it will suffice

to recall its clearest legal application (and therefore judicial praxis): i.e. the institution of the cross-examination of witnesses;

3. Finally, it will be possible to represent a model that allows to accomplish the judicial due process, drawing upon the classical thought of Plato, Aristotle and Cicero.

2. *Trial - due process of law - principle*

In this section I will confine myself to defining the scope of my research.

The task of this study is the principle of due process, authentic foundation of western juridical civilization, the centrality of which appears juridically undisputable. So much so that many believe there cannot be trial without due process of law.

Jurists often express this principle through the Latin brocard "*audiatur et altera pars*". Seneca's *Medea* addressed the tyrant Creon with these words to call for an equitable decision, claiming that the fairness of a judgment depended on giving each party the opportunity to give reasons for their conduct and be listened to [1]. To fully understand the extent of this principle in the trial, we will ponder its constitutive structure. It is worth, therefore, analysing the concepts involved: trial, due process of law, principle.

2.1. *Trial*

In the modern juridical thought, dominated by the scientific - rationalistic and empiricist - model, a common aspect to the different juridical perspectives (particularly that of *civil law*) is the centrality of norms, which serve the function of regulating controversy.

A *norm*, product of the will of the State, would represent a hypothesis escaping whatever argument (prohibition of interpretation), able to settle contrast and to preserve social order. Founding themselves upon this assumption, the main branches of modern and contemporary legal philosophy (legal positivism, legal naturalism and legal realism) conceived law as a set of norms issued by the State for the purpose of coactively regulating the intersubjectively meaningful behaviours. A judgment, in this perspective, becomes synonymous of a sentence which is guaranteed by a syllogistic logical procedure consisting in the subsumption of a fact in a norm.

Clearly, this norm-centred point of view leads to the abandonment of law to the power and its reduction to a mere tool of social control (*Auctoritas non veritas facit legem*, according to the well-known Hobbesian formula). But, above all, this

type of juridical conception is animated by the claim to suppress or to ignore the conflict, distorting and neglecting a constitutive datum of social experience, i.e. controversy.

Controversy among opposite positions is not an avoidable circumstance of human life, but it is one structural aspect of it[**ii**].

Then, if we acknowledge experience as a diversity of intersubjective positions, we will not be able to suppress or ignore the opposition of a different claim without incurring logical and practical contradictions.

In fact, on one hand, he who aims to suppress the opposition ends by holding true only his own position. This is the dogmatist's position: his reasoning leads, however, to an unprovable judgment.

On the other hand, he who ignores the opposition, considering indifferently his own claim and any others', denies the existence of any truth. This position is that of the sceptic, who implicitly assumes a dogmatic position: he, in fact, recognizes his own affirmation (i.e. that there is no truth at all) as an indisputable premise, according to a contradictory reasoning.

Since it is not possible to suppress neither to ignore the oppositions, the controversy escapes any determination of willing and it has to be accepted as an indelible aspect of social experience and - therefore - *unavailable*.

Starting from these considerations, and regarding controversy as the root of experience, it is possible to appraise the importance of the trial. Moving beyond the rationalistic hypotheses of the normative conception, we can thus see that the foundation of the juridical experience is not the norm but the trial.

As far as Italy is concerned, at this point it is worth remembering that a juridical-philosophical tradition - strongly connected to the judicial experience - could be traced in the studies of Capograssi, Cotta and Opocher. Their work represented an alternative to the tradition based on the formal analysis of the legislator's discourse authoritatively led by Bobbio and Scarpelli[**iii**].

In its essence, that can be considered as acquired in most legal systems, a *trial* is a series of legal acts to which the parties are summoned to participate (the parties being those who support opposite positions and mean to achieve a resolution to their dispute upon execution of a conclusive provision accounting for their claims) before a third judging party. In this view, a judgment is a complex act, since each party and the third judging party necessarily take part to it. It is not just the sentence, a static aspect of the judicial experience, but it includes all

the dynamic phases of discussion of the controversy.

Drawing upon Paolo Moro's valuable research[iv], we can state that the concept of trial comprises four constitutive elements undeniably representing its principles. These principles are: confrontation, due process of law, evidence and jurisdiction. *Confrontation*: the questioning and answering during the trial. The questions and the exceptions of the parties qualify the trial opposition and they define the scope of the controversy and the judgment.

Due process of law: it is the core of every trial because it enables each party to participate in the judicial activity and to affect it, under fair conditions.

Evidence: it is the logical control procedure of the basis of confrontation.

Jurisdiction: it is the synthesis of these elements, the neutral activity developed by a third party to settle the controversy through a judgment acknowledging a balance among the opposite claims to be proved by the parties.

Although each of these elements may require better insight, together they allow us to observe a further datum: the *juridical reasoning* par excellence is the judicial reasoning, i.e. that which unravels during trial. Since the trial is the place and time where different positions meet, "the reasoning of the jurist always develops according to due process: from the very beginning it performs before an opposite thesis and succeeds as long as it removes the opposition"[v](Cavalla 2004, p. 32). Unlike geometric demonstrations, dialogicity is an original feature of juridical discourse. Moreover, it expresses itself within a language that is not as symbolic and formalized as that of mathematical sciences. Therefore, because of these peculiarities, the juridical reasoning is not a demonstration, neither can it exclusively apply, as a form of order, the scientific syllogism - habitually employed by formal sciences - but the dialectical syllogism. In different passages, Aristotle refers to this form of reasoning that moves from the premise of someone else's reasoning not to remove it but to question it.

The juridical reasoning is also not a mere empirical verification. We tend to believe that the construction of a fact is an objective description of the historical truth of what happened. But it is not: a trial cannot be reduced to a laboratory because what happens during it is not what happens in a laboratory, as the equipment and the conditions are different. As Cavalla clarifies, judicial truth is not a truth as correspondence[vi]. The data collected during the trial, also by means of scientific evidence, are not self-explained but can lead to different conclusions depending on how they are connected and interpreted.

The juridical reasoning is, therefore, an *argumentation*. However, the meaning of this term here is different from that proposed by Perelman. According to Perelman, an argumentation is an organization of the speech aimed at persuading, and to which the truth is precluded. In fact, only demonstrations can generate truth. According to Cavalla and other researchers at CERMEG (Centro di Ricerche sulla Metodologia Giuridica, i.e. Research Center on Legal Methodology), anchored to the classical thought of Plato, Aristotle and Cicero, an argumentation is an organization of the discourse that can persuade if it succeeds in showing the contextual truth (the so-called instantaneous truth) of what it states. It implicates therefore an articulated series of logical operations of topical, dialectical and rhetorical kind.

These observations are enough to show that only a critical notion of the characteristic aspects of the juridical-judicial discourse allows to consider the principle of due process.

2.2. *Due process of law*

As we have already stated, due process of law is the core of the trial - allowing every party to take part in the judicial activity and to influence its final result under fair conditions.

At international level, the judicial due process is enshrined in many sources (Universal Declaration in the rights of the man, Convention for the safeguard of the rights of the man and the fundamental liberties, International Pact related to the civil rights and political). As far as the Italian legal system is concerned, due process can be found in the Constitution and in a series of technical judicial rules. Under what conditions can we positively say due process will have been fulfilled? Is the staging of the debating parties enough for the dialogic structure of the trial to be shown? Is it enough for the judge to make sure the defendant and his defending counsel are physically present? Can the judging body's supplementary activity along with the party's activities jeopardize the principle? Can compliance with technical judicial rules guarantee *per se* abidance of due process?

If the answer to all these questions is yes, then we conform to a modern rationalistic-type of law. For the juridical discourse to be genuinely dialogic, the judicial reasoning has to assume its characteristic feature, that is not the scientific syllogism but, following the Aristotelian distinction, the dialectical syllogism. Supported by the principle of non-contradiction, it moves from the premise of someone else's reasoning to question it and validate it through denial

of its opposite alternatives. It is due process of law that necessarily influences the evolving of the juridical discourse in its confutative form.

2.3. Principle

Moving beyond the normative datum, it is necessary to explain what is meant by qualifying due process as principle.

First of all, it is worth noticing that due process is inscribed within an axiological horizon representing the juridical community. This means that the principle of due process dwells, sooner than in the legal system, in a pre-juridical common sense. It is common sense that makes us deem preferable to depend on adversary hearings rather than a judge's monological decision.

Let us dwell upon this key point a little longer. We have already mentioned the commonplace, recurrent in the juridical community, that a matter discussed among the parties is better settled than one settled by the decision-maker on his own.

However, qualifying due process as a principle does not allude only to this. In fact, in our search for the reason why due process is approvable and hardly disputable, the nature of due process as a principle appears very clear. Through due process, we see the intrinsic structure of the trial, requiring that either party and the judge co-operate in the debate of the controversy and acknowledge dialogue as a common, undeniable aspect in the dispute of the conflicting theses.

It might be worthy of note, at this point, the qualification of due process that Manzin proposes in a recent contribution on the matter. He identifies three levels at which due process reveals itself: ontological, logical and deontological. Due process is, in fact, an ontological principle, representing the very essence of the trial; it performs, at a logical level, as a method characterized by specific sequences; finally, it is a prescriptive rule for legal experts (Manzin 2008b, p. 15).

3. Implementation of the principle of due process in the Italian criminal trial

This section analyses the Italian judicial praxis to assess the state of implementation of due process, especially as a criminal trial principle.

The Italian experience of application of this principle, strengthened by a plethora of technical judicial rules in the last twenty years, will trigger a series of jus-philosophical reflections.

I chose to restrict this research to the criminal field because it is in this very context that we can find an asymmetry between parties which serves us as a

better way of testing due process as a principle.

As far as the evolution of the principle of due process in ordinary law (code of criminal procedure) is concerned, in 1988 Italy switched from an inquisitorial to a “tendentally” accusatorial system. The new criminal procedure sought to convert the judicial system into adversary proceedings following the example of *common law*^[vii] .

Let us very briefly characterize the accusatorial and inquisitorial models. On one hand, the accusatorial model states the perfect equality between prosecution and defence before a third judging party, the centrality of the trial phase and the dialectical search for truth. On the other hand, the inquisitorial model asserts the disparity between parties (with a prevalence of the prosecution over the defence), the centrality of the phase of the preliminary investigations and the search of an objective truth, seen as factual or material truth. At present, according to the finest criminal trial doctrine, although within a generally accusatory context, many inquisitorial norms - especially those regulating the preliminary investigations phase - cause the system to be only “tendentally” accusatorial. Note that in the code of criminal procedure there is not an explicit statute contemplating due process of law. However, its subsistence can be drawn by the set of norms that regulate participation and intervention of the accused in the trial as well as from the dispositions on formation of evidence.

Yet the presence of due process in the trial is explicitly formulated in the Constitution in article 111. The term has been included at the highest normative level only recently, i.e. when the Constitutional Law - introducing the principles of fair trial - became effective (law n. 2/1999). In particular, Paragraph 2 of article 111 provides that “All court trials are conducted according to due process and the parties are entitled to equal conditions before an impartial judge in third party position”. Paragraphs 4 and 5 of the same article, regarding criminal trials, state that “The formation of evidence is based on the principle of due process” and that “Law regulates the cases in which the formation of evidence does not occur according to due process with the consent of the defendant or owing to reasons of ascertained objective impossibility or proven illicit conduct”.

With these premises, let us now consider the operational reality of the principle of due process in criminal trials inferring it from the Italian experience. In order to do this, we will refer to the judicial praxis of cross-examination, a criminal trial

institution clearly inspired by due process**[viii]** .

Cross-examination is a means of acquisition and formation of (oral) evidence through direct examination (conducted by the party who introduces the evidence supporting his own thesis), cross-examination (conducted by the adverse party, to adduce proof supporting his own antithesis) and re-examination of witnesses upon adversary hearings of the parties.

Each of these moments is of a particular strategic interest for the party. More precisely, in the direct examination the party seeks confirmation of his own claim. With integrative cross-examination the adversary party seeks to obtain evidence from a witness on points on which he has not been questioned in chief and that he is thought to be acquainted with. Dubitative cross-examination aims at hurting the credibility of the witness or what he has said. Finally, destructive cross-examination seeks to disprove the opposite argument showing its contradiction. This method of examination of the witnesses determines the reaffirmation of what is the ineludible basis of the classical judicial model: the dialectical confrontation of the parties. Let us consider, with an example as contemporary as ever, the dialogue between Socrates and Meletus, reported in the Plato's *Apology of Socrates*, when the philosopher was forced to defend himself from the charge of corrupting the young.

Many publications have been dedicated to this institution: much literature consists of lists of commandments or practical enunciations of skills of the good lawyer.

Nevertheless, one work among the others is noteworthy thanks to the perpetuity of its teachings: we are reporting there to the work of Francis Wellman, famous New Yorker trial lawyer of the XIX century**[ix]**. In 1903 he wrote *The Art of Cross-examination*: neither a manual nor a collection of precepts on how to carry out cross-examination, but a lively account of the experience of an extremely well-qualified professional man gathered as a result of many years' court practice. The effectiveness of this book is that it provides the tools for an authentic "rhetoric of argument"**[x]**.

Rhetoric is generally defined as the study of the criterions and models to communicate effectively, with as a means to please or persuade the audience. Distinction needs to be made between two different kinds of rhetoric: "there is a rhetoric of persuasion which is exclusively aimed at conferring the maximum effectiveness to the discourse; there is a rhetoric of argument, i.e. of using

reasonable arguments, which is the one that aims at linking different propositions in the discourse through valid and controllable inferences”**[xi]**.

Since, as we have previously remarked, juridical reasoning cannot be a mathematical demonstration: we can at best detect its ability to persuade. Thus it has been demonstrated that, statistically speaking, certain ways of organize and introduce the discourse are more effective than others. Yet judicial reasoning cannot depend on such means only: each grid of precepts will ineluctably reveal its own limits when applied to different cases. It is necessary to apply rhetoric to judicial reasoning - rhetoric meant as an authentic way of cogently (i.e. in rational and controllable form) establishing the premises and the inferences between premises and conclusions. The classicism of Wellman’s work originates here: he does not only point out that an argument can be more persuasive than another one but also gathers confutative experience.

Although cross-examination is minutely regulated in the Italian procedural system (technical rules are stated in articles nn. 498, 499 and 500 of the Code of Criminal Procedure), nevertheless experience recorded from 1988 up to now shows a scarce awareness of this institution and its overall method. The result is that trial examination of witnesses is often restricted to mere faculty of the parties to directly ask questions with no need for the judge to act as an intermediary; questions are censored or admitted upon authoritarian judicial choice; confrontation develops in a disordered way. “It has not been understood that examination is a tool finalistically aimed at arising persuasion elements that are to be measured not only by the answers to the questions but also by the probative outcome to be progressively acquired”**[xii]**.

In Italy, this happens for a series of reasons that can be summarized as follows.

