ISSA Proceedings 2006 – Undoing Premises. The Interrelation Of Argumentation And Narration In Criminal Proceedings

1. *Introduction*

Criminal proceedings produce facts about an instance that is often controversial. These facts are employed in argumentative practices during the entire course of the proceeding and function as premises. In this paper I will describe and analyze a production process of such facts, following Prior's (2005) request for an ethnography of argumentation that moves to the study of the production of grounds for argument (see p. 133). I suggest that the interaction of narrating and arguing in criminal trials offers a lens through which this process can be viewed beneficially. Hence, this paper will address the questions: What relation do narration and argumentation as persuasive means entertain? How distinct are they and how do they interact? What does their relation say about the production of facts in criminal proceedings?

First, I shall briefly lay out the different perspectives on criminal trials from the views of narrative and argumentation theory, focusing on works from the rhetorical perspective.

Second, I am going to analyze the development of a theme in an actual criminal case with regard to its narrative and argumentative employment. On the basis of this analysis, I shall then discuss if and how narration and argumentation interact.

In criminal proceedings stories are established as products by transforming them into premises that are used argumentatively (Hannken-Illjes, submitted). In this paper I will follow a case from the verdict through to the appeal hearing and finally the acquittal. My argument is that premises as products of the fact-finding process can be unbuild by re-transforming them into narratives.

2. *Narration and Argumentation in Legal Rhetoric*

In classical legal rhetoric, two parts were central for convincing the addressee or the audience: the narratio and the argumentatio. Roughly 2000 years later, *narration* and *argumentation* are still considered central to the establishment of

facts in criminal proceedings. On the one hand, a series of works presumes that criminal proceedings should be understood as stories which are subject to a narrative rationality. On the other hand, acts of reasoning are considered paradigmatic for the legal procedure.
The basic notion of narration as an essential part of criminal proceedings is probably not controversial. During my fieldwork lawyers would often be skeptical when hearing what my work was about: the development of criminal proceedings, the connection between preparation and performance. However, as soon as I mentioned that one question was how stories developed in the course of the proceeding, there was a lot of nodding going on: Indeed, that could be an interesting topic.
Following Cicero the narratio in legal rhetoric is "the exposition of actual or apparently actual events" (Knape 2003, p. 100, translation mine). As part of a speech that is designed to convince the other, the narratio does not serve as an objective description of the occurrences but is an essentially partial description that should be designed to fit the party's overarching strategy. In that sense, Quintilian describes narratio as fundamentally persuasive: "Narration is the depiction of an actual or apparently actual event useful for persuasion" (1995, p. 449, translation mine).

In the course of the narrative turn, contemporary rhetoric, too, has turned its attention to narrating in legal discourse. White (1987), for instance, argues that the activity of defense lawyers, and moreover that law itself, is by nature narrative: "At its heart it [the law] is a way of telling a story about what has happened in the world and claiming a meaning for it by writing an ending to it". The lawyer is repeatedly saying, or imaging himself or herself saying: 'Here is 'what happened'; here is 'what it means', and here is 'why it means what I claim'. The process is at heart a narrative one because there cannot be a legal case without a real story" (p. 305). Not only does White in this paragraph link storytelling to persuasion but to some extent also to argumentation, even though he does not further elaborate this connection. The history of what has happened is interpreted for the audience and this interpretation is backed up by reasons. This understanding of a narrative rationality underlying all legal discourse is reminiscent of Fisher's concept of the narrative paradigm (1987). Fisher understands narrative rationality as being constituted by coherence and fidelity – that is inner and outer congruence.

But what does it mean to say that law is a form of storytelling and consequently subject to narrative rationality? Exactly where and how does storytelling take place in criminal proceedings? The concept of narration shares its fate with a multitude of prominent concept: it is in danger of losing significance due to its popularity: everything is narrative and no further insights can be generated by the concept. Prince (1996) sums it up brilliantly: „But if ‚everything' constitutes narrative, doesn't the category ‚narrative' lose (much of) its conceptual content? More pointedly, if, 'Little Red Riding Hood', the Three Musketeers, a supermarket ad, and me wanting to have a drink all constitute narratives, what principles, operations, and features make it possible to consider and to process them as such?" (p. 98).
Many papers about narrativity in legal rhetoric raise the question of what is meant here. At least three different, although not necessarily mutually exclusive notions exist. Bennet (1978/2001), for instance, concentrates on the story the jury has to filter out of the various testimonies and pieces of evidence and on the basis of which it makes its judgment. This understanding of the story in a criminal proceeding is similar to what Lynch/ Bogen (1996) call meta-narrative or master narrative, using both terms as synonyms (see p. 71). In German criminal proceedings, the account discussed by Bennet, which would be labeled a master narrative by Lynch/ Bogen, would most likely be found in the reasons for the judgment.

Jackson (1998) criticizes Bennet's notion of stories in criminal proceedings and points out that not a single, coherent story is told but rather a series of stories that can be contradictory.
„But this [the presumption that different narrators tell one single story] wrongly supposes that one is dealing simply with the telling of one overall story in the trial, rather than a series of interlocking stories, the credibility of each one of which (that of each witness) is assessed as a factor in the credibility of the whole" (p. 66). So according to Jackson, the unit of analysis is not the single, coherent story developing in a trial but rather the multiple, diverse, and contradictory stories being told during that trial. Accordingly, Lynch/ Bogen (1996) in their analysis of the Iran-Contra hearing concentrate on the interaction between master narrative and the individual stories and counter narratives supporting this master narrative.**[i]**

Thirdly, law itself, as depicted by White (1987) above can be viewed as narratively

constructed. From this perspective criminal law feeds into the grand narratives of society about occurrences that are labeled unlawful.This of course is quite a rough distinction. I shall, similarly to Bogen/ Lynch (1996) in their analysis of the Iran-Contra hearings be mainly interested in how the small, “fragile stories” (p. 166) told by different actors contribute to the case. Other than Bogen/ Lynch I am not interested in how a master narrative is constructed but in a broader sense, how these fragile stories are stabilized and rendered factual.

The second central part of legal rhetoric is the argumentatio, the place for presenting and countering arguments. The links between argumentation and legal discourse are considerably closer than those between narrative theory and law. Not only are there specific applications of general argumentation theory for the field of law, but also has modern argumentation theory, at least in its beginnings, been strongly oriented towards the legal paradigm. In the central works of argumentation theory at the end of the 1950s by Perelman/ Olbrechts-Tyteca (1969), Toulmin (1958) and also Viehweg (1953), legal discourse functioned as a blueprint for argumentation, especially for rhetorical conceptions.
This close interrelation between general argumentation theory and legal argumentation may be the reason why questions of general argumentation theory are reflected in the problems and questions of legal argumentation and vice versa. Feteris (1999), for instance, distinguishes rhetorical, dialogical and logical approaches in legal argumentation, grounded in the heuristic distinction between logic, dialectic and rhetoric, which, drawing on Aristotle, has gained considerable prominence in general argumentation theory.
A rhetorical perspective on legal discourse can refer to different approaches. Following Wenzel (1980) it is concerned with the process of argumentation and stresses the orientation towards an audience, thus it is the persuasive element. At the same time, rhetorical approaches in legal argumentation emphasize an approach to legal argumentation through the topic, as for example in the fundamental work of Viehweg (1953) and more recent works by Seibert (1996). Drawing conclusions during the trial is not understood as a logical procedure of subsumtion but as a creative process of finding and using adequate reasons. The system of law is not closed but, although stable, open to the introduction of new topoi. Hence, as Feteris (1997) puts it, it “emphasizes the content of arguments and the context-dependent aspects of acceptability” (p. 359).
Interestingly, there seems to be little literature about the interrelationship of argumentation and narration in the legal field. However, in other areas the

relationship between narration and argumentation has enjoyed quite some interest. In linguistics, narration and argumentation are often taken to be distinct text types (see among others Dijk 1980, Gülich/ Hausendorf 2000). When a closer relationship has been established this was often conceived with either the narrative or the argumentative being dominant. Some works have taken either narrative to be the dominant partner, functioning as framing the argument (see for example Lucatis/ Condit 1985 and Parrett 1987) or arguing as the overarching function of narratives (see for example Korsten 1998). The latter take is also prominent in the notion of narratives as proof by example or as the illustrative function in argumentation. In this sense, several works describe specific kinds of narration that are characterized by having a function in an overarching frame of action. Ryan (in Prince 1996) speaks of instrumental narrativity, Gülich (1980) of functional narratives, where she characterizes functional narratives among others by their truth claim.