Defective trial structure. The main reason for the system to resist submission to the order of adversary proceedings is that there is no equality between parties in that the prosecutor (*Pubblico Ministero*) is a magistrate just as the judging party is. The pretence of the impartial prosecutor alters the equilibrium of the triadic parties-judge diagram.

Atomization of collection of evidence activities. Practically speaking, examination of witnesses is reduced to just asking question. Which is quite different from really conducting an examination. Lawyers often prepare a list of questions to

read to the witness who, this way, escapes the examiner's control. The *cross examiner* should, instead, constantly self-limit himself, according to what is required by the contextuality of the deposition of the witness and by the whole probative picture. This way, it may sometimes become necessary to leave out a witness or a question: silent adversary hearings can be an interesting facet to the dialectical structure of confrontation and not a way to escape it.

Professional specialization. In his book, Wellman refers to the "art of advocacy." As we know, systems of common law distinguish between barrister and solicitor. In Italy there used to be a distinction between lawyer and attorney but there is not anymore. Only the barrister is qualified as competent to represent people in trial by jury, whereas the solicitor institutes proceedings, gathers probative elements and is responsible for liaison with clients. In the adversary systems, cross-examination is therefore a specialty, that of the barrister. On the contrary, in Italy, a lawyer who is exclusively devote to criminal cases is rare - but for in large cities. Neither can such a distinction of roles be found: the acquisition of the art of advocacy would be jeopardized by little court practice.

Powers of the court. In our legal system, cross-examination is completed by a fourth phase (often indistinguishable as mingled with direct and cross-examination), i.e. the examination of the witness carried out by the judge. It is worth pointing out that also the tradition of common law admits questions to the witnesses by the judge, different from those asked by the parties. However, courts are carefully controlled as to suppress any abuse which may occur every time a judge abandons his impartial role and assumes that of a lawyer. It is also true that article 506 of the Code of Criminal Procedure forbids the judge to ask questions during the examination. Even so, in general, it the judge common for the judge to make remarks, frequent they are the observations, the interventions and the applications of the judge.

4. Topics-dialectic-rhetoric

All we have stated so far can be summarized as follows:

- a. reflecting on law means considering the trial in its dynamic structure of opposition and composition;
- b. due process reveals itself as the essence of the trial: it is an ontological, therefore unavailable principle; it is the logical method of composition of the conflict; it is a deontological rule of conduct;
- c. the juridical reasoning par excellence is the judicial reasoning: it can neither be

represented as a demonstration nor as a mere empirical verification because the context in which it develops is dialogic and the language that employs is vague;

d. the juridical reasoning is an argumentation: it must be intended as the organization of the discourse that can persuade if it succeeds in showing the contextual truth of what it states.

The search of a method of composition of the controversy brings us back to the origins of the trial, and, more precisely, to the classical configuration of rhetoric. The rhetorical procedure implicates an articulated series of logical operations of topical, dialectical and rhetorical kind[xiii].

Where there is a controversy, opposite claims expect to be valid. Therefore, at the beginning it is necessary to choose the proposition that should be discussed first. So the rhetorician learns the art of *topics*: he finds the common places familiar to the audience and builds the premise of his own reasoning.

Topics are functional to the use of *dialectics* which correspond to the praxis of confutation (*elenchos*): having recovered the premises, it becomes necessary to verify that a certain proposition lacks opposition because it is shared by the parties or because its opposition is contradictory. The proposition defended by confutation of the opposite thesis within the controversial context is true: this conclusion is rationally guaranteed by the logical principle of non-contradiction.

Lastly, *rhetoric*: it does neither replace nor coincide with dialectics but it pursues a purpose complementary to it, that is to support persuasively the dialectic's conclusions. Though without excluding but rather underlining the importance of a careful study of words, voice, gestures, rhetoric must not be reduced to the mere practice of techniques which can move the inspiration of the audience. The employment of rhetorical means leads to cogent conclusions as the objections are overcome. The distracted or indifferent audience can be won either through a formally impressive discourse (*aesthetic rhetoric*) or through a discourse made clear thanks to the use of metaphors and periphrasis (*didactic rhetoric*). Having overcome these resistances, the rhetorician will then have to motivate his thesis (*peroration*). He will develop his reasoning adding on the - generally given - object of the main definition a series of more and more detailed attributes, thus bringing a certain juridical institution closer to that particular case. This is the reason why it is important not to "atomize" the collection of evidence activities. In ancient Greek, probative elements were called *semeia* (signs): they were divided into *techmeria* and *eichota*, depending on whether they were necessary or not

necessary, so that they could be added to other evidence and become stronger. In other words, in order for evidence – be it even scientific or technical – to be effective, it has to be incorporated into a wider reasoning based on the argumentative logic. Finally, the thesis defended by the rhetorician may be opposite to a specific and distinct alternative which he will have to disprove developing a confutative rhetoric.

As far as the truth orientation is concerned, it is better to make clear the methodological position of the text. One of the basics of the Aristotelian concept of truth is the principle that true is something which is not deniable, otherwise there is a contradiction. Aristotle denotes the topical premises as *eikos*. This concept is mainly discussed in *Rhetoric*: *eikos* is what is true not in all of the cases but only in the concrete experience. In fact, it is possible to qualify a proposition as true at any time, only by making an abstract and generalizing hypothesis. So, the Aristotelian concept of truth has nothing to do with the notion addressed to Legal Naturalism according to which truth is dogmatic, evident by itself and prior to verification. It is also completely different from the notion of coherence or empirical verification developed by Perelman.

Abandoning the classical canons of argumentation to follow the suggestions of forensic psychology or to seek aid in lists of rules may be dangerous because we could forget the practice of the dialectical method. Be all of this restated in order to continuously ponder the principle of due process as the foundation of the trial and decision.

NOTES

[i] For a reconstruction of the usage of this latin expression in a legal context, see Manzin (2008b).

[ii] On controversy, see Moro (2001) and Cavalla (1992) (2007).

[iii] For a more detailed description, see Cavalla (1991).

[iv] I will confine myself to discussing the concept of trial in accordance to the perspective of Paolo Moro, a pupil of Francesco Cavalla (2001). He provides an ideal model of trial in which the judicial reasoning develops through four sequential stages.

[v] Cfr. Cavalla (2004).

[vi] See Cavalla (2007); on this issue, see also Fuselli (2008).

[vii] I will confine myself to pointing out the most authoritative readings concerning the Italian criminal procedure: Amdio (2009), Ferrua (2005) (2007);

for a philosophical approach, see Fuselli (2008).

[viii] For a closer examination of this institute and its application in Italian judicial praxis, see Schittar (1989) (1998) (2001) (2010), Randazzo (2008), Frigo (2009).

[ix] The book has been recently published in Italy: it is particularly noteworthy the introduction written by Ennio Amodio in which he points out the anomalies of the so called “Italian style”. Besides, most of my remarks refer to the endnotes edited by Giuseppe Frigo, a famous judge of the Italian Constitutional Court.

[x] See Cavalla (2004).

[xi] Loc.ul.cit.

[xii] See Frigo (2009).

[xiii] In this paragraph I am using the terms “topics”, “dialectic” and “rhetoric” in the specific sense developed by Francesco Cavalla in his essays. Every definition given is gathered from Cavalla (2007), *passim*. Especially, see Cavalla (2006) (2007). For further information on this theory of argumentation and its metaphysical foundation, see Cavalla (1996), Manzin (2004) (2005a) (2005b) (2008) (2008a) (2008b) (2010).

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ISSA Proceedings 2010 - Everyday Argument Strategies In Appellate Court ArgumentA Same-Sex Marriage



1. Introduction

(1) *Exchange between Plaintiff Attorney (A-SM) and two Supreme Court Justices In re Marriage Cases, California, 03/04/08, Line 2653*

A-SM: Your honors, with regards to the question to of uh possible adverse consequences, you know with- with apologies to Shakespeare, same-sex couples have come here today to praise marriage, not to bury it. Petitioners deeply value the tradition of marriage and wish to participate in it with all of the joy and responsibility that that brings. There's absolutely no evidence uh in the record here or elsewhere that permitting same-sex couples to marry elsewhere has in [any-

CJ: [I thought when you invoked Shakespeare, you were gonna invoke the line, "what's in a name?"

((laughter))

A-SM: Also would have been very appropriate.

J-M: Also with apologies to Shakespeare, I thought you were gonna say, "a rose by any other name would smell just as sweet."

((laughter))

A-SM: Names are very important, your honor um-

In 2008 and 2009 California's Supreme Court issued two opinions regarding the legality of the state restricting marriage to opposite-sex couples. In the first case,

In Re Marriage, the Court overturned the state's existing marriage laws, ruling that denying same-sex couples the right to participate in state-sanctioned ceremonies that labeled unions "marriage" was denying the couples a "fundamental interest in liberty and personal autonomy" (p. 7). In the second case, *Strauss v. Horton*, the Court upheld the legality of a constitutional amendment, Proposition 8, which was a ballot initiative that restricted marriage to one man and one woman that California voters approved in the months after the Court ruling in the *Marriage Cases*. In justifying its opinion, the Court argued that giving a different name to the legally-recognized relationships of same-sex couples was not a significant enough change to count as a constitutional revision, and hence Proposition 8 was a legal amendment. In both cases - as the above moment of levity suggests - the constitutional issues revolved around the significance of a term.

Within argument studies, legal disputing is often treated as an exemplary model of how to argue (Perelman & Olbrechts-Tyteca, 1969; Toulmin, 1969), and, explicitly or implicitly, ordinary disputants are encouraged to use the kinds of practices common in legal discourse. My goal is not to challenge this positive assessment of legal discourse. Oral argument in appellate exchanges, the legal talk that is this paper's focus, is impressive. But oral argument is *talk* and as such, it is replete with ordinary talk's strategies of influence. Oral argument may be rich with institutionally distinctive vocabulary and reasoning moves, but appellate arguers also regularly use the evaluation-generating strategies of everyday discourse. Attorneys and judges strategically seek to advance their preferred outcomes through the names they select, the definitions they assume, and the descriptive details included. Simply put, participants load their expression so that one side of a dispute seems ever so reasonable, and the opposing side does not.

I begin by describing the discourse strategies of ordinary argument-making in informal conversations and public talk. Then, I provide background on oral argument and the two cases. The analysis describes three persuasive argument-building techniques used by attorneys and judges in these same-sex marriage cases: (1) assuming a definition of a key term, (2) employing evaluatively-tilted analogies, and (3) using stance-cuing non-focal terms. In concluding, I draw out implications for assessing judicial argument.

2. Argument-Building in Public and Personal Exchanges

Describing events one way rather than another is a key way ordinary arguers seek

to build the reasonableness of what they are saying. In disputes, Edwards and Potter (1992) show, “reports being proffered . . . are typically contrasting versions. That is, they are typically organized to undermine or reject an alternative that may be either implicit or explicit” (p. 3).

A first way communicators seek to bolster their preferred position is by the way they define key terms. As Zarefsky (1998, p. 1) noted “to choose a definition is to plead a cause.” And while it is possible to argue why a key concept should be defined a certain way, what speakers do most often is to describe a situation using the meaning entailments of one definition of a disputed term. In other words rather than explicitly arguing as to what should be the definition of a key term, disputants simply speak as if their definition were accepted by all, the straightforward meaning of the word. This move to stipulate and treat their definition as the essence casts other meanings as unreasonable. Schiappi (2003) shows how this process worked in public disputes about “obscenity,” “rape,” and “wetlands.” Similar moves will be seen in appellate speakers’ uses of the term “marriage.”

A second way everyday communicators seek to shape views toward an issue is by using vivid analogies. Comparing one kind of thing to another can lead a person to give attention to aspects of an issue that may have been overlooked. The danger, however, is that any analogy may be problematic, connecting two things that shouldn’t be regarded as comparable. Texts on critical thinking (e.g., Browne & Keeley, 2006), in fact, regularly warn college students that they need to inspect any analogy for its appropriateness. What is not noted in these texts is that an assessor’s judgment of appropriateness is likely to be shaped by his or her position in a dispute. Interpreters need to weigh the degree of similarity and difference in judging the fittedness of an analogy, but in scenes of dispute such a weighing often depends on an interpreter’s other commitments.

A third way ordinary speakers build the reasonableness of their view (and the unreasonableness of those who are disputing them) is through their use of stance markers. In selecting words to express themselves, speakers tap into larger cultural scenes in which particular expressions, when in the neighborhood of other kinds of expressions, convey positive or negative stances toward what is being discussed. Stance, as it has been developed by discourse analysts (Englebretson, 2007; Jaffe, 2009), refers to the attitudinal position toward the topic of talk (or the other) that is conveyed by words, gestures and other semiotic

forms (DuBois, 2007). As Amossy (2009, p. 315), comments, “the selection of a term is never innocent, and it is rarely devoid of argumentative purpose.” Put crassly, ordinary arguers forward their preferred position by selecting words to surround a key claim that will tilt understanding toward their view and away from their opponent’s.

To be sure, argument building in appellate exchanges uses discourse devices that are distinctive to this site. These devices include (1) extensive use of argument meta-language, i.e., terms such as claim position, evidence, and argue (Craig & Tracy, 2010), (2) referencing of prior cases to justify claims, (3) hypothetical questions to explore complexities of issues (Tracy & Parks, 2010), and (4) a speaking style that uses few tokens of face-attention and face-attack (Tracy, 2011). But amidst these distinctively legal moves, appellate court exchanges, I will show, rest on the most ordinary of influence practices.

3. Oral Argument and the Two California Cases

Although US state supreme courts do not have identical formats for oral argument (Comparato 2003; Langer 2002), they do evidence a strong family resemblance. Across state courts oral argument involves a short presentation by the attorney(s) for a side, which ends when a first judge decides he or she has something to ask. Most of the time in oral argument is comprised of a string of rapidly fired questions in which justices, in no particular order, claim the floor to raise questions. At the end of the pre-allocated amount of time, or slightly longer if the Chief Justice approves, the first party sits down. The same sequence of activities occurs with the second party. In some courts, a party may include several attorneys, each of whom tackles one piece of that side’s argument; in other courts, each side has only a single attorney. Typically the party who goes first, the one petitioning to overturn the lower court’s opinion, can save a portion of his/her time for a rebuttal.

This study is part of a larger project (Tracy, 2009, in-press; Tracy & Delgadillo, in press) examining disputes about same-sex marriage in oral argument in eight state supreme courts and several state legislative hearings. Tapes of oral argument and legislative hearings were downloaded from state websites and simple transcripts were created. I also collected each court’s judicial opinions. In the two California cases, which are this paper’s focus, the same seven justices heard both cases. For the *In re Marriage Cases*, there were eight attorneys, with four on each side. In the *Strauss v. Horton* case there were six attorneys, five on

the plaintiff side and one on the defense side. In each of the cases the oral argument lasted three to four hours, and averaged about 80 questions per hour. In the *In re Marriage Cases*, the focal issue identified in the judicial opinion was whether the California constitution “prohibits the state from establishing a statutory scheme . . . under which the union of an opposite-sex couple is officially designated a ‘marriage’ whereas the union of a same-sex couple is officially designated a ‘domestic partnership’” Important to note is that at the time of the case, except for the name, existing California law extended all “significant legal rights and obligations traditionally associated with the institution of marriage” (p. 4) In the *Strauss v. Horton* case, there were two issues: (1) Is Proposition 8’s restriction on marriage to one man and one woman a permissible change to the California constitution? (2) And if so, are the 18,000 marriages that were performed between the time of the first and second case valid?

4. Everyday Evaluation-Tilting Strategies at Play during Oral Argument

4.1. A Contested Key Definition

A central difference between the proponents and opponents in these cases was their definition of the term marriage. Proponents used the word “marriage” to point to a committed, loving relationships between two parties that “consists of a core bundle of rights pertaining to privacy, autonomy, freedom of expression” which includes “freedom to choose one’s spouse[i].” Marriage is a fundamental right constitutionally granted to almost all US citizens today, excluding only children, blood relatives, and multiple partners. Denying a person the right to marry his or her preferred partner the plaintiffs argued, is as discriminatory (and hence should be illegal) as denying two people of different races the right to marry. In contrast, attorneys for the defense defined marriage as a union between a man and a woman. Period. Consider one defense attorney’s response to a question about what role he saw the Court to have in this dispute.

(2) Line 2167, Attorney Lavy, defense of existing marriage law[ii]

Y- your honor, I don’t believe that this r- court has a role in *redefining the term marriage*. E- since- I mean I- I understand that the petitioners are saying what we want is the right to marry, but the right to marry as defined in every decision by this court, every decision by the US Supreme Court, and almost every decision by any other state court, is the union of a man and a woman. That’s what it was in Perez, that’s what it was in Loving.

The attorney's comment is interesting in two regards. First, he describes what the plaintiffs are asking for as a *redefinition* of marriage. It is not extending marriage to a new set of people, but rather it is fundamentally changing its meaning. Marriage, in its essence, to use Sciappi's (2003) distinction is a union of a man and a woman. Anything else is not marriage. Second, Lavy bolsters this stipulative definition by citing precedent and treating it as supporting his view. In mentioning Perez (a 1948 California Supreme Court case) and Loving (a 1967 US Supreme Court case) — two visible cases about interracial marriage which affirmed the rights of blacks and whites to marry each other — Lavy uses them to support his claim that the law has been consistent in its definition of marriage, since in both cases, one of the parties was male and the other was female.

A similar stipulative move was made by a plaintiff's attorney. Consider an exchange in which a justice asked the attorney how he was defining marriage.

(3) *Line 1093, A-M = Attorney McCoy, J-W = Justice Werdeger*

A-M: The definition of marriage which we are asserting here is the commitment between two individuals to provide love and emotional support to one another for the rest [of their lives].

J-W: [With all due respect I understand that's the definition that you are advancing, but how does court know that implicit with all the commitment and the choice and so forth is not the understanding that it's between a man and a woman?

A-M: Well I- I- think it's- uh I think history and tradition uh has showed that marriage, the common understanding of marriage, is between a man and a woman. However, our- our focus here is whether the statute and the common understanding of marriage is unconstitutional on its face, whether the definition *excludes individuals in California for the right of free choice, that is right to choose their life partner.*

In essence, identical to the defense attorney's move, the plaintiff attorney can be seen to arguing that because the law does not allow some people to choose their life partner - his preferred definition of marriage - then the existing law is unconstitutional.

The definitional debate over this key term, "marriage" carried over to the judicial opinions. The Court opinion, endorsed by four of the seven justices, describes the plaintiffs as "not seeking recognition of a novel constitutional right to 'same-sex marriage' rather than simply the application of an established fundamental right

to marry a person of one's choice" (p. 18) whereas the dissenting judges argued that " though the majority insists otherwise, plaintiffs seek, and the majority grants, a *new* right to *same-sex* marriage that has only recently been urged upon our social and legal system" (p. 15). In an analysis of the suasive power built into words, using the debate about "marriage" between same-sex couples as an example, Macagno and Walton (2010) make a similar point, highlighting how words have built into them bits of culture and this feature is "an integral part of the language itself" (p. 2000). Disputes over definition are disputes about what is culturally desirable.

Just like in most arenas of public disputing, then, which party is seen to have the more reasonable claim comes down to which party gets to define the key term. In this case, the preferred definition of marriage held by four judges trumped the preferred definition held by the other three justices. Thus, despite the legal clothing of judges and attorneys' talk, the dispute was a very ordinary one. As Zarefsky (1998) concluded about the act of defining: it "affects what counts as data for a conclusion about whether or what action should be taken. It highlights elements of the situation that are used to construct an argument about it" (p. 5).

4.2. Reasonable or Problematic Analogies?

One of the more ordinary of everyday reasoning tools is the analogy. In seeking to persuade justices of the reasonableness of a claim, attorneys occasionally used this device. Below I examine two analogies, one by each side, and I consider why the analogy is reasonable and why it is problematic, showing how the assessment cannot be separated from an evaluator's positioning. In each instance, the Court decided against the side that used the analogy.

The first instance comes from *In re Marriage* where an attorney defending the existing marriage law responded to a justice's question about potential adverse effects for society if same-sex couples were permitted to marry.

(4) Line 2497, Attorney Staver

I think it would undermine opposite-sex marriage in the same way that if you were to have, and this is just an illustration, *to have uh one atom of sodium and one atom of chlorine creates salt, you can't change that name without having consequences*. You can't simply redefine the definition of marriage to include what it's never included, same-sex relationships...

The attorney's analogy between marriage and salt strongly implies that just as one atom of sodium and one atom of chlorine create salt and only salt, so too is it the case with marriage and a single man and a single woman. Two elements of chlorine will not create salt. In equating "marriage" to this natural substance, the inappropriateness of two men or two women being marriage partners is asserted. Although currently not popular among many US legal scholars, there is a tradition of seeing the law as deriving from God and nature (e.g., Washington, 2002). Within such a tradition, Staver's analogy is reasonable. However, if one sees marriage, and the laws that have been created about it, as a social institution that has changed across time, then the inappropriateness of the analogy becomes obvious. The bonding between chlorine and sodium is a natural process, not at all like the bonding between intimate partners. To treat the two as analogous is inappropriate.

A second analogy comes from a plaintiff attorney in the final minutes of rebuttal during the Proposition 8 case. The attorney is making the case of the importance of the word "marriage" rather than "domestic partnership" to describe committed relationships between same-sex couples. As an analogy, he suggests the importance of having similar titles for male and female judges. He says:

(5) *Line 2769, Attorney Maroko*

Thank you, your honor. I wanna- if I may just follow up on Justice Kennard and Justice George's questions of Mr. Minter. Um aren't we basically just focusing on a very narrow aspect of Prop 8, which has changed the nomenclature, but the basic suspect class action of rights which was the core of the case stays? That's the position [of the other side]... so I'm proposing hypotheticals, we've all been talking about hypotheticals ... Back in the sixties saying that uh- cause we all know that a bar- a bartender has to be a man. Can't have a woman bar- basically simplifying it. ...[So I propose a ballot initiative that will be only nomenclature] Nomenclature. Only males shall serve as members of the California judiciary. Females shall be commissioners with the same rights and powers as men. Okay, people, the people have the sovereign- sovereign people 51% passed it, 52% passed that, they have reasons. Many women get pregnant and be off the bench. It won't be- whatever their reasoning is. Women will be commissioners, called commissi- Same rights. Same rights. Justice- Justice Corrigan, Justice k- uh um Justice Kennard, Justice Werdegar [three named justices are female] you h- you can rule the same way, but you're called a commissioner, Justice Moreno [male] is

not, is called a judge, justice.

This analogy seems highly appropriate, although not necessarily politically smart. In creating an analogy about the importance of names, not in principle, but in the concrete situation confronted by the three female justices, the attorney can be seen as seeking to drive home the consequentiality of the name that is given to an event or person. At the same time, his analogy is at odds with the impersonal argument style favored by appellate court arguers. In being personal, however reasonable the analogy, the attorney violates the institutionally legitimized ways of weaving passion into argument (Bailey, 1983), therein making his emotion visible in a fashion neither expected nor acceptable in appellate exchanges.

4.3. *Stance-Cuing Non-Focal Terms*

In addition to the debate about the definition of marriage, a second important debate occurring in both cases concerned the significance of words. What relationship did the label “marriage” have to the already existing rights that were provided in the state’s domestic partnership law? Was the right to call one’s union “marriage” an important right of marriage or was the name a relatively unimportant difference? In opening minutes of the *In re Marriage* case the lead plaintiff attorney argued, “Words matter. Names matter.” Soon after, this issue was explored in questioning.

(6) *Line 300, Justices Kennard and Chin questioning Attorney Stewart*

J-K: What is the most significant difference uh between domestic partnership and marriage? Is it that domestic partnership, according to your position, doesn’t provide the *title, status, or stature of marriage*?

A-S: That is the most important distinction [and it’s not the only-

J-C: [But aren’t the rights and responsibilities *substantially the same*?

A-S: They- there are some differences, your honor, but they are [close.

J-C: [Aren’t they the s- *substantially the same*?

A-S: They’re- are the rights and- but the [tangible rights-

J-C: [Aren’t the rights and responsibilities of domestic partners and marriage partners *substantially the same*?

In repeatedly pursuing the plaintiff attorney to get her to acknowledge that the rights of marriage and domestic partnership are substantially the same, a strong impression is created – which turned out to be accurate – that Justice Chin would be non-supportive of the plaintiff’s claim.

While “marriage” was a key term in these oral arguments, some times the focus was on the institution, and at other times the focus was on the word. To signal which one was being discussed, justices and attorney tended to mark when they were referencing the word marriage. The words speakers used to mark that they were focused on the word included such terms as “word,” “name,” “nomenclature,” “title” “label” “term/terminology” and “designation.” To refer to the word “marriage” in (6) Justice Kennard uses the term “title.” Of note, in over half its uses by judges or attorneys (4 out of 7) – as exemplified above – “title” co-occurred with the positive term, “status.” Table 1 displays a frequency count of the terms the judges used to refer to the word for marriage, organized by each word’s typical evaluative loadings that are explained below.

Table 1
Terms for Terms used by the Judges

Terms	#1: <i>In re Marriage</i>	#2: <i>Strauss v. Horton</i>
Positive		
Name	5	1
Word	3	0
Title	5	0
Negative		
Label	0	6
Nomenclature	0	9
Neutral		
Term/terminology	3	4
Designation	2	3

Table 1 -Terms for Terms used by the Judges

These non-focal words for terms, I suggest, implicitly cue different stances toward the consequentiality of names. To label terms as “titles,” “names,” or “words” more often grants the significance of a term. It was “names” and “words” that the plaintiff attorney used as referents in her presentation’s opening moments. Later she explicitly argued that the state legislature’s willingness to extend tangible marriage benefits to same-sex couples, but to retain “a separate *name* shows how much the status and the *word* marriage do matter.” In the *In re Marriage* case, it was the plaintiffs’ attorneys who used the terms “word,” “name” and “title,” not the defending state attorneys (14 to 2 uses).

The words used to refer to words also can carry weight in a negative direction. Those judges who referenced the term for marriage with “nomenclature” or “label” conveyed a sense that naming was a small matter. It was “just,” “only,” or “merely” a name difference. In the Proposition 8 case, Justice Chin, the same justice in (6) who strongly implied that there was little substantive difference

between marriage and domestic partnership, asked: "Counselor, in what way does Proposition 8 take anything away other than the *nomenclature of marriage*?" Justice Kennard, the justice who had referred to "marriage" with the term "title" in the first case (see (6)), was one of the majority in the *In re Marriage Cases*, voting that denial of the name was a significant inequality. But in *Strauss v. Horton* where she voted to rescind the name marriage from gay couples' unions, she used the terms "label" and "nomenclature." In essence, when she voted against the significance of calling same-sex unions marriage she employed different words to reference the word marriage than when she voted to uphold the significance of the name.

(7) *Line 353, Justice Kennard*

Given these precedential- precedential values that have been established by this court in previous decisions, how do you distinguish those previous decisions from this particular initiative where the people of California in essence took away the *label of marriage*, but as has been pointed out by the chief justice and other members of the bench, it left intact most of what this court declared to be proper under the California constitution?

If the terms to designate words are stancetaking cues, then we could expect to find a different pattern of use between the two cases. A greater number of more positive words should have been used in the first case that supported the importance of words whereas in the second case, where the wording difference was judged inconsequential, we would expect to see a greater number of negative, minimizing words. This pattern, in fact, was observed. A Pearson Chi-square test comparing the uses of positive and negative terms in the two cases was significant ($\chi^2 = 27.19$, $df = 1$, $p < .001$, Cramer's $V = .94$). In sum, through the words that judges used to refer to words, they cued their stance regarding the consequentiality of language.

An interesting question to consider is whether there is a similar pattern in the written judicial opinions. The answer is "no." When word counts were done on the same seven words for majority, concurring, and dissenting opinions in the two cases (*In re Marriage* = 172; *Strauss* = 185 pages), the pattern was different [iii]. One difference was that terms for words were simply used more frequently in *In re Marriage* (.65 terms per page) than in the second case (*Strauss* = .36 terms per page). This difference suggests that there may be a link between more explicit written discussion of language terms and an assessment that terms are

consequential.

A second difference was in the usage of evaluative terms compared to more neutral ones. Neutral terms were used much more often in judicial opinions than in oral argument. Two terms that were used to stake out an even-handed stance toward the significance of naming issues in the oral and written genres were “designation” and “terminology.” Although either of these terms could convey a negative evaluation - as happened when the Chief Justice prefaced “designation” with the minimizer “mere” - most of the time the terms conveyed a neutral stance. Evidence for the relative neutrality of these terms is seen in their chronological placement in oral argument.

Opening moments are often taken as indicators that a party will be treated fairly. As such, we might expect a chief justice to monitor his or her language choices especially closely at the start of a case. Consider, then, how Chief Justice George, the first question-asker in each case, formulated his question about the significance of the word marriage. In *In re Marriage* he began “Is it your position that the use of the *terminology* marriage itself is part and parcel of the uh right to marry?” In the *Strauss* case, he started the questioning of the Plaintiffs referring to the many pieces of the Court’s decision in the first case, including its position on “terminology.” Of note, his selection of the word “terminology” was a repair from the more negative form “nomenclature,” thereby cuing both the greater neutrality of “terminology” and the negative loading of “nomenclature.”

(8) *Line 41, Chief Justice George*

Now, there’re many things that were held in that particular ruling, uh including the um application of the suspect classification to sexual orientation, submitting that to strict scrutiny and so forth, and of course *the nomenclature, the terminology of marriage*.