Lately, Deppermann/ Lucius-Hoene (2003) have argued that narration and argumentation should not be viewed as distinct text types but as different principles of production, functioning as solutions task (see p. 141). They also describe argumentation in this sense not as a text type that can be distinguished through structural features but rather as a function in discourse (see p. 142). Narrating of personal experience is not only the reconstruction of past events but constitute a process of interpretation by the storyteller (p. 143). Hence, narrations are inextricably linked to the person who tells them and are difficult to counter without countering the ethos of the speaker at the same time (see p. 132). This is reminiscent of Quintilian's definition of the narratio in legal rhetoric.

3. *Data*

Before proceeding to the analysis, some remarks about the data. The data used in this paper are part of a corpus that has been developed during my field work in the project "Comparative Microsociology of Criminal Proceedings" at the Freie Universität Berlin. I accompanied criminal cases while they unfolded and the lawyers at work on them in two five-months field research periods. The data collected during this time consist of field notes, copies of the files, recordings of lawyer-client meetings, ethnographic interviews and protocols of court hearings.

I shall in the following concentrate on the development of narratives and arguments at the example of one case. I will not consider the case in its entirety but pursue the development of the critical question the case depends upon. Let's

see what the case of Kai Kuhnau and his scooter can show.

4. *Scooting*

I encountered this case right at the beginning of my second field phase. Kai Kuhnau**[ii]** was stopped by the police while "driving" a scooter with auxiliary engine on public ground. Kai had no liability insurance for the vehicle, and he would not have been able to get one, since scooters of this type are not licensed in Germany. This was the second time Kai was stopped by the police with his scooter. In the course of the proceeding it became controversial what exactly Kai did with the scooter – did he drive it with the engine running or did he just scoot it, that is: did the engine work or not? From the view of classical status theory this brings us in a situation either between or simultaneously in a *status conjecturalis* and a *status definitivus*: the charges are clearly denied. However, the complete progression of events as described by the police and recorded by the public prosecutor is conceded – with the difference of the defendant claiming he did not *utilize* the scooter (in the legal sense) but only use it. The main hearing was already over, the client had been sentenced to three months of prison without probation. I could observe the preparation of the appeal hearing and the hearing itself.

In an earlier paper I have analyzed the case of Kai and his scooter from the beginning to the verdict. The analysis showed how at specific checkpoints in the procedure narratives were employed as arguments and thereby gained stability. In order to become products of the fact-finding process they needed to make the step from narrative to premise (Hannken-Illjes, submitted). This analysis now starts with the reasons for appeal, written by the lawyer. The verdict stated, put as a reason, that the defendant did drive the motor-scooter – that is, the engine was running – without proof of insurance. It further states, that the court believes the two police officers who testified rather than Kai's own version of the broken engine. The sentence comes up to three months without probation, which is unusually harsh.

In the reasons for appeal (*Berufungsbegründung*) the lawyer criticizes the verdict on procedural and material grounds. For the latter she returns to the story told by Kai in the court room.

(1) The defendant said that the scooter did not work, as it could not be powered by the engine. Therefore he had left the scooter with a friend. Due to bad weather and a sailing accident the defendant decided to use the scooter at least with

muscular power in order to get home, as his friend, who was injured, could not give him a lift. … Mr. Mathias Wartenberg can testify these facts as a witness. … The evaluation of the testimonies is contradictory“

The lawyer takes up the counter narrative that has already been told during the main hearing by the defendant. Thereby the story receives stabilization: obviously the lawyer considers it strong enough to use it**[iii]**. But she does not only tell the story, she also backs it up with a witness and counters at the same time the testimony given by the police officers, devaluing their narrative account of what became later the leading narrative in the verdict. On the same day the lawyer sends a letter to the client, informing him about the reasons for appeal and noting that she named Mr. Wartenberg as a witness.
Three weeks before the appeal hearing lawyer and client meet. Before the conference the lawyer told me that today the client and she would need to agree on why it was that the engine did not work, if it was either the rain entering the engine or the broken piston ring. As it turns out during the meeting it is – according to the client – the combination of the two. A note in the lawyer's file reads:

(2) rain + piston ring, water runs inside = silence
The meeting does not only function to produce a coherent narrative, but also to produce a narrative that the client as well as the lawyer understand and can tell. It is notable, that the reason why the scooter did not work had been omitted in the reasons for the appeal. In the protected space of the defense ensemble the story has become stronger, and someone else has been enabled to tell it.