When we focus on the judicial opinions and contrast the frequency of neutral and evaluative terms, we find that evaluative terms were a far bigger percentage in *In re Marriage* (45%) than in the *Strauss* case (22%). A Chi-square test indicated that this difference was significant ($\chi^2 = 8.86$, $df = 1$, $p < .01$, Cramer’s $V = .22$). See Table 2. Not only were evaluative words used more often in the *In re Marriage* case in which the Court decision extended the name as well as the rights of marriage to gay couples, but the tilt of the evaluative words was largely positive (71% of the 49 words). Thus, when justices saw the significance of the

name “marriage” for the legal issue before them, they used a greater number of evaluative terms to refer to the naming issue. When they judged the wording issue to not warrant a favorable decision for gay couples, they used more neutral language to refer to terms.

*Table 2
Stance-cuing Words for Words in Judicial Opinions*

Stance Terms	<i>In re Marriage</i>	<i>Strass v. Horton</i>
Evaluative (positive or negative)	49	15
Neutral	61	52

Table 2 - Stance-cuing Words for Words in Judicial Opinions

When speaking, communicators have little time to reflect about the very best word choices. Writing, in contrast, provides time for authors to sort through subtle wording implications. In crafting high visibility documents - what these written opinions were - we see the document language shifting from the more positive- and negative-leaning evaluative language that characterizes talk to a more neutral register. When we compare oral argument to the judicial opinions summing across both cases, the difference is marked. In the written opinions the single term “designation,” in fact, occurred 98 times (55%) out of the total 177 occurrences of the seven terms. A Pearson Chi-Square test finds evidence of an association between stance and genre ($\chi^2 = 16.27$, $df = 1$, $p < .001$, Cramer’s $V = .28$). Judges used many more evaluative words to reference the wording issue when they were speaking than when they were writing

*Table 3
Stance Differences between Oral Argument and Judicial Opinions*

Stance Terms	Oral Argument	Judicial Opinions
Evaluative	29	64
Neutral	12	113

Table 3 - Stance Differences between Oral Argument and Judicial Opinions

An implication I would draw out of this pattern is that written judicial opinions, more than the critical discussion that shaped them, enact the dispassionate neutral style that so often is described as “legal argument.” In contrast, the practice of oral argument reveals a different profile. As is common in everyday

talk (Bergmann, 1998) oral argument is loaded with moral, evaluative language that makes an argument for or against a position simply through the terms that a speaker selects to describe what is favored or opposed.

5. *Conclusions*

Philips (1998) noted that “the spoken law really has an interpretive life and culture of its own and is not just a reflection of the written law” (p. xii). What we see when we look at this one practice of law is that it has much in common with the ordinary ways communicators seek to persuade each other in situations of dispute. In oral argument, participants define terms in ways that are consistent with the conclusions they favor, they use analogies to advantage their side, and they convey the (un)reasonableness of what they are asserting or challenging through subtle wording choices. In Amsterdam and Bruner’s (2000) words, legal arguers use the “small coins” of language, the immense variety of penny and five-cent tokens such as “name,” “nomenclature” or “designation” to build the argumentative stance they favor.

From looking closely at oral argument about same-sex marriage in eight state supreme courts, I would assess judges and attorneys to be doing an argumentatively good job in critically examining difficult issues that divide US society. The praiseworthy arguing style that the parties enact, though, is not because they avoid the persuasive moves of ordinary speaking. Rather, appellate arguing is (usually) well done because participants take seriously the joint interpretive task before them. In mixing ordinary discourse strategies with law-specific practices, justices collectively display, to quote Davis (1997), that they are engaged in the demanding “work of worrying over the proper reading of an open text” (p. 40).

NOTES

[i] Taken from Justice Kennard’s question in *In re Marriage* to a plaintiff attorney checking her understanding of their position.

[ii] Italics are used in excerpts to draw attention to words and phrases that are the focus of commentary.

[iii] Using the search option in Acrobat, instances of the seven words were searched for in each set of texts. Instances of words were examined to see if the word was connected to a reference to “marriage” or “domestic partnership.” that is when terms were being used in other ways - e.g. ““in other *words*,” “In long-term relationships” - they were not counted.

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ISSA Proceedings 2010 - Towards An Empirically Plausible

Classification Of Argumentative Markers



1. Introduction

Despite the varying theoretical perspectives that argumentation scholars take when studying argumentative discourse and despite their different research goals, almost all have shown, in one way or another, interest in the linguistic realisation of argumentative moves and of other argumentative aspects that fall under their object of study. Such an interest may be seen as satisfying at least two goals. The first is a purely utilitarian one. Argumentation scholars are interested in those linguistic elements that can help them identify the units that they are studying and subsequently help them to justify their proposed analyses on some linguistic grounds. The second goal that one may have is to reach a better understanding of what language users do when they argue by studying the way they use language. These two goals are not necessarily self excluding.

In this paper[i], I present some preliminary thoughts on the subject of argumentative markers that result from an ongoing study of a large corpus of texts (in French) on the controversies surrounding the application and development of nanotechnology[ii]. Given the large number of texts and the different sources from where these texts come, a software is used that allows a semi-automatic treatment of the data. To this endeavour, linguistic elements appearing on the surface of texts that can point to the argumentative aspects of discourse in which we are interested can be highly useful. At the same time, this endeavour gives the opportunity for a theoretical discussion concerning argumentative markers, as a preliminary step to the identification, description and classification of various linguistic elements that may represent one or another type of marker. It is to this latter point, that is the theoretical preliminaries, that I focus on in this paper. Working towards refining the categories and the tools used by a software for the analysis of text corpora is a unique opportunity to ponder over the theoretical categories and concepts that one needs to have recourse to when analysing argumentative discourse.

In sections 2 and 3, I briefly present the project within which the interest in

argumentative markers has arisen, and the software that is used for the analysis. In section 4, I discuss three main approaches in argumentation studies that can provide useful insights to the study of markers. In the final section, I present a working definition of argumentative markers and discuss its main elements with the use of examples taken from a part of the corpus.

2. The Chimères project

The research project Chimères is carried out by a team of sociologists, anthropologists and argumentation theorists in Paris [iii]. One of the aims of the project is to describe in a systematic way the positions that the various parties assume and the arguments they bring forward as well as the criticisms exchanged in the controversy surrounding the challenges, risks and promises related to the development and applications of nano and biotechnologies [iv]. Questions that are raised in the Chimères project include: How are the boundaries between legitimate expectations and irrational projects constructed and discussed upon by the stakeholders? How do those expressing their opinions in this controversy elaborate on their argumentation and react to the arguments advanced by the other participants? How do arguments come about, are transformed, receive consensus and eventually die out? The interest of the Chimères project lies in understanding how controversies arise in the public sphere and how they develop over time, constructing and transforming the public's common sense [v].

For this project, a large number of texts is collected from different sources (news articles, scientific articles, media reports, official reports, interviews, etc.), mainly from the Internet, in which the analyst is invited to look for the arguments and the positions advanced or the criticisms that are put forward. As a result, the texts collected cannot be reconstructed straightforwardly as representing positions in one main discussion over one specific difference of opinion. Moreover, given their different types, it cannot be guaranteed that these texts are argumentative from beginning to end. Finally, the questions that the particular project seeks to answer require one to focus more on the content of the discourse and of the arguments exchanged in it rather than on the formal and structural relations that can be identified between these arguments. At the same time, however, the need of studying a large number of texts produced over a certain period of time in order to answer these questions calls for an automatic or semi-automatic treatment of the corpus, treatment which resides mainly on the linguistic surface of the texts under study.

3. Prospéro: a software for socio-informatics

An integral part of the project is the use of a software called Prospéro. The name is an acronym of “PROgrammes de Sociologie Pragmatique Expérimentale et Réflexive sur Ordinateur”. The software is being developed since 1995 by the sociologist Francis Chateauraynaud and the informatics engineer Jean-Pierre Charriau to respond to the demand for computer-aided analysis of large numbers of written texts of public debates and controversies (Chateauraynaud 2003)[vi]. Angermüller (2005), in an overview of the various approaches in contemporary French sociology, writes with respect to Prospéro:

Prospéro is a software utility that processes “complex files” and generates conceptual dictionaries. This software produces intermediate layers of codes and categories between the level of the text and the sociological model. The research procedure can be called “qualitative” in that the human interpretive act plays a crucial role in the constitution and codification of the corpus. .. The codification takes place in close interaction with the computer which stores and accumulates the coding routines so as to codify new texts of the corpus more or less automatically. Since the researcher is constantly forced to develop new categories and to confirm or modify older ones the research design is more flexible than much of the software coming out of the tradition of automated discourse analysis established by Pêcheux (1969).

The software serves as a search engine providing the analyst with a variety of tools that he can use in order to access the texts collected in the corpus under study. The various tools proposed by Prospéro have been conceived of in such a way that they allow a treatment of the corpus that takes into account jointly the content (what is said), the mode (the way of saying it) and the context in which it is said (Chateauraynaud 2003).

Seven levels of representation and description are proposed which allow for different entrance points into the corpus. These are: 1) the representation of authors and dates, which helps contextualise the information regarding the texts under study; 2) the representation of themes that takes into consideration the entities, the list of names and the list of actors that are present or discussed upon in the corpus; 3) the representation of thematic networks and the qualifications applied to themes and actors; 4) the representation of categories (see following paragraph) and collections; 5) the representation of the arguments exchanged by the actors; 6) the representation of the modalities, markers and connectors used

in the texts; 7) and the representation along the time axis **[vii]**.

In addition, the software can represent the content of the texts on the basis of seven categories, namely: entities (which correspond roughly to the grammatical class of nouns and noun phrases), qualities (which correspond roughly to adjectives and adjectival phrases), processes (which correspond roughly to verbs), markers (which correspond roughly to adverbs), auxiliary words (which correspond roughly to the classes of articles, pronouns and conjuncts), numbers, and finally undefined elements (which include the elements that cannot be recognised automatically as belonging to any of the above categories, and which the analyst should manually assign to one of them).

One of the particularities of the Prospéro software is that it encourages the analyst to create sub-categories and modify existing ones in order to have a better representation of the data under study. Contrary to other software for computer-aided text analysis, Prospéro does not provide ready-made and fixed categories. The dictionaries that include lists of the items representing each category can be modified at any time and other dictionaries developed by other users **[viii]** can be incorporated in order to provide a different entrance point into the same corpus of texts. It is to the direction of refining the category of markers (see above) in particular and of elaborating on the elements that constitute its dictionary that an understanding of what argumentative markers are and which linguistic elements can function as such can prove useful. Before proposing a definition of argumentative markers in section 5, I present a brief overview of some influential studies on this subject, in the following section.

4. From “connectives” to “operators” to “indicators”

In the argumentation studies literature, one can identify three main approaches that provide a fruitful and rich background against which one can try to describe argumentative markers and the role they play for the analyst and/or the language users. These are the so-called Geneva school, the theory of Argumentation within Language developed by Anscombe and Ducrot, and finally the pragma-dialectical approach to the study of argumentation developed by van Eemeren and Grootendorst.

4.1 The Geneva School on “pragmatic connectives”

In the 80's, the so-called Geneva School, with Eddy Roulet, Antoine Auchlin, Jacques Moeschler among its members, produced a significant amount of studies on the subject of markers and connectors (about French language) in their

attempt to describe the means by which various relationships between acts can be made explicit in discourse. In a comprehensive study (Roulet et al. 1985), the authors distinguish three main types of markers/connectors, which correspond to the three levels of units that compose the structure of discourse, according to the Geneva School's approach, namely exchanges, moves and acts. These are: a) markers of the organisation of conversation, the use of which guarantees the continuous development of discourse while it provides indications about the actual state of its structure; b) markers of illocutionary function, that concern the relations between acts [ix], and c)

markers of interactive function. Leaving the first class of markers aside, Moeschler and Roulet refer collectively to the other two classes as "pragmatic connectives" and define them as follows:

A pragmatic connective is any lexical item of a particular natural language which connects two (or more) propositions realised in utterances, in a non-truth-functional manner (Moeschler 1989, p. 323).

The relationship between the constituents which form a discourse at different levels may be indicated by markers of illocutionary or interactive function which we call 'pragmatic connectives' since they serve to articulate discourse units (Roulet 1984, p. 32).

Within the group of interactive markers, the following three sub-groups are distinguished: a) those that mark the relationship between the arguments and the master act. These can be further divided into those markers that appear in the subordinated act (connecteurs argumentatifs), such as: *car, parce que, en effet, du fait que*, and those that appear in the master act (connecteurs consécutifs), such as: *donc, par conséquent, aussi, ainsi, alors*. b) Those that mark the relationship between the counter-arguments and the master act (connecteurs contre-argumentatifs): *bien que, mais, quand même, alors que, malgré que, cependant, néanmoins, pourtant*. c) Those that mark a certain reformulation /re-evaluation of the acts that precede (connecteurs réévaluatifs), which are distinguished between those that have a recapitulating function (récapitulatifs), such as: *bref, en somme, au fond, décidément, en fin de compte, finalement, de toute façon*, and those that have a corrective function (correctifs), such as: *en fait, en tout cas, enfin*.

The studies carried by the members of the Geneva school focus on real discourse

and provide a detailed analysis of a varied number of elements that indeed go beyond the study of the grammatical class of conjunctions. However, their interest is in the relations that these elements mark between the various units of discourse. Such a view implies that the argumentativity of discourse lies in the coherence relations and the structural organisation of various discourse units. While this may be true to a certain extent, it risks neglecting those cases where the standpoint-argument relation is not explicitly marked, as well as cases in which the argumentative nature of a piece of discourse is not revealed by a standpoint-argument relation but rather by the use of a figure of speech or by the use of a strategy that accompanies the argumentative move performed (see 5.2).

4.2 “Operators” in the Argumentation within Language Theory

Even though the theory of argumentation developed by Anscombre and Ducrot (1983) has been a source of inspiration for the study of pragmatic connectives carried out by the members of the Geneva School, I discuss it in this order because I believe that it preserves an interest in the semantics of the linguistic elements that may function as argumentative markers, which lacks in the study of pragmatic connectives by the Geneva School. Ducrot’s study of the “discourse words” (*les mots du discours*) emanates from his interest in describing the instructions that such words as *mais* [but], *d’ailleurs* [moreover], *justement* [exactly], *donc* [so/therefore], among others, give to the interlocutor for recovering the argumentative orientation of the utterance in which these words appear and thereby for understanding the meaning of that utterance (Ducrot *et al.* 1980).