In the appeal hearing the verdict as well as the reasons for appeal are read out at the beginning. Thereby not only are both stories introduced, the one once told by the prosecution and now by the court of the first instance and the counter narrative told by Kai, but also is their controversial status as to what story can claim validity. The one story, told first, is introduced as a fact: "The defendant drove with the scooter on public ground without having issued a liability insurance …", given as a reason for the verdict, the other one merely as an alternative account.
However, although introduced with differing status and stability, by means of the appeal hearing the entire process of taking evidence has to be repeated. The narrative in the verdict, functioning as a premise, has to be opened up again and becomes subject of contestation. Before the taking of evidence the defendant is

asked if he wants to say something about the case. Yes, he does. He gives the following statement.

(3) I went sailing with a friend, got into a storm, we had an accident, my friend was slightly injured, driving home to friend's place, I took the scooter in order to get home. I had brought the scooter to the friend two weeks earlier, it worked at first, I tried to use it, but the rain finished it off.

Kai Kuhnau retells the story he told in the first instance and his lawyer told in the reasons for appeal. Hence he repeats and therewith stabilizes the story. After this narrative account of what-happened, the judge, and later the prosecutor ask several questions. As central emerges the question why the engine did not work. We know the answer from the lawyer's notes: rain plus piston ring means silence. What the defense ensemble, and I, did expect was that this story would have to win against the story by the two police officers who encountered Kai on the scooter. Frankly that seemed quite unlikely. But the hearing shall develop very differently. The first witness, police officer Krause, is asked about that day and ultimately if he heard the engine running. No, he says.

(4) I could not hear the engine running.

This testimony weakens the strong premise introduced by the verdict considerably. However, Krause was also in the first instance not sure if Kai Kuhnau actually drove or just scooted. Also, he seems less than interested in the case. But he leaves the story vulnerable to counter-accounts. Then, the second police-officer, Meyer, is asked in. He tells the court the story of seeing Kai Kuhnau first on the scooter and then descending when he spotted the police. However, he cannot say if he heard the engine running. German criminal trials rely on the principle of orality. Everything that informs the verdict has to be presented orally in court, even though the file might already provide a testimony. Also, the witness has to actually remember. So saying, it is as I put it down in a file note is not sufficient. This principle is negotiated very differently in different trials, depending mainly on the presiding judge. In this case the judge asked several times if the police officer really could not remember, not accepting the answer, of "if it says so in the file, that's how it was". It all comes down to the fact that today, five months after this small incident, the witness cannot remember if he had heard the engine or not.

Through this testimony the leading narrative is harmed beyond recovery. No actor in the appeal hearing is able to actually tell that story from personal

experience. The counter-narrative on the other side was not only told by Kai Kuhnau himself, but also by his friend and is ultimately backed up by the expert witness who states, that everything Kai said could be possible with an engine like that.
Kai Kuhnau is acquitted on the grounds of in *dubio pro reo*. The judge states that it might have been like the defendant said and even the prosecution moves for an acquittal. None of the stories are and have to be transformed into a premise explicitly, as an acquittal has no reasons attached to it. Both narratives are on equal footing again – as different narrative accounts of an instance. A story that at one possible ending of the procedure had gained the status of a stable premise a verdict could rest upon is opened up again, unbuilt and then just vanishes.

5. *Conclusion*

When asking the question of how facts are produced in criminal proceedings, the notions of narration and argumentation point at interesting findings. The production of facts can be viewed as a process of stabilizing narratives and turning them into premises, that is making them relevant argumentatively. But not only are stories tested, stabilized and attacked on the micro-level, and then turned into products of the investigation by being used as arguments at the proceedings' check points. As the analysis showed these products can be also opened up again, unbuild and thereby facts can be turned fragile.

NOTES

[i] It may seem that the significance of narration as a means of making things plausible and eventually of constituting truth plays a particularly prominent role in the adversarial Anglo-American system. But even if the production of counter-narratives may possibly bear particular significance in adversarial contexts, Danet (1980) rather considers inquisitorial proceedings the home of narrative plausibilazation. She distinguishes two fundamentally different modes of language in legal disputes: the narrative and the questioning mode. „Whereas the modern inquisitorial model combines questioning by the judge with relative freedom of the witness to tell their stories in openended narrative style, the adversary model requires tight control of questioning so that claims are generally expressed only as answers to very specific questions." (514).
[ii] All names, dates, and places have been changed. The reported data has been translated and in the case of my protocols of court-hearings has been edited for readability.