To my knowledge, there is no general classification of connectors proposed in the works of Ducrot except for studies of individual words or phrases. Nevertheless, two distinctions have been proposed that can provide useful insights in the search for argumentative markers. The first is between “argumentative connectors” and “argumentative operators” (Ducrot 1983). Argumentative connectors serve as articulators of two or more propositions. They ascribe to each proposition a certain argumentative function, as is the case with *donc*. The proposition introduced by this adverb functions as the conclusion, while the proposition that precedes it has the function of argument in support of this conclusion. Argumentative operators, on the other hand, which are words like *presque* or expressions like *ne..que*, function within the boundaries of a proposition, changing the argumentative potential of that proposition.

The second distinction proposed by Ducrot is between “realising” and “de-realising” modifiers (Ducrot 1995). This distinction concerns modifiers (like adverbs and adjectives) that can accompany the predicates of a phrase (a verb or a noun) and result in changing the argumentative force of that predicate: the “realising” ones by increasing that force, and the “de-realising” ones by decreasing it. In the following two sentences, “difficult” is a realising modifier for the noun “problem”, while “easy” is a de-realising one for the same noun:

There is a problem, and it is even *difficult*. [RM]

There is a problem, but it is *easy*. [DM]

Although the original focus of Ducrot and his colleagues has been mainly on functional words such as conjunctions and particles and not so much on words and expressions with full lexical meaning, the insights that can be gained from their studies can be useful in considering evaluative words, for example, as playing the role of markers of argumentative aspects that are pertinent to the study of controversies(10). Along these lines, the use of nouns like “revolution” to refer to “nanotechnology” and verbs like “enhance” and “improve” to refer to the applications of these technologies can be considered as markers of a positive representation of the object of controversy, to be found in the discourse of those favouring its development rather than in the discourse of those supporting a moratorium on its development.

4.3 The pragma-dialectical approach to “argumentative indicators”

Given the definition of argumentation as a social, rational and dialectical activity (van Eemeren & Grootendorst 1992, 2004), the interest of the pragma-dialectical approach in the linguistic surface of argumentative discourse goes well beyond the study of conjunctions and discourse connectors. As van Eemeren, Houtlosser and Snoeck Henkemans (2007, p. 2) state:

we do not consider argumentative indicators to be merely words and expressions that directly refer to argumentation, but consider argumentative indicators to include all words and expressions that refer to *any of the moves* that are significant to the argumentative process.

The authors take the ideal model of a critical discussion as their starting point and seek to identify the elements of actual discourse that are pertinent to the units of analysis proposed in the pragma-dialectical model. They thus identify

argumentative markers that pertain to the moves that are to be carried out at all four stages of the ideal model of a critical discussion, such as indicators of standpoints (confrontation stage), indicators of challenge to defend a standpoint or indicators of proposal to accept a proposition as a starting point (opening stage), indicators of argument schemes and of related criticisms (argumentation stage), and indicators of maintaining or withdrawing a standpoint or doubt (concluding stage), to name a few.

An asset of this approach to argumentative indicators, as Kienpointner (2010) rightly observes, is that the authors “do not restrict the notion of “indicator” to one type of expression (e.g. to one word class, for example, nouns or adverbs; or to one level of language, such as morphology)”. Another useful insight for the search of argumentative markers that the study by van Eemeren *et al.* provides is that the reactions of the other party can also be used as indicators of what the speaker’s move is, something which acknowledges the dialogicality of argumentative discourse to the fullest.

Nevertheless, the aspects that are identified by means of the proposed indicators are at times too analytic and too theory-dependent to be pertinent in the (computer-aided) study of actual discourse. It is not evident, for example, whether the difference between one-sided and two-sided burden of proof, or the difference between unrestricted acceptance and acceptance with restrictions of a proposition as a starting point can be linguistically marked. Moreover, a number of the items listed as argumentative indicators rely heavily on the assumption that argumentative discourse is reconstructed in the form of a dialogue, something which is not very helpful for the analyst who seeks to identify the respective moves in written monological argumentative discourse[xi]. Finally, a number of linguistic elements that may help the analyst identify certain argumentative strategies rather than specific argumentative moves tend to be overlooked by the definition of argumentative markers as “words and expressions that may refer to argumentative moves”[xii].

A software such as Prospéro invites the analyst to take a reflexive stand towards the data under analysis (Chateauraynaud 2003). Because the categories used for the search of relevant fragments and for their analysis are not determined exhaustively and in advance, the analyst is constantly invited to reconsider the proposed categorisations and the linguistic items that may represent them. In addition, it should be noted that the software recognises the linguistic surface of

the various texts without however coding these elements grammatically or morphologically [xiii]. It thus becomes a challenge for the argumentation theorist to find ways in which he could search for those passages of the corpus that are pertinent for him, based on the linguistic realisation and configuration these may have. It is to this direction that the use of argumentative markers can prove useful.

5. A working definition of argumentative markers

Considering the specificity of the Chimères project and the technical characteristics of the Prospéro software, the argumentative markers that one is interested in identifying should be such that they can be expected to lead the analyst to fragments of the corpus in which a certain argumentative activity is to be found. Two main questions arise, namely: 'What can an argumentative marker be like?' and 'What does an argumentative marker mark?'. A formula for argumentative markers such as the following can be proposed: *Marker (M) marks a unit X as Y*. Starting from this formula, I address these two questions in the following sub-sections.

5.1 What can an argumentative marker be like?

Argumentative markers do not constitute a finite class and are not to be identified with one specific grammatical class either. Any lexical item, single or complex, can be an argumentative marker [xiv]. Such lexical items can be a single word (see examples 1-2), a phrase (see 3-4) or a whole sentence (see example 5) [xv]:

(1) Les nanotechnologies sont *assurément* au cœur de la Convergence Technologique actuelle. (AFT)

[Nanotechnologies are *undoubtedly* in the heart of the actual Technological Convergence]

(2) *Paradoxalement*, on connaît très peu l'impact sur la santé et l'environnement des nanomatériaux utilisés pour mettre au point les nanomédicaments. (ETC)

[*Paradoxically*, we know very little about the impact that the nanomaterials used in nanomedicines may have on health and environment]

(3) Que ce soit dans l'industrie pharmaceutique, l'agroalimentaire, le nucléaire ou l'informatique pour ne citer que ceux là, *tout le monde convient* qu'il y a des risques et que des mesures ont été prises pour protéger les citoyens en général et les salariés qui participent à la production de ces produits et services. (CFE-CGC)

[Be it in the pharmaceutical industry, the food-processing industry, the nuclear or the informatics industry, to mention only a few, *everyone agrees that* there are

risks and measures have been taken to protect the citizens in general and the employees who are involved in the production of these products and services]

(4) Le désir de réaliser des profits et de gagner une certaine compétition scientifico-économique tue, chez les scientifiques, les industriels et les élus, toute conscience morale sans laquelle, *comme chacun sait*, il n'y a « point de science », mais « ruine de l'âme » (Rabelais, 1550)! (SEPANSO)

[The desire to make profit and to win the competition at the scientific and financial levels kills any moral conscience that scientists, industrialists and politicians may have, without which, *as everyone knows*, there is “no science” only “ruins of the soul” (Rabelais, 1550)!]

(5) Que les nanotechnologies tendent à modifier au fond la Nature, l'Humain et l'Humanité nous est montré par de multiples exemples. (AFT)

[That nanotechnologies tend to deeply modify Nature, Humans and Humanity is shown to us by a multitude of examples]

It may also be the case that a certain discursive configuration functions as an argumentative marker. This is a combination of elements that appear in a certain order over a number of utterances (or within the same utterance), as the following example illustrates:

(6) *Il est compréhensible de mener des débats thématiques là où sont les experts de la question et de les inviter à intervenir. Néanmoins, est-ce que ces experts ne risquent pas de défendre le domaine qui les rémunère pour leurs recherches?* (FSC)

[*It is understandable to carry out thematic debates on topics on which one can invite the ones who are specialists. Nevertheless, isn't there a risk that these experts are going to defend the field that finances their research?*]

In the case of single words or phrases functioning as an argumentative marker, a further distinction can be made between those that are part of the main constituents of the phrase (playing the syntactic role of the verb, the subject or object, for example) and are thus integrated into the propositional content of the sentence, and those that are semantically and syntactically detached. The latter ones are more flexible and can occupy sentence initial or final position or even have a parenthetical position. See, for instance, examples 1 and 3 where the marker is integrated in the propositional content, compared to examples 2 and 4 where the marker is detached. Moreover, the argumentative marker may refer to an element (unit X, in the formula) that precedes or follows it. In either case, the

element that the marker targets may be a constituent of the sentence (as in example 1), a whole sentence (as in examples 2-4) or a larger unit of discourse. The latter is the case in example 5, where the paragraph immediately following this sentence is marked as being the exemplification of the claim made in that sentence.

5.2 What does an argumentative marker mark?

Contrary to what the received view may be, I take an argumentative marker to be a linguistic item that signals a certain function, not necessarily one that connects two elements. In this view, a marker that signals that a certain piece of discourse is to be understood as the expression of an argument in support of a standpoint, for example, may either be one that makes explicit the relation that this piece of discourse has with another piece that precedes (or follows) it, or one that signals the function of this piece of discourse without necessarily indicating a relation between two units. Compare the two examples below:

(7) En outre, certains nanomatériaux chimiquement « inertes » constituent du fait, notamment de leur caractère non soluble et biopersistant, un risque pour la santé humaine et l'environnement. Il est *donc* indispensable d'adapter le règlement REACH à cette donnée. (CFTC)

[Moreover, certain nano-materials that are chemically "inert" constitute already, mainly because of their insoluble and bio-persistent properties, a risk for human health and the environment. It is *therefore* indispensable to adapt the REACH regulation to these facts]

(8) *Il nous paraît important qu'un* débat public soit mené sur ce sujet, et qu'y soit envisagé une approche plus large de l'information des consommateurs en matière de risque, ne se limitant pas aux nanotechnologies. (Sciences et Démocratie)

[*It seems to us important that* a public deliberation takes place on this subject and that a more encompassing approach is sought that informs the consumers about the risks, without being limited to nanotechnology]

In (7) the standpoint is to be identified thanks to the conjunction *donc* [therefore] that relates the sentence in which it appears with what precedes it, marking the former as a consequence/result of the latter. In (8), however, the standpoint is identified thanks to the impersonal construction "it seems to us important that..", which signals to the interlocutor that the utterance expresses the speaker's point of view. In the first case, the marker relates two units to each other and has a

'connecting' function, while in the second case it refers to a unit X (that precedes or follows it) and has what I would call a 'commenting' function. The two functions, however, may at times be confused, as is the case with certain stance adverbs like "unfortunately" or "actually", for example, which can also have a linking function. This is also the case with sentence initial noun phrases in apposition, as the following example illustrates:

(9) *Annonciatrices de progrès considérables* selon les uns, *sources de risques* imprévisibles pour les autres, les nanotechnologies restent pour la plupart des citoyens mal connues. (CLCV)

[*Announcing a considerable progress* according to the ones, *sources of unforeseeable risks* for the others, nanotechnologies remain for the majority of the citizens unknown]

The phrases "announcing a considerable progress" and "sources of unforeseeable risks" in the above example refer to nanotechnologies and add a qualifying comment. At the same time, the content of these phrases comes into a contrastive relation with the verb of the sentence, which could be rendered explicit by the use of a contrastive connector like "nevertheless" following immediately after the verb "remain".

The decision to consider the connecting function of markers as only one of the possible functions and not as essential for the definition of argumentative markers is driven not only by theoretical considerations but also by methodological ones. As Charaudeau (1992, p. 782) rightly observes:

Argumentation cannot be reduced to the identification of a series of phrases or propositions that are linked together by logical connectors. (my translation)[**xvi**]

First of all, relations between phrases or propositions are not always explicitly marked by the use of connecting words, and when they are, these relations are not necessarily argumentative[**xvii**]. Second, connecting words are not the only means by which such relations can be made explicit on the linguistic surface of discourse. Use of words with full lexical meaning, such as verbs like "cause", "lead", and nouns like "problem", "consequence" or prepositional phrases introduced by "due to", "because of", "despite of", among others, can also mark relations of cause-consequence and opposition, for example[**xviii**]. Focusing exclusively on connectives and conjunctions when searching for argumentative fragments in a large corpus of texts with the use of the Prospéro software would

risk giving a faulty representation of argumentative activity in that corpus. Moreover, as suggested earlier, for the purposes of the Chimères project (see above) one is interested not only in identifying argumentative moves that the parties contribute in the discussion concerning nanotechnology but also, and maybe more importantly, one is interested in identifying the ways in which the actors seek to reinforce the acceptability of their positions and to weaken the plausibility of the positions of their adversaries. That is, one is interested in identifying markers of argumentative moves as well as markers of argumentative strategies. One would expect that the latter are marked by more complex linguistic elements than merely connecting words.

The question now is what are these moves and strategies that one may be interested in discovering in a corpus of texts that represents the controversy regarding the development and applications of nanotechnology (that is, the Y element in the formula presented in 5). To answer this question, the study by van Eemeren *et al.* (2007) can provide one good starting point. A selection can thus be made of the moves that seem pertinent, given the aims of the Chimères project, from the various moves identified in the pragma-dialectical model. These can be: the positions assumed, the doubt/criticism advanced, the representation of the common ground, the representation of the difference of opinion, and the types of arguments used. With respect to the latter, a further elaboration of markers that can signal the use of the various sub-types that go beyond the three main argument schemes distinguished within Pragma-dialectics will be required. Moreover, markers should be identified for the use of rhetorical figures and strategies, such as dissociation, metonymy, and others to be discovered in the corpus under study. Finally, special attention should be paid to markers of counter-arguments. Since counter-arguments allude to an existing or potential criticism (as well as to old standpoints that may have already been defended and which can further be used to counter new standpoints or arguments), they can provide valuable clues for the circulation and the trajectory of arguments among the various stakeholders in a controversy. For the same reason, attention to the way the authors judge the discourse of their interlocutors should also be paid.

In the light of the discussion in the last two sub-sections, I propose the following working definition of argumentative markers:

An argumentative marker is any single or complex lexical item or any configuration of these, whose presence in a text can be a (more or less reliable)

sign that a certain argumentative move is performed or that a certain argumentative strategy is at hand.

Ideally, one would wish to have unequivocal markers of this or the other argumentative move or strategy that one is looking for in a corpus of texts. However, given the polyvalence of the elements that constitute good candidates for such markers and the fact that the argumentative analysis pertains to a higher textual level (than a mere syntactic or semantic analysis), it becomes almost impossible to have such unequivocal markers.

Moreover, it may be the case that certain markers are successful in leading us to pertinent fragments in a certain corpus of texts but not in another.

6. Concluding remarks

In this paper, I have presented some preliminary steps that are required towards an empirically plausible identification and classification of argumentative markers. Such markers are going to be of use to the search, identification and analysis of argumentative fragments in a large corpus of texts produced by a number of different actors concerning the controversies related to the development and applications of nanotechnology in France. Given the interests of the particular project and the technical specificities of the software that is used for the collection and analysis of these texts, argumentative markers are not identified exclusively with connectives. Moreover, the target of their marking refers not only to argumentative moves but also to argumentative strategies.

NOTES

[i] I would like to thank Marianne Doury and Francis Chateauraynaud for their comments and suggestions as well as for the lively research group within which the ideas presented in this paper have grown.

[ii] The project is called “Chimères” and is financed by the French National Research Agency (ANR).

[iii] The three partners of the project are the Groupe de Sociologie Pragmatique et Réflexive of the Ecole des Hautes Etudes en Sciences Sociales, the Laboratoire Sport et Culture of the University of Paris Ouest Nanterre La Défense, and the Laboratoire Communication et Politique of the CNRS.

[iv] Foresight Institute (<http://www.foresight.org/>), the first organisation founded in 1989 with the aim to educate society about the benefits and risks of nanotechnology, describes it as follows: “Nanotechnology is a group of emerging technologies in which the structure of matter is controlled at the nanometer scale,

the scale of small numbers of atoms, to produce novel materials and devices that have useful and unique properties. Some of these technologies impose only limited control of structure at the nanometer scale, but they are already in use, producing useful products. They are also being further developed to produce even more sophisticated products in which the structure of matter is more precisely controlled”.

[v] For a presentation in English of the pragmatic and reflexive approach to sociology within which public controversies are studied, see Chateauraynaud (2009).

[vi] In 1996 the association Doxa was founded in order to support the development and diffusion of the Prospéro software as well as of other related projects and to provide a forum for dialogue and exchange of ideas among the various users of this software. For more information visit: http://92.243.27.161:9673/prospero/acces_public/06_association_doxa.

[vii] See the paper on “désormais” [from now on] by Chateauraynaud and Doury in the present volume.

[viii] Outside the field of argumentation studies, connectors and/or discourse markers have been studied in detail from a variety of theoretical approaches and with varying theoretical and practical interests. For an overview, see the volume edited by Fischer (2006). The three approaches presented here fall within the field of argumentation studies and share an interest in providing a more general theoretical frame, within which the study of independent linguistic elements can be subsumed, something which I consider a necessary step before studying each element separately.

[ix] A sub-group in this class are the so-called “meta-discursive markers”, which include expressions that are used to signal to the interlocutor the illocutionary function of the utterance that follows (or precedes) them, such as “I have a question to ask”, “Let me tell you something”, “this is not a critique”, “I was just asking”.

[x] On the argumentative use of evaluative modalities in a French corpus of texts concerning the development and applications of nanotechnology see Tseronis (forthcoming).

[xi] See, for example, the many indicators in interrogative form that the authors identify, such as “what do you mean exactly?”, “isn’t it true that..?”, “do you agree that..?”, etc.

[xii] For instance, one can think of indicators of dissociation that van Rees discusses in her book (van Rees 2009, Chapter 3).

[xiii] It should be emphasized that Prospéro is not a software developed by linguists that seeks to provide an accurate description of a certain linguistic phenomenon based on a corpus search but a software developed by sociologists who are interested in describing social phenomena, such as controversies in the fields of science and technology, by paying close attention to the linguistic properties of the discourse that social actors produce.

[xiv] Non-linguistic items such as prosodic features as well as gestures could eventually be considered as argumentative markers. However, given the lack of detailed studies in this area and the difficulty of coding such features for a software-aided analysis, I am not considering them here. Similarly, grammatical aspects such as tense, mood or number may also be considered as candidates for argumentative markers, but they cannot be coded separately from their phonological realisation, something which renders their use as markers impossible, given the technical characteristics of the particular software at hand.

[xv] The examples are taken from a part of the corpus that consists of the leaflets that various groups engaged in a public debate on the issue of the development of nanotechnology in France have published between 2009 and 2010. The abbreviations in parenthesis refer to the names of these groups. The translation in English is the author's.

[xvi] « L'argumentation ne peut pas se réduire au repérage d'une suite de phrases ou de propositions reliées par des connecteurs logiques ».

[xvii] I use "argumentative" here to refer to the characteristics of the activity of arguing for or against a position in front of a present or implicit other party, not to the semantic property of words that Anscombre and Ducrot (1983) account for in their theory of Argumentation within Language.

[xviii] It is worth noting that van Eemeren et al. (2007) do consider such linguistic elements, in particular when presenting indicators of argument schemes (Chapter 6).

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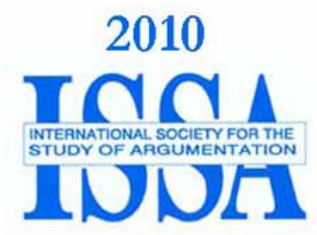
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ISSA Proceedings 2010 - Argumentation In The Context Of Mediation Activity



This paper examines interaction in the course of dispute mediation to explore argumentation in the context of mediation activity. The mediation sessions involve divorced or divorcing couples attempting to create or repair a plan for child custody arrangements. A practical problem participants face when attempting to deliberate is that out of all the possible ways the interaction could go they must create this activity out of their conflicted circumstances. The empirical aspect of this project provides material for reflecting on mediation activity and understanding argumentation.

An existing collection of transcripts from audio recordings of mediation sessions at a mediation center in the western United States serves as a source of interactional data. The transcripts are from sessions held in a public divorce mediation program connected with a court where the judge approves the decision (Donohue 1991). The participants in the mediation sessions are couples going through a divorce or divorced couples (re)negotiating their divorce decrees. The sessions involve one mediator. The mediation sessions are mandatory for participants. If they cannot reach a settlement they can opt to go to court to resolve their dispute. The participants can also choose to have more than one

session. The mediation sessions under study took place 2 hours prior to the court hearings. The length of sessions varied but in the majority of cases it was about 2 hours.

Argumentation scholars sometimes equate mediation with a certain type of argumentative activity (Eemeren & Houtlosser 2005) or a kind of dialogue type (Walton 1998). Walton (1998), for example, considers mediation to be an example of negotiation type of dialogue that presupposes conflict of interests. The aim of this type of dialogue is personal gain. It has its specific features such as the commitments of participants towards some course of action, the structure similar to the critical discussion, and moves that fit its structure and goal (e.g., threats). Eemeren and Houtlosser (2005), in their turn, distinguish mediation as a conventionalized type of argumentative activity that is distinct from negotiation and adjudication. They argue that mediation involves a difference of opinion rather than conflict of interests. Like critical discussion, it develops through four stages of argumentation.

Dispute mediation, however, is a more complex activity than pictured in either of these two approaches. Clark (1996) points out that one “activity can be embedded within another” (p. 32). Examining mediation activity as it occurs naturally shows that this process is multidimensional as it is accomplished through various dialogue activities. It involves negotiation, information exchange, recommendation giving, and clarification among other dialogue activities. The point of models such as Walton’s or van Eemeren’s is to simplify the complexity of an activity in relevant and meaningful ways. In some sense, different stages of an argumentative activity imply that other kinds of activity are necessary for this activity to develop. However, all these stages are argument oriented. The problem is that both models take an argument to be a primary activity as opposed to Jacobs and Jackson’s (2006) idea of argument being subordinate to some other kind of activity. In dispute mediation, not all dialogue activities involve argument. When it arises, it serves as a repair mechanism for the mediation activity.

Another problem with these approaches is that they are normative and consider mediation in terms of some ideal type of interaction, whether an argumentative activity type or dialogue type. However, activity types are never given, they are produced. This production is a joint achievement of all the participants. Speaking about joint activities, Clark (1996) states, “One reason joint activities are complicated is two or more people must come mutually to believe that they are

participating in the same joint activity” (p. 36). The development of the activity involves constant negotiation of the interactants of what they are doing in a given moment and of what they are trying to accomplish. The participants of the activity have different sets of responsibilities (Clark 1996). These responsibilities and the actions participants perform “depend on the role they inherited from the activity they are engaged in” (Clark 1996, p. 34). In the course of the mediation session, the mediator has a leading role and tries to design talk in a certain way, to institutionalize it in the sense that mediators are disciplining the performance through language use. The institutional goal of the mediation session puts constraints on what can be done in this interaction and how the disputants can manage their disagreement. The mediator makes moves to institutionalize the talk in the moment of the session by advancing certain dialogue activities and preventing others. However, all the participants contribute to constructing the way the interaction unfolds.

Walton and van Eemeren and his colleagues emphasize the use of discourse as a basis for realizing what the arguments are in a dialogue, that in turn is a way of doing informal logic analysis of argument quality. The focus of the current study is on argumentative conduct and the qualities of reasoning realized in the joint performance of activity. This draws a different kind of attention to understanding and evaluating argument, that is, evaluating argumentation and the actions performed to construct a dialogue quality.

Another feature of joint activities is multiple goals. While one goal can be dominating (e.g., for the mediation activity it is an institutional goal of making arrangements for the children), participants can also pursue procedural and interpersonal goals and have private agendas. Thus, disputants can have agendas of their own and engage in shaping an interactivity that is different from what the mediator is designing. This can lead to interactional tensions.

In this respect, what is of interest here is how disagreement is managed and how the mediator’s contributions construct a preferred form of interactivity. This paper will address this issue at the level of dialogue activities participants initiate with the special focus on the dialogue activity of having-an-argument.

O’Keefe (1977) makes a distinction between making-an-argument and having-an-argument. In the first case, an argument is a speech act “which directly or indirectly support or undermine some other act by expansion along ... a set of logically related propositions known as felicity conditions” (Jacobs & Jackson

1981, p. 126). In the second case, an argument is an activity that presupposes “some exchange of disagreement that extends an initial open clash” and does not necessarily involve reason-giving (Jacobs & Jackson 1981, p. 127). Having-an-argument is institutionally dispreferred as it does not contribute to resolving a dispute and creating arrangements and is likely to lead to escalating the conflict. The content of having-an-argument would revolve around the issues of negative features of one’s personality and actions. Although the topic is a common characteristic for these dialogue activities, what distinguishes this dialogue activity is mutual performance of the participants, the stance they take towards each other through the use of language and different moves they make. When the disputants engage in having-an-argument, they would take on the roles of people in conflict and become oppositional. In the prototypical case of having-an-argument the disputants would hit each other verbally [i] and focus primarily on the character of the other party. They would use offensive language, make insults, accusations, challenges, threats, and the like. There will be exchanges of disagreement but the following moves would not provide support for the claims and would not be necessarily connected to the preceding moves in any rational way. The moves can be also recycled in an aggravated form. This type of performance is off-task as name-calling affects the quality of interaction. The way the interaction unfolds does not allow the participants to share opinions. These moves also present a threat for the image of the disputants. Thus, the disputants focus on the restoring their image rather than working out an arrangement.

In more subtle cases, the opposition described above would not be so obvious. The disputants would try to prove who is right or wrong by bringing evidence that depicts the other party unfavorably. It is not a pure case of having an argument without making an argument. Instead, the making of arguments is done in such a way that undermines the image of the opponent (i.e., it carries what Aakhus (2003) calls *negative collateral implications*) and treats the mediator as a judge. The disputants would make assertions, often addressed to the mediator, about the other disputant’s character or actions. The disagreement would develop over the sequence of moves as the participants would provide support for their claim, objected to or countered by another participant. These subtle cases are problematic for interaction as well, as the disputants use the mediator to attack the other disputant and prove that they are bad, which is likely to develop into a primitive argument.

Example 1 and 2 illustrate how this dialogue activity unfolds. Prior to the episode

in example 1, the disputants were having a quarrel about custody issues. The (ex)-wife was accusing her (ex)-husband of his intentions to take the child away from her and expressing her determination not to let that happen. In the episode below, it is the (ex)-husband who takes an accusatory position. He claims that his (ex)-wife is not acting as a good mother as she does not take care of their child all the time, which the (ex)-wife denies. The mediator makes moves to terminate the development of the dialogue activity.

1.

130M: OK now the other thing is

131H: If she's [uh you know not] a fit mother or something=

132M: [a temporary order]

133H: = y[ou know] if she's not in some way=

134W: [I'm not]

135H: = [capable of]

136M: = [Is she un- is she un] fit?

137H: = coming home,

138M: Is she u[n]fit?

139H: [No she's a fit mother when she is at home

140W: Oh my [God

141H: [But you know I don't know my my [uh in laws take] care of =

142M: [Okay there's]

143H: = [him] all the time now=

144M: [OK]

145W: = [No they do not]=

146H: = [from what I understand]=

147M: = [OK let's]=

148H: = [She doesn't come home at night]=

149M: = We're not this is not a, [trial]

150W: [I have] been ho[me every]=

151M: [Kathryn]=

152W: = [single=

153M: = [Kathryn

154W: = night [Michael

155H: You would be investigated.

156M: Hey Kathryn excuse me, [we're not,] this is not a trial

157H: [What do you want]

158W: You disgust me=

159M: = Okay

160W: You are a disgusting person Michael

161M: [Kathryn]

162W: [You will] lie ah ((WHISPERED)) God=

[You're gonna get yours in the end () you watch] it.

163M: [Excuse me, Kathryn excuse me please.] Okay w- we're not

trying the case, I don't wanna hear any more arguments. All I wanna do now is see if there's any way you two can agree to some sort of temporary plan because if you don't, then the court can help you with that.

In turns 130 and 132, the mediator (M) makes moves to refocus the interaction on the task at hand by providing a minimal response to the preceding move and introducing a new topic, which is a temporary order. However, the (ex)-husband (H) interrupts and makes a claim that his (ex)-wife (W) is not capable of taking care of their son. In turns 131, 133, 135, and 137, he makes an attempt to justify his intentions to have the child with him by depicting W as not being a fit mother all the time, which is opposed by W in turn 134. Instead of pursuing the shift initiated in turns 130 and 132, M gets engaged in the current dialogue activity. While H shapes his accusation of W's behavior in a mitigated manner by using the conditional mood, M asks H directly if he considers W to be an unfit mother in general (turns 136 and 138). M's move opens a possibility for the current activity to continue. H makes a statement that W is fit when she is at home (turn 139). Further on, he makes a point that his in-laws take care of the child all the time (turns 141 and 143) and W is not at home at night (turn 148). He warns W that she will be investigated (turn 155). Thus, H does not call his W unfit directly but references he makes and facts he brings into the interaction depict her in a negative way. W expresses her disagreement in turns 140, 145, 150, 152, and 154. H asks W what she wants (turn 157). W attacks H's personality by using offensive language such as "a disgusting person" (turns 158 and 160) and by depicting him as a liar (turn 162). M makes a number of moves to stop the development of the dialogue activity and to make a shift in the discussion. M uses the marker "Okay" (turns 142, 144, 147, and 159) to indicate the termination of the dialogue activity and/or topic, addresses W by name (turns 151, 153, 156, and 161) to get her attention, and directly points out that H and W engage in an inappropriate activity (turns 149, 156, and 163). However, this dialogue activity continues, and M finishes the session.