[iii] For the binding force of early statements in criminal proceedings see Scheffer, Hannken-Illjes, Kozin (forthcoming).

REFERENCES

Bennett, L. W. (1978/ 2001). Storytelling in Criminal Trials. In L. P. Hinchman & S. K. Hinchman (Ed.), *Memory, Identity, Community. The Idea of Narrative in the Human Sciences*. (pp. 72-103). New York: SUNY Press.

Danet, B. (1980). Language in the Legal Process. *Law & Society Review*, 14(3), 445-564.

Deppermann, A. & Lucius-Hoene, G. (2003). Argumentatives Erzählen. In A. Deppermann & M. Hartung (Ed.), *Argumentieren in Gesprächen* (pp. 130-144). Tübingen: Staufenburg.

Dijk, Teun van (1980). *Textwissenschaft. Eine interdisziplinäre Einführung*. Tübingen.

Feteris, E. T. (1997). A Survey of 25 Years of Research on Legal Argumentation. *Argumentation* 11, 355-376.

Feteris, E. T. (1999). *Fundamentals of Legal Argumentation. A Survey of Theories on the Justification of Judicial Decisions.* Dordrecht, Boston, London: Kluwer Academic Publishers.

Fisher, W. R. (1987). *Human communication as narration*. Columbia: University of South Carolina Press.

Gülich, E. (1980). Konventionelle Muster und kommunikative Funktionen von Alltagserzählungen. In K. Ehlich (Ed.), *Erzählen im Alltag*. Frankfurt am Main:

Gülich, E. & Hausendorf, H. (2000). Art. 37: Vertextungsmuster Narration. In K. Brinker & G. Antos (Ed.), *Text- und Gesprächslinguistik*, 1. Halbband (pp. 369-385). Berlin: de Gruyter.

Hannken-Illjes, K. (submitted). Mit Gründen erzählen. Argumentation und Narration im Strafverfahren.

Jackson, B. S. (1988). *Law, Fact, and Narrative Coherence.* Deborah Charles Publications.

Knape, J. (2003). Narratio. In G. Ueding (Ed.), *Historisches Wörterbuch der Rhetorik* (Vol.6, pp. 98-106). Tübingen: Niemeyer.

Korsten, F. (1998). The Wisdom Brokers. Amsterdam: ASCA.

Lucaites, J. L. & Condit, C. M. (1985). Re-constructing narrative theory: A functional perspective. *Journal of Communication*, 35, 90-108.

Lynch, M. & Bogen, D. (1996). *The spectacle of history.* Durham: Duke University Press.

Perelman, C. & Olbrechts-Tyteca, L.(1969). *The New Rhetoric.* Notre Dame: UP Notre Dame.
Prince, G. (1996). Remarks on Narrativity. In C. Wahlin (Hrsg.), *Perspectives on Narratology.* Frankfurt am Main.
Prior, P. (2005). Toward the Ethnography of Argumentation. *Text,* 25(1), 129-144.
Quintillian, M. F. (1995). *Ausbildung des Redners*. (Übersetzung H. Rahn) Darmstadt.
Scheffer, T., Kozin, A. & Hannken-Illjes, K. (forthcoming). Bound to the Past? A Comparison of Procedural Regimes in England, US, and Germany. *Law and Social Inquiry*.
Seibert, T. (1996). Die prozedurale Topik und das juristische Archiv. In W. Gast (Ed.), *Juristische Rhetorik* (Vol.15, pp. 81-95). Tübingen: Niemeyer.
Toulmin, S. (1959). *The Uses of Argument.*
Viehweg, T. (1974). *Topik und Jurisprudenz.* München: Beck.
Wenzel, J. W. (1980). Perspectives on argument. In J. Rhodes & S. Newell(Ed.), *Proceedings of the 1979 Summer Conference on Argument* (pp. 112-132). Falls Church: SCA.
White, J. B. (1987). Rhetoric and Law. In J. S. Nelson, A. Megill & D. N. McCloskey (Ed.), *The Rhetoric of the Human Sciences* (pp. 298-318). Madison: University of Wisconsin Press.