In this episode, there is a clash of pursuing projects that are going on, the one that M is trying to enforce, and the one that H is initiating. H essentially makes a case that W is an unfit mother. W resists this. M gets involved in this dialogue activity, and his/ her move in turn 136 puts the disputants into antagonistic talk with each other. As the dialogue activity of proving who is right or wrong continues, H and W exchange accusations of each other. M intervenes as this dialogue activity is likely to escalate the conflict, which indeed happens later in this episode (turns 155-162). H is making a claim, W denies. Though it can be proven, M does not tolerate this exploration. According to M, the parties' moves construct a dialogue activity that is more appropriate for the trial (e. g., "this is not a trial" (turns 149 and 156), "we're not trying the case" (turn 163)). Attacking each other and defending themselves are the moves that the participants make in the court. In order to convince the judge and win the case, they have to present themselves in a positive way and discredit the opponent by different means. However, undermining the image of the opponent is improper for the mediation session (which is evident, for example, in the mediator's statement "I don't wanna hear any more arguments" in turn 163). The mediator does not make any decisions so there is no point in convincing the mediator in their rightness. What we have here is two different designs for talk that reveal differing kinds of rationality. A classic feature of mediation sessions is focus on future. A trial, on the contrary, is about adjudicating about the past, getting the truth, distributing the blame, and assigning punishment. At the beginning of the episode, H was giving facts about the situation. However, in the progression, the talk is becoming about a character. It is not a simplistic argument the disputants engage in. In this episode, it is having an argument in the process of making an argument. As the interaction progresses, however, this dialogue activity develops into primitive argument and quarrelling. The disputants are not making arguments any more but are merely exchanging disagreements. While earlier in the episode the focus was on W's character, here, W makes moves to hit H verbally and depict him unfavorably. The conflict escalates through a challenge (e.g., in turn 157, H challenges W with his question), through insults and recycling prior moves in aggravated form (e.g., a generalized assessment of H's personality "You are a disgusting person Michael" in turn 160 is stronger than a specific one "You disgust me" in turn 160), and through an accusation ("You will lie" in turn 162) and a threat ("You're gonna get yours in the end () you watch it" in turn 162). M intervenes directly to reframe the talk. M reminds the parties what they are supposed to do during the session, namely, they have to work out a temporary

plan together (e.g, “All I wanna do now is see if there’s anyway you two can agree to some sort of temporary plan” (turn 163)). The words M uses create a contrast between what H and W were doing (i.e., having a quarrel, which implies disagreement and separation) and what they should do (i.e., they have to agree to a plan, which implies some kind of union). In this way, M once again emphasizes the necessity of collaboration between H and W.

This episode is an example of two lines of dialogue activities that are in clash. The disputants engage in having an argument and orient toward proving their own position. The activity of defining who is right or wrong is not appropriate, as this cannot be established. The mediator treats this as not possible and not part of mediation. Instead, making arguments must be geared toward advancing a plan for managing the children. The mediator’s moves are geared to shift this dialogue activity to the planning discussion and put the disputants into different social relations. Jacobs and Aakhus (2002a) point out that mediators often show no interest in resolving the points of clash and discourage the elaboration of the disputants’ positions through making arguments. Mediators do not cut off all the arguments, however. In planning or negotiating, the disputants can still make arguments but on a different issue, that is, they can make arguments that have to do with the future focus, not the past.

In the previous example the mediator was the one who indicated having-an-argument as an inappropriate activity. The disputants themselves can recognize that they are off-task. For example, in example 2 it is one of the parties, namely the (ex)-wife, who refers to the dialogue activity of having-an-argument and points out that she would not like to engage in this dialogue activity. The disputants exchange a number of accusations. The (ex)-wife raises doubts about her (ex)-husband’s good intentions to have their daughter Alison to live with him and not giving a Christmas gift to Alison. In his turn, the (ex)-husband accuses his (ex)-wife of neglecting their child and being a cause of relationship issues between her and Alison.

Finally, the (ex)-wife makes a move to stop the current dialogue activity.

2.

184W : Is that the only reason why you want her? I mean come on now or is it because you don’t want to pay child support?

185H : I know this erroneous statement was going to come up let me point thus out to ya. When Alison did come over to me and signed all the papers over to me

now

I have of choice of whether I want to pay child support. This is a great thing about history you can't change what's happened in the past. When Alison come and live with me I didn't stop her allowance. I could have I give half of it to her for weekly allowance I put the other half in the bank for her future education or whatever she wanted to use it for when she got older. Her mother never comes and visited her one time in the year and a half

186W: Wait

187H : No somebody tell me I don't want to pay child support I did it of my own vol[ition nobody forced me to]

188W : [I didn't wait wait wait. I] didn't come and visit Alison in the year and a half?

189H : That's right

190W : Wait just a minute okay? How many times did I go over to the house and take Alison to the ()? Did I or did I not go to your house and send Alison a birthday present you didn't give her nothing for Christmas this year.=

191H : After the suicide attempt you're referring to?

192W : Yes=

193H : No I'm speaking up to the point of the suicide attempt=

194W : She wasn't speaking to me

195H : Oh

196W : I made the first attempt to go over there

197H : Why wasn't she speaking to you?

198W : Because we got into an argument in the front yard she called me a bitch

199H : Holds a grudge a long time doesn't she a year and a half?

200W : Me hold a grudge?

201H : No Alison

202W : Not me

203H : If that's the problem how come she held a grudge for a year and a half?

204W : Why isn't Kelly speaking to me now did I ever do anything to hurt her?

205H : Because she sees what's happening

206W : The only thing I want to say I don't want to argue with you okay? Whatever's best for Alison

207H : My oldest daughter's first words were

((15 turns omitted as these continue the exchange in the manner of the preceding turns))

223M : [[Loretta you're saying that uh what is in the best interest of Alison?

In this excerpt, W makes a supposition that H wants their daughter Alison to live with him because he is not willing to pay child support (turn 184). H denies this accusation and brings in the facts that can be evidence that W is wrong. In his turn, he accuses W of not visiting Alison once while she was living with him (turn 185). W challenges H's accusation (turn 188 and 190) and accuses H of not giving any Christmas gift to Alison (turn 190). In turns 191-193, H and W clarify to what time period each of them is referring. In turns 194-203, the focus of the interaction is on why Alison was not speaking to W. In turn 204, W questions H why their elder daughter Kelly is not speaking to her. H's point is this happens because Kelly sees what is going on between the mother and Alison (turn 205). In turn 206, W backs off saying that she does not want to argue with H and is willing to do anything that is best for Alison. Thus, she points out what activity they have engaged in, that is, having-an-argument, and makes an attempt to stop it. As the dialogue activity continues, M intervenes (turn 223).

Similar to example 1, in the excerpt above, H and W make a number of moves that aim at proving who is right and who is wrong but at the same time depict each other in an unfavorable light. W's supposition that H tries to avoid paying child support (turn 184) and her accusation that he did not give any gift to Alison threaten H's face as these moves portray H as a bad father. In his turn, H creates an image of W as an unfit mother. First, he accused W of neglecting her duties as a mother (e.g., "Her mother never comes and visited her one time in the year and a half" (turn 185)). Next, he did not accept W's explanation why Alison and she had had communication problems (e.g., "Holds a grudge a long time doesn't she a year and a half?" (turn 199) and "If that's the problem how come she held a grudge for a year and a half?" (turn 203)). By expressing his lack of understanding of how one quarrel could result in a year and half of not speaking to each other and repeating the same question twice, H makes it clear that there should be a more serious reason for a relationship problem between W and Alison, and W is likely to be responsible for this. Speaking about the lack of communication between W and their other daughter, he alluded again that it might be W's fault that they have a problem ("Because she sees what's happening" (turn 205)). Kelly did not stop talking to H, so W must have been doing something wrong if she refused to speak with her. The moves that H and W make are typical for the dialogue activity of having-an-argument. W makes an attempt to terminate this unproductive dialogue activity by making a statement that she does not want to participate in it and by shifting the focus of the

interaction from relationship problems back to the interests of the daughter. Her move, however, did not result in bringing the end to having-an-argument, and later on M had to intervene to stop it. Thus, participants themselves signal recognition of the inappropriateness of the dialogue activity and initiate its termination even though their attempt may fail as they do not have authority to do that. In contrast to example 1, where M was trying to terminate a dialogue activity at the early stage of its development, in the episode above M does not mind the disputants building their argument as the having-an-argument features are not so pronounced as in the previous example and the facts they bring might be helpful for future plans. This example illustrates that forms of dialogue activity are emergent and what is going on is not always obvious. Indeed, it may have gone in a different direction but it turned into having-an-argument. As this dialogue activity progresses, M intervenes to make shift by referring to what was mentioned earlier in the interaction (i.e., W's mentioning of acting in the interest of the child). At the same time, it is not simply the primitive argument that is problematic here but the fact that the disputants are treating their turns as though they are cross-examining a case in front of a judge. The disputants interchangeably assume the role of an interrogator and question each other about the past events in the way that depict the other party unfavorably while showing themselves in a positive light. Their moves do not treat the mediator as a mediator. Their contributions construct the debate and treat the mediator as the judge. The mediator cuts this dialogue activity off to initiate a different kind of dialogue activity.

In line with work done by Jacobs and Jackson (Jackson, 1992; Jackson & Jacobs, 1980, 1981; Jacobs & Jackson, 1989, 1992) and Jacobs and Aakhus (2002a, 2002b) the present study draws the attention to the process of how reasoning between the participants is embedded in the activity. The actions used to perform a certain type of activity are related to the epistemic quality of that activity. Mutual performance of actions takes a trajectory that may not be expected. Participants may be reasonable on separate moves, but when these moves are put together they do not necessarily have this quality. Moves and countermoves give a shape to disagreement space (Jackson 1992) that is always emergent. What is taken from this disagreement space to construct the next communicative move can be beyond what is expected by anyone in the interaction. Disputants may bring reasonable things to talk about (e.g., whether the other party can be trusted if he or she violated trust in the past) but sometimes this action takes into a different

direction.

Mediation is an institutionalized type of discourse in the sense of disciplining the performance of participants. The argument plays a different role there than, for example, in the court, where the aim is to establish the truth and assign responsibilities. In court, the participants bring in facts about the past to make an argument to support their claim. In the course of the mediation session making an argument about the past is discouraged, which is related to the orientation of mediation sessions on the future. The disputants can make arguments but they should do this with the future focus for planning and negotiating the arrangements for their children. In this case the disputants are reasoning together to find a better solution for their problem. When the disputants engage in cross-examination similar to what happens in the court and a primitive argument, they are in a way reasoning against each other. What is reasonable for one type of activity (e.g., a court trial) is not acceptable in the other one (e.g., dispute mediation). Bringing in facts that depict the other party in a negative way, for example, is appropriate for trial but not for dispute mediation. Acting in adversarial roles is normal for the court, while the roles of collaborators are encouraged in dispute mediation.

Another point about an argument in the context of mediation is that although making-an-argument or having-an-argument in their prototypical form do occur, what commonly happens in dispute mediation is having an argument while making an argument. In some cases a having-an-argument part is more pronounced and easily recognized by the participants, and the mediator cuts this dialogue activity at the early stage. In other cases it is not that obvious and is terminated by the mediator when it starts aggravating.

The mediator's focal point is to try to construct a mediation activity, which involves acting strategically. The study expands the idea of strategic maneuvering beyond two-party argumentative discussion. It shows how this concept is applied to those who are not principals of dispute but who take on a responsibility for the quality of interaction. In a two-party argumentative discussion, arguers engage in strategic maneuvering to balance the goal of the discussion and their own needs. In a mediation encounter, disputants, who are principal arguers, act strategically to balance the institutional goal of the meeting and their personal agenda. The mediator's strategic maneuvering is different as it orients toward the institutional goal and the quality of interaction. They use routine institutional practices to keep

the disputants on task to constrain what becomes arguable. The concept of strategic maneuvering is usually related to traditional argumentative moves. The work that the mediator performs goes beyond that. Mediators' strategic maneuvering manifests itself not just at the levels of presentational device (e.g., references and interventions they make), topical potential (e.g., topics they initiate), or audience demand (e.g., taking into consideration face concerns in framing interventions). The dialogue activities themselves that the mediator initiate and encourage are strategic moves of a higher level. With help of all these resources, mediators are doing persuasion about the nature of the given activity. The work that the mediator performs is to structure dialogue in such a way that disputants would be able to make contributions to create the process of deliberation.

NOTES

[i] That is what Walton (1995) calls a quarrel, and Jacobs and Jackson (1981) describe as having an argument without making arguments.

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ISSA Proceedings 2010 - Argumentation In The Appellative

Genre



A speech genre lies between language and speech - it uses (a) beyond-language units (utterances, not words and sentences); (b) proto-speech units (speech models, not real speech).

The Appellative Genre (AG) is a subtype of the business kind of conventional discourse. Let me first consider the genre characteristics of conventionality in this perspective.

Identification features of business written correspondence are these:

(A) social conditionality; (B) communicative-situational conditionality; (C) speech genre conditionality; (D) linguistic conditionality.

(A) Social conditionality means that business correspondence does not only function under social conditions but also is an important component of socio-practical people's activities that presuppose the presence of social-significant tasks and situations.

(B) Communicative-situational conditionality provides for these:

- (1) business interaction is implemented by means of symbolic systems (language, as a rule);
- (2) the symbolic system used is functionally-oriented (i.e. it corresponds to the mode of communication, which is businesslike and written);
- (3) the language system used by interlocutors is means of communication;
- (4) by means of that system communicants accomplish their interrelations as prescribed by the communicative situation;
- (5) interrelations between the communicants are conventional and normative;
- (6) communicants' aims are mapped on their norms and conventions and accomplished by strategies, tactics and techniques of communication;
- (7) the communicants have socio-cultural and psychological properties.

(C) Speech genre conditionality means that communicative-situational features are manifested depending on the specifics of a speech genre within business written communication - a speech genre is thus viewed as a conventional-normative form of written discourse.

(D) Linguistic conditionality means that socio-cultural and psychological properties of communicants within the boundaries of a concrete speech genre are manifested in discourse by linguistic means - lexical, word-building, grammatical

and para-linguistic.

Business correspondence has a number of specific linguistic features. A. O. Stebletsova (Stebletsova 2001) writes about thematic unity, sense integrity, coherence, informativity, communicative directionality, pragmaticity, modality, completeness, etc.

Besides these features, characteristic of claims and complaints within AG are:

- a. textual mixing of the official and unofficial (in a personal complaint) styles;
- b. pragmatic orientation at a certain addressee (at a higher-status in a complaint, at an equal-status or status-indifferent for a claim);
- c. feedback orientation with predominantly non-verbal reaction;
- d. mono-thematic character;
- e. compositional and graphical completeness with possible use of para-graphemic elements (as in filling-out forms);
- f. discourse coherence;
- g. concreteness of locale-temporal character;
- h. etiquette and conventionality of linguistic means (usually for claims);
- i. chiefly co-operative modus of communication.

The written AG is subdivided into a Complaint and a Claim. Pragmatic features of AG can be considered on the basis of J. Searle's system of pragmatic description. Preparatory conditions. Addressee is in the position enabling him to perform an action that is desirable for Addresser.

Propositional Content conditions. There is a situation unfavorable for Addresser and caused by unsatisfactory behavior of a person (the case of Complaint) or by unsatisfactory quality of something (the case of Claim). Manifestationally, the macro-subject part of the Appellative contains exposition of the preparatory and propositional content conditions; the macro-predicate part contains a request or a demand for specific actions from Addressee which could improve the situation.

Sincerity conditions. The Addresser wishes the Addressee do the requested action.

Essential conditions. First, Addresser's generating a discourse is an attempt to inform Addressee about unsatisfactory state of affairs (this is the secondary function of the Appellative). Second, it is an attempt to impel the Addressee to perform certain actions to improve the situation (this is the primary function of the Appellative).

Now let's have a look at 7 specific features of the Appellative for the Russian and

anglo-saxon cultures.

1. The communicative goal. Claim and Complaint are close in this respect, but the Claim is much weaker in its emotional force (that is, want for understanding and sympathy), especially for Russian culture.
2. The Addresser conception. Addresser's ethos includes sincerity, truthfulness, responsibility and completeness of the exposition of the problem in question.
3. The Addressee conception. The commissioned Addressee has institutional ethos of honesty, objectivity (for the Claim) and empathy (for the Complaint).
4. The situational content. (A) Personal sphere parameter: AG as a written form of discourse presupposes attribution to the personal individual sphere of Addresser and to the social institutional sphere of Addressee. (B) Temporal perspective: it is both past and future: the past deals with the information of the event that caused the Appellative; the future deals with the demand to take measures. (C) Event estimation: it is unsatisfactory character of the past event and satisfactory character of the future event - both for Addresser. (D) Number of episodes: for the Complaint it can be both single (if the problem is solved) and multiple (if the unsatisfactory situation repeats or develops); for the Claim it is usually single.
5. The communicative past. Both the Claim and Complaint are enterprising: it is the Addresser who initiates the verbal event.
6. The communicative future. The monologue character of AG presupposes only anticipated, not real perlocutionary effect that usually involves Addressee's positive reaction.
7. The linguistic manifestation. It is business-style oriented, it is institutional discourse with slight elements of personal discourse (for Complaints); the argumentative component is necessary and it is manifested in syntactically various multi-level argumentation.

Being a written monologue, AG has nevertheless dialogical potential because it is Addressee-oriented. AG discourse is constructed along certain strategies. The strategies in monologue differ from those in dialogue. The dialogue strategies are heuristic and are very sensitive to how the dialogue develops: the strategies can be modified, changed and resigned. The monologue strategies are predominantly lines of constructing coherent discourse (and persuasive for AG); they are not usually departed from.

We can describe 7 communicative strategies for AG:

1. standardizing;
2. informational completeness;

3. conciseness;
4. logical clarity;
5. politeness;
6. naturalness;
7. expressiveness.

The first 5 strategies are conditioned by general features of official-business style - clarity, accuracy, laconicism, normativity and stereotypicity. They are manifested in Claims. The strategies of naturalness and expressiveness are characteristic for semi-official style and are manifested in Complaints where self-expression and unofficiality is often the case. Complaints are thus in the periphery of the official-business style.

Each strategy has its typical linguistic exposition. According to my student N. Cherkasskaya's observations, for Standardizing it is cliché, terminology, standard constructions. For Informational completeness it is extension constructions, complex sentences, lexical repetitions. For Conciseness it is small and medium format of the text, clichés and abbreviations. For Logical Clarity it is terms and patterns. For Politeness it is etiquette constructions, indirect speech acts, the subjunctive constructions, specific vocabulary. For Naturalness it is unrestricted vocabulary and conversational constructions. For Expressiveness it is emotive nouns, adjectives, particles, intensifiers, negative estimation words, exclamations (Cherkasskaya 2007).

It is important to give some definitions of the units and elements of argumentation on which I base my further considerations, specifically, schematizing arguments.

An argument is a discourse consisting of the grounding and the grounded parts. Argumentation is both a process of grounding (in dynamics) and its linguistically-manifested result (in statics).

A conclusion (a thesis) is a grounded content (manifested linguistically) within an argument.

A premise is a grounding content (manifested linguistically) within an argument.

An Argumentation Step is a minimal argument, a unit of discourse level.

An Argumentation Move is a main textual unit of argumentation limited by the paragraph boundaries (it can consist of several Steps, sometimes of one step only).

The argumentation factor of AG has not been described before, to the best of my

knowledge. Still, in the characterization of complex directives (Karaban 1989) we can find some useful ideas to be taken for the description in question.

V. I. Karaban views a directive as a complex speech act consisting of an argumentative act (Aa) and of a directive act (Da). Propositional content of Aa reflects a problematic/unsatisfactory situation for the addresser. An illustration to this can be the text where a problematic/unsatisfactory situation is a factual premise (taken in round brackets) for an estimation thesis (in square brackets): *I'd only been wearing them for a short while when (one of the heels fell off) and you can imagine [how awkward that was] in the middle of the High Street; The contents are (so severely damaged) as to be [unsaleable]; Although we have (followed your operating instructions to the letter) we are [unable to obtain the performances promised].*

V. I. Karaban's view cannot be regarded satisfactory because of his ambiguous treatment of the term *argumentative speech act*. It is both a complex Premise+Conclusion, and only a single Premise. Karaban's *argumentative speech act* is not defined as to its boundaries.

On the one hand, such an act can be manifested within a whole paragraph if we have a fact description. In that case, support is given by the paragraph which is functionally a premise, and the conclusion (p. ex. estimation) can be placed into another paragraph. The *argumentative act* thus crosses the boundaries of an Argumentation Move (a basic discourse unit of argumentation).

On the other hand, the *argumentative act* can be manifested within one and the same paragraph, containing both a premise (fact) and a conclusion (estimation). In this case, *argumentative act* is within its Argumentation Move, and the former can be viewed as a speech act representing the Argumentation Move.

It is also unclear how many *argumentative acts* it takes to get one-time perlocutionary effect of directivity, and if there are several what relations between them are at work.

In our view, grounding in AG can contain more than one tactic. Critical here is that the principal *strategy* is argumentation and it is accomplished by argumentation tactics of premise giving.

These tactics are manifested in the linear text structure relating tectonically (hierarchically) to one another. The tectonics can provide for placing premises on one and the same level (the tactics of single, co-ordinative or multiple argumentation) or on different levels (the tactics of serial argumentation).

From the point of view of *speech-act strategies*, there are two basic of them: argumentative and directive. Using D. Wunderlich's (Wunderlich 1976) approach (on which V. I. Karaban's ideas are clearly based), we can say that AG comprises satisfactive and representation strategies. But since satisfactive in Wunderlich's system is explanation and grounding, the representation strategy is, as a matter of fact, its manifestation. Thus, representation is made by means of these tactics: presentation of the problem, description of the causes of the problem and explication of the harm.

Interestingly enough, Argumentation and Stimulating strategies can be accompanied by the Commissive strategy. In it measures are exposed if the demand is not satisfied. Explicitly commissives are expressed in Russian AG; in anglo-saxon AG it is done implicitly, by means of mentioning the so-called carbon copies (addressed to other people or organizations) in the ending part of the text. The argumentative function of this strategy is that of *ad baculum*.

On the global functional level, the Stimulating strategy performs the Opinion function, the Argumentative strategy - Data and Warrant functions, the Stimulating strategy - the function of Reservation.

The main strategy for AG is stimulating, the other strategy is argumentative (including expositive and some others). We can also model an ideal AG with its strategy components. Since we regard AG as an actional speech genre, the ideal in question is established on the basis of the "problem - solution" feature and can in a somewhat simplified way be represented as follows:

1. Problem.
 - 1.1. The essence of the problem.
 - 1.2. The damages caused by the problem.
2. Solution.
 - 2.1. Possible solutions.
 - 2.2. The best solution.
 - 2.3. Positive results of the solution.

The relation between the macro-components Problem - Solution can be made more exact as "Since there is a Problem, it must be Solved". This is a macro-strategy of argumentation for AG.

Let us now take a brief look at the interrelations between the components within the macro-components Problem and Solution.

The relation 1.1. – 1.2 is causal (“if there is a problem, there is/can be harm”). The causal relation differs from argumentation and implication.

Unlike causation, argumentation does not presuppose *obligatory* presence of the cause (p. ex. physical cause) when there is a conclusion. In other words, the problem For example, bad living conditions (problem) do not have to result in family quarrels (harm) – some families having two children having moved from a studio to a two-bedroom flat feel for some time more comfortable in one room. That means that a solution of the problem does not often have to do with harm resolution proper.

Unlike causation, implication is the relation of logical necessity $A \supset B$ (on a par with conjunction ($A \wedge B$), disjunction ($A \vee B$), negation (A, \bar{A}), and equivalence ($A \sim B$)). Some scholars also single out the relation of anti-implication (it combines features of negation and implication and is expressed by construction of concession and adversative (Melnikova 2003, p. 15). The implicative relation between the members of the judgment is true in all contexts. (*see: Figure 1*)

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Figure 1

The relation 1 – 1.1 and 1.2 is informative (by its influence on the addressee) and narrative (by description of the problem).

The relation 2.1 – 2.2 is argumentative: the author gives grounds why his variant is the best one out of all others. The relation 2 – 2.1 is informative (by its influence on the addressee) and narrative (by description of the problem). The relation 2 – 2.2 is argumentative (by its influence on the addressee) and narrative (by description of the problem). The relation 2 – 2.3 is informative (by its influence on the addressee) and narrative (by description of the problem).

The scheme “Problem – Solution is not always accomplished in its full form: the component 2.1 is not often used with the explication of 2.2 instead. The component 2.3 is used more often than 2.1 but more seldom than 2.2.

The Argumentation strategy is manifested through the tactics of premise giving. We observed about 40 tectonic-functional types of argumentation for AG; those tactics are manifested with two opposite tendencies – (A) to freedom of tectonics and (B) to restriction of tectonics.

Tendency (A) is conditioned by culture and by context. By culture, AG in American culture are manifested by structures with lesser branching and depth than in Russian culture. By context, the structures are very different and we failed to detect any regularity. Most common for Complaints in Russian and English is a 4-level tactic of giving premises. The same is true for British and American Claims. Russian Claims are most often exposed by a 6-level tactic of premise-giving. For Russian Complaints we observed many 2-level cases of premise-giving which is absolute minimum for Complaints; on the other hand, Russian Claims give an absolute maximum of levels in premise-giving - it is as many as 9 levels which is completely un-characteristic for British and American AG.

Tendency (B) - restriction of tectonics is due to 2 textual factors: (a) length of the text; (b) conventionality of the super-structure. A computer-printed Complaint does not exceed 1 page (A-4 format); a hand-written Complaint in a complaint-book is usually up to half a page (A-5 format). Speaking of a Claim, it is usually written according to a standard pattern which can be determined by normative recommendations (in Russian culture) or to usage (see the details for my student's and mine collaborative work in: Cherkasskaya 2009).

To see structural and semantic characteristics of AG let us consider two examples - one from the Russian culture, the other - from anglo-saxon one. These two examples do not, of course, exhaust potentialities of AG: there are typical 4-level and 6-level structures as well as 2-level arguments in short written complaints and 9-level structures in one Russian complaint (see: Cherkasskaya 2009, p. 19-20).

Complaint Example

(translated from Russian; syntax as in the original).

On 9/5/2008 I bought a North refrigerator at your store; in 6 month (1-1), within a warranty period, it got broken. I went to a warranty shop to repair it. (1-2) Because there were no necessary repair details (1-3) the master could not repair it, and (1-4) there won't be necessary details available in the shop within this month.

So,(2-1) this problem cannot be solved without excessive time waste and (2-2)is therefore essential; (2-3) I have the right to change the refrigerator to a similar product of a different trade-mark.

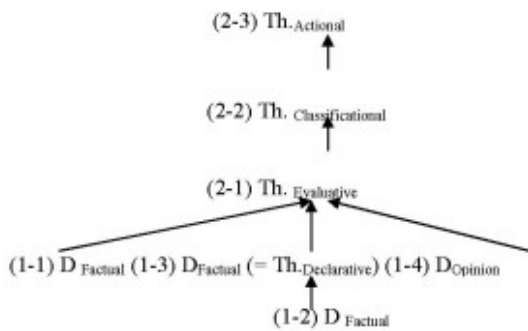


Figure 2

Claim example.

Dear Sirs,

After carefully examining the sawn goods supplied under our order of 16 October, (1-1) we must express surprise and (1-2) disappointment at their quality. (1-3) They certainly do not match the samples on the basis of which the contract was signed. (1-4) Some of the boards are of the wrong sizes and we can not help feeling (1-5) there must have been some mistake in making up the order.

(2-1)The sawn goods are quite unsuited to the needs of our customers and (2-2) we have no choice but to ask you to take them back and (2-3) replace them by sawn goods of the quality ordered. If this is not possible, then I am afraid (2-4) we shall have to ask you to cancel our order.

We have no wish to embarrass you and if (3-1) you can replace the goods (3-2) we are prepared to allow the stated time for delivery to run from the date you confirm that you can supply the goods we need.

Yours faithfully,

R. Fairfax

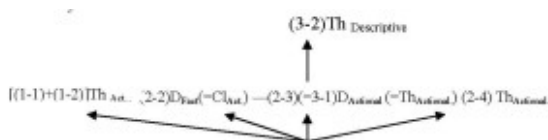


Figure 3

Argumentation in the Complaint is manifested by a five-level structure with coordination on the fourth level and single subordination on the fifth level. The actional Conclusion (= argument Thesis) of the first level is sentence (2-3), the classification Thesis of the second level is sentence (2-2), the evaluative Thesis of the third level is sentence (2-1). Premises (1-1) and (1-2) are factual Data, premise

(1-4) is opinion Data; (1-3) is a declarative Thesis transformed into factual Data on the closest higher level.

Argumentation in the Claim is a six-level structure with subordination between levels (6) and (5), (5) and (4), (4) and (3), (2) and (1); there is a divergence structure between levels (3) and (2) and a coordinative structure on the second level.

The functional semantics of the premises is this. Premises (1-5), (1-4), (1-3) and (2-1) are factual Data. Sentences (1-1)+(1-2) and sentence (2-4) are of actional Thesis nature. The same holds for sentences (2-2) and (2-3) which transform into coordinated factual Date for their higher level. Sentence (3-2) is a declarative Thesis.

